Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

[TRANSLATION]

Citation: *D. O. v Canada Employment Insurance Commission*, 2018 SST 1110

Tribunal File Number: GE-18-757
GE-18-759
GE-18-761
GE-18-762
GE-18-763
GE-18-765

BETWEEN:

D. O.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Lucie Leduc

HEARD ON: Decision on the record

DATE OF DECISION: July 19, 2018

Canada

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] The Appellant established Employment Insurance benefit periods in 2010, 2011, 2012, 2013, 2014, and 2015. Following an investigation, the Canada Employment Insurance Commission (Commission) determined that the Appellant did not meet the entitlement conditions for each benefit period. Specifically, it found that there was no interruption of earnings during at least seven consecutive days before the beginning of her benefit periods, so it cancelled the claims for benefits, causing an overpayment. After the Appellant's appeal, the Tribunal heard the case and rendered a decision on the Appellant's entitlement in relation to the benefit periods in question. The Tribunal found that the Appellant had failed to show that an interruption of earnings occurred before her benefit periods. As a result, the Tribunal imposed a disentitlement from benefits on the Appellant for all of the benefit periods mentioned above.

[3] The Appellant then filed an application to amend the Tribunal's decision based on a new or material fact. The Tribunal notes that the application concerns the original decision's first issue, that is, the cancellation of the benefit periods. The application to amend the decision does not concern the other two issues in the initial decision (penalty and notice of violation), and this decision will not address them. In support of the application to amend the decision, the Appellant submits documentary evidence consisting of bank statements and pay stubs. She maintains that they prove an interruption of earnings during the holiday period of each year in question.

PRELIMINARY MATTERS

[4] The Tribunal considers the Appellant's six files to raise shared issues of law or fact (GE-18-757, GE-18-759, GE-18-761, GE-18-762, GE-18-763, and GE-18-765). In accordance with section 13 of the *Social Security Tribunal Regulations*, the Tribunal decided on its own initiative to join the appeals. The appeals will be subject to a single decision, which will apply, *mutatis mutandis*, to each of them.

[5] The Tribunal made its decision based on the record for the following reasons:

a) The member decided that a new hearing was not necessary.

b) There are no gaps in the information in the file or need for clarification.

c) Credibility is not a prevailing issue.

d) This method of proceeding respects the requirement under the *Social Security Tribunal Regulations* to proceed as informally and quickly as circumstances, fairness, and natural justice permit.

ISSUES

[6] The Tribunal must decide the following issues:

a) Does the evidence consisting of bank statements and pay stubs that the Appellant submitted constitute a new fact?

b) Does the evidence consisting of bank statements and pay stubs the Appellant submitted manage to show that the decision was made without knowledge of, or on the basis of a mistake as to, some material fact?

ANALYSIS

[7] The relevant statutory provisions appear in the annex of this decision.

Issue 1: Does the evidence consisting of bank statements and pay stubs that the Appellant submitted constitute a new fact?

[8] The Appellant filed an application to amend a decision rendered earlier by the Tribunal. In support of her application, she produced bank statements and pay stubs for November, December, and January of each year in question to show an interruption of earnings during the holiday period of those years. The statements and stubs were not in the Tribunal's file when the member rendered their decision.

[9] For the Tribunal to be able to rescind or amend a previous decision relating to the *Employment Insurance Act*, the requirements of section 66(1)(a) of the *Department of Employment and Social Development Act* (DESD Act) must be met:

> 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[.]

[10] The Tribunal finds that the new evidence submitted by the Appellant does not constitute a new fact for the reasons that follow.

[11] Section 66(1)(a) of the DESD Act has two distinct tests, and a decision may be rescinded or amended if one or the other of those two tests is met. The first test allows a decision to be rescinded or amended based on "new facts."

