



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *M. S. v. Canada Employment Insurance Commission*, 2018 SST 1252

Tribunal File Number: AD-18-667

BETWEEN:

M. S.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Stephen Bergen

DATE OF DECISION: November 28, 2018

DECISION AND REASONS

DECISION

[1] The application to rescind or amend is refused.

OVERVIEW

[2] The Appellant, M. S. (Claimant), accepted employment during a period in which he was collecting Employment Insurance benefits. On learning of this fact, the Respondent, the Canada Employment Insurance Commission (Commission), calculated an overpayment relating to undeclared earnings and payments received during the period in which he was considered to be disentitled. A penalty was also assessed, and a notice of violation was issued.

[3] Following the Claimant's request for reconsideration, the penalty was reduced, but the decision was otherwise maintained. The Claimant appealed to the General Division of the Social Security Tribunal, which accepted the Commission's concession that the notice of violation should be withdrawn and its recommendation that the penalty should be reduced even further. The Claimant sought leave to appeal the General Division decision to the Appeal Division, but the application was late, and the Appeal Division refused an extension of time. The Claimant now applies to the Appeal Division, requesting that it rescind or amend its decision.

[4] The application to rescind or amend is refused. The Claimant has not presented new facts or established that the Appeal Division decision was made without knowledge of, or based on a mistake as to, a material fact.

ISSUES

[5] Has the Claimant presented new facts that would have been relevant to the Appeal Division determination?

[6] Was the Appeal Division decision made without knowledge of, or based on a mistake as to, a material fact?

ANALYSIS

[7] According to section 66(1) of the *Department of Employment and Social Development Act* (DESD Act), the Appeal Division may rescind or amend a decision if new facts are presented to the Tribunal or if the Tribunal is satisfied that the decision was made without knowledge of, or was based on a mistake as to, a material fact. Section 66(4) states that a decision may be amended only by the division that made the decision.

[8] This means that I have the jurisdiction to rescind or amend only the Appeal Division decision and that I am not permitted to rescind or amend a General Division decision.

[9] The Appeal Division decision was concerned with whether the Claimant should be granted an extension of time to appeal the General Division decision. I was not satisfied in the circumstances that it was in the interests of justice to do so. This was substantially based on two factors: the Claimant had not given a reasonable explanation for the delay, and the Claimant had no arguable case to take forward in the appeal and therefore no reasonable chance of success.

[10] In order to now rescind or amend that decision, I would have to find that the new facts in question would have had a decisive impact on my finding to deny the extension of time if I had been aware of them, or I would have to be satisfied that I misunderstood some fact that was material or significant to my decision.

Issue 1: Existence of new facts

[11] The Federal Court of Appeal considered the meaning of “new facts” in relation to section 120 of the former *Employment Insurance Act*, whose wording is very similar to that of section 66(1)(a) of the DESD Act, in *Canada (Attorney General) v Chan*.¹ According to *Chan*, for facts to be new, they must have happened after the decision was rendered or, if they had happened before the decision, the “new facts” could not have been discovered by a claimant acting diligently. Furthermore, they would have to be “decisive of the issue at hand”.

[12] In the Claimant’s October 8, 2018, application, he argues emphatically that he was upset about losing his job of 12 years, that he has never collected Employment Insurance benefits

¹ *Canada (Attorney General) v Chan*, A-185-94.

before, that his wife was very sick and going to the hospital frequently, and that repaying the overpayment would present a financial hardship. The Claimant had provided much the same information in support of his original leave to appeal application.

[13] To the extent that there are any details in the information provided by the Claimant on the application to rescind or amend that were not provided in support of the original leave to appeal application, those details relate to facts that were known to the Claimant at the time of the first application.

[14] The Claimant also provided a statement of account from the Payment Office of Employment and Social Development Canada indicating that he had a balance of \$5,778.81 outstanding as at the statement date of October 26, 2018. While the Claimant did not have this statement of account **document** at the time of the decision to refuse his extension of time, the magnitude of the amount owing, which at that time was \$5,522.00, was communicated in a notice of debt sent to the Claimant on July 22, 2017. The Claimant's debt is not a new fact.

[15] Furthermore, the statement of account would not have had a decisive impact on the decision to deny the extension of time. The Claimant explained that he had not known he would have to pay more than the penalty amount. As I noted in the decision in which I denied the extension of time, the penalty and violation were the only issues before the General Division. The General Division did not make a decision on the overpayment of benefits or his obligation to repay them. The Claimant's knowledge of how much he would have had to repay—that is the overpayment and the penalty—would not have been relevant to his delay in appealing a decision that did not concern the overpayment.

Issue 2: Lack of knowledge or mistake of material fact

[16] I might also have granted the Claimant's request to rescind or amend my decision if I accepted that I had not known of a material fact at the time I denied the extension of time or that I had based my decision on a mistake about a material fact. I have reviewed the Claimant's submissions and the October 2018 statement of account, but they do not suggest to me any fact that was outside of my knowledge or that might have influenced my decision that the General Division did not err. Nor do the Claimant's submissions identify how I based my decision on a mistake about a material fact relating to the evidence that was before the General Division.

[17] The Claimant has encountered some difficult circumstances in his life, and I understand that he will view the application of the *Employment Insurance Act* (the Act) as harsh. However, I am restricted to applying the Act as it is written, and interpreted by the courts.

CONCLUSION

[18] The application to rescind or amend is refused.

Stephen Bergen
Member, Appeal Division

METHOD OF PROCEEDING:	On the record
Submissions:	M. S., Appellant