[12] The test for "new facts" was stated in *Canada (Attorney General) v Chan*, [1994] FCJ No 1916 (*Chan*) and confirmed by the Federal Court of Appeal in *Canada v Hines*, 2011 FCA 252. These facts must have happened after the decision was rendered or happened before but could not have been discovered by a claimant acting diligently. After that, the facts must be determinative of the issue.

[13] In this case, the Tribunal finds that the evidence presented existed at the time of the hearing. The evidence refers to work and pay periods in 2010, 2011, 2012, 2013, 2014, and 2015. The Tribunal therefore finds that the facts happened before the hearing. As a result, the Tribunal finds that the evidence submitted was available and that the Appellant should have produced it at the hearing, which she did not do. It is correct to say that the Tribunal granted the Appellant additional time to submit the evidence in question. However, these circumstances do not mean that the facts satisfy the test for "new facts."

[14] The Appellant knew the issues that the Tribunal had to decide at the hearing and could have submitted her evidence. It is well established that ignorance of the law is not a reason, whether on appeal or as part of a reconsideration.

[15] The Tribunal finds that the Appellant's arguments do not change the fact that the facts are not new in the sense that they did not happen after the decision was rendered or even during the hearing. As a result, the Tribunal finds that there are no new facts that would enable it to reconsider its initial decision under section 66(1)(a) of the DESD Act.

Issue 2: Does the evidence consisting of bank statements and pay stubs the Appellant submitted manage to show that the decision was made without knowledge of, or on the basis of a mistake as to, some material fact?

[16] The second part of section 66(1)(a) of the DESD Act applies when it can be shown that "the decision was made without knowledge of, or on the basis of a mistake as to, some material fact." What about this case in terms of the second part of section 66(1)(a)?

[17] The Tribunal finds that the Appellant's request does not satisfy the second test.

[18] The federal courts have given little clarification of the meaning of the second test in section 66(1)(a), but it seems to be accepted that it differs from that of "new facts" (see *Green*, 2012 FCA 313; *Badra*, 2002 FCA 140). The case law does not propose an interpretation of the second part of section 66(1)(a). The wording of section 66(1)(a) is almost identical to that of section 120 of the *Employment Insurance Act*, which is now repealed. Despite this resemblance, there is no case law on the old provision that would indicate how section 66(1)(a) should be interpreted.

[19] Without more precise indications from the courts, it is difficult to establish the exact test to apply. The Tribunal will apply the meaning of this part of the provision in the way it deems the most relevant and consistent with the spirit of the *Employment Insurance Act* (Act). The requirement that the fact be "material" means that the "fact" presented must be determinative in the case. This is based on the ordinary meaning of the term "material," and on the notion that a decision cannot be amended without a valid reason (the test for "new facts," which is addressed above, supposes a similar materiality).

[20] In this case, the Tribunal decided that the Appellant had not met the requirements that enable her to establish a benefit period and therefore be entitled to benefits. Specifically, the Tribunal found that the Appellant had not shown an interruption of earnings from her employment as required by section 7(2) of the Act (*Thériault v Canada*, 2008 FCA 283). To show an interruption of earnings, a claimant must be unemployed and without wages for seven consecutive days in accordance with section 14(1) of the *Employment Insurance Regulations* (Regulations).

[21] After reconsidering the new evidence the Appellant filed with the application, the Tribunal is unable to find that the documents could have had a major influence on the result of the case.

[22] The Tribunal finds that the documents are not sufficiently detailed to show that she did not work for seven consecutive days during the holiday period or support her version at the hearing. The Tribunal analyzed each pay stub and each payroll deposit submitted and does not see clear evidence of an interruption of earnings during the holiday period. On the contrary, the payroll deposits seem to be consistent at every two weeks, even during the holidays. When the Appellant stopped receiving pay, her partner received it very soon after and vice versa. The Tribunal notes that it was established in its initial decision that the partners were splitting a single full-time position. If the position did not undergo an interruption of earnings, the Tribunal finds that the Appellant and her partner did not either.

[23] It is correct to say that the Tribunal granted the Appellant additional time to file her bank statements. However, their impact on the Tribunal's findings was not guaranteed. The circumstances were that the Tribunal granted the time in good faith, without knowing what these new documents would reveal. The burden of proof regarding entitlement remains with the Appellant. The evidence in the file that was considered in the initial decision is still in place, and the documents that the Appellant submitted later have failed to disprove the Tribunal's findings. On the merits, the Tribunal finds that, based on the balance of probabilities, the Appellant failed to show an interruption of earnings with the new documents, and the Tribunal is therefore not persuaded that the decision was made without knowledge of a material fact. The Tribunal finds that the evidence filed is weak and does not rebut the existing evidence, which is already the

subject of the initial decision. The Tribunal continues to place greater weight on the Appellant's initial, spontaneous statements that she worked without interruption, the employer's statements, and the Canada Revenue Agency's findings that indicated that the Appellant and her partner did not have any work stoppages or interruptions of earnings during the holidays for the X contract, for the reasons already stated in the Tribunal's original decision. In other words, if the evidence had been available when the Tribunal made its decision, the Tribunal would not have found any determinative fact other than the facts established when it made its decision.

[24] Furthermore, the Tribunal finds that it did not make a decision based on an error relating to a material fact that it misunderstood, because the fact (the evidence of an interruption of earnings) was not submitted to the Tribunal. The Tribunal therefore did not make an error relating to a material fact by failing to analyze evidence that was not submitted to the Tribunal during its decision-making.

[25] In addition, the Tribunal reiterates that it never received the documents enclosed with this application. The Appellant's representative submits that there was a transmission error when she sent the documents by email within the time set by the Tribunal. If proven, this hypothesis could have had serious implications for her client if the Tribunal has considered the evidence to prove facts material to the outcome of the case. Nevertheless, the Tribunal is of the opinion that a transmission error would not have satisfied the test in section 66(1)(a) of the DESD Act even if the Tribunal had found that the evidence constituted material facts.

[26] If the second test in section 66(1)(a) required merely that the facts presented be decisive of the issue and unknown to the decision-maker at the time they made their decision, the discoverability requirement of the first test in section 66(1)(a) would become obsolete. Any fact that would not satisfy the "new facts" test could therefore be presented under the second test if it is determinative of the issue and the decision-maker was unaware of it beforehand. This would completely limit the purpose of the "new facts" test, which has been described as a mechanism of limited recourse:

> [translation]
> Reconsideration of a decision by an umpire on the basis of "new facts" is and should remain an exceptional measure. Employment Insurance

> claimants have a large number of opportunities to challenge the decisions affecting them, and umpires should be careful not to let the reconsideration process be abused by careless or ill-advised claimants. (*Chan* at paragraph 11)

[27] The difference between the two tests in section 66(1)(a) is that the second test may apply in situations where the "fact" in question was not a "new fact" within the meaning of section 66(1)(a), but rather a material fact that the Tribunal member did not know of or misunderstood.

[28] In this case, similar to the new-facts test because it is an exceptional measure, the mechanism would give rise only to claimants proving they have acted diligently. In this case, the Tribunal remains perplexed that the Appellant's representative sent the document to the Tribunal in several parts through a personal email service provider (Hotmail) and did not make sure that the parts had been received. The Tribunal finds that it is unlikely that the second test in section 66(1)(a) encompasses situations where ignorance of a material fact is attributable to mistakes for which the Appellant is responsible (through her representative). Appellants must prove that they are entitled to benefits, and an appellant cannot have another opportunity to plead their case simply because they did not manage to meet this burden of proof.

[29] Finally, if the Appellant believes that one of the principles of natural justice has not been observed because the documents were not considered for the Tribunal's initial decision, an application under section 66(1)(a) of the DESD Act is not the proper tool for addressing that issue. In that case, the Appellant should have appealed to the Tribunal's Appeal Division instead.

[30] In conclusion, the Tribunal is not persuaded that the evidence filed represents a material fact or a sufficiently determinative fact that the Tribunal was not aware of before making its decision. The Tribunal therefore finds that the Appellant failed to prove that the documents submitted satisfy the requirements of section 66(1)(a) of the DESD Act. There is therefore no reason to rescind or amend the Tribunal's decision of February 1, 2018.

CONCLUSION

[31] The appeal is dismissed.

Lucie Leduc
Member, General Division – Employment Insurance Section

ANNEX

THE LAW

Department of Employment and Social Development Act

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 Applicant.

(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.

Employment Insurance Act

7 (1) Unemployment benefits are payable as provided in this Part to an insured person who qualifies to receive them.

(2) An insured person qualifies if the person

> **(a)** has had an interruption of earnings from employment; and
>
> **(b)** has had during their qualifying period at least the number of hours of insurable employment set out in the following table in relation to the regional rate of unemployment that applies to the person.

TABLE

Regional Rate of Unemployment	Required Number of Hours of Insurable Employment in Qualifying Period
6% and under	700
more than 6% but not more than 7%	665
more than 7% but not more than 8%	630
more than 8% but not more than 9%	595
more than 9% but not more than 10%	560
more than 10% but not more than 11%	525
more than 11% but not more than 12%	490
more than 12% but not more than 13%	455
more than 13%	420

(3) to (5) [Repealed, 2016, c. 7, s. 209]

(6) An insured person is not qualified to receive benefits if it is jointly determined that the insured person must first exhaust or end benefit rights under the laws of another jurisdiction, as provided by Article VI of the *Agreement Between Canada and the United States Respecting Unemployment Insurance*, signed on March 6 and 12, 1942.

Employment Insurance Regulations

14 (1) Subject to subsections (2) to (7), an interruption of earnings occurs where, following a period of employment with an employer, an insured person is laid off or separated from that employment and has a period of seven or more consecutive days during which no work is performed for that employer and in respect of which no earnings that arise from that employment, other than earnings described in subsection 36(13), are payable or allocated.

(2) An interruption of earnings from an employment occurs in respect of an insured person at the beginning of a week in which a reduction in earnings that is more than 40% of the insured person's normal weekly earnings occurs because the insured person ceases to work in that employment by reason of illness, injury or quarantine, pregnancy, the need to care for a child or children referred to in subsection 23(1) of the Act or the need to provide care or support to a family member referred to in subsection 23.1(2) of the Act, to a critically ill child.

(3) A period of leave referred to in subsection 11(4) of the Act does not constitute an interruption of earnings, regardless of whether the person is remunerated for that period of leave.

(4) Where an insured person is employed under a contract of employment under which the usual remuneration is payable in respect of a period greater than a week, no interruption of earnings occurs during that period, regardless of the amount of work performed in the period and regardless of the time at which or the manner in which the remuneration is paid.

(5) An interruption of earnings in respect of an insured person occurs

(a) in the case of an insured person who is employed in the sale or purchase of real estate on a commission basis and holds a licence to sell real estate issued by a provincial authority, when

(i) the licence of the insured person is surrendered, suspended or revoked, or

(ii) the insured person ceases to work in that employment by reason of a circumstance referred to in subsection (2); and

(b) in the case of an insured person who is employed under a contract of employment and whose earnings from that employment consist mainly of commissions, when

(i) the insured person's contract of employment is terminated, or

(ii) the insured person ceases to work in that employment by reason of a circumstance referred to in subsection (2).

(6) A period of leave referred to in subsection 11(3) of the Act does not constitute an interruption of earnings, regardless of the time at which or the manner in which remuneration is paid.

(7) Where an insured person accepts less remunerative work with their employer and as a consequence receives a wage supplement under a provincial law intended to provide indemnity payments where the continuation of a person's work represents a physical danger to them, to their unborn child or to the child they are breast-feeding, an interruption of earnings occurs on the insured person's last day of work before the beginning of the less remunerative work.