



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *A. S. v Canada Employment Insurance Commission*, 2018 SST 1363

Tribunal File Number: GE-18-2331

BETWEEN:

A. S.

Applicant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Heather Hamilton

HEARD ON: October 29, 2018

DATE OF DECISION: November 29, 2018

DECISION

[1] The Tribunal finds that the Applicant (Appellant) has provided new facts; however the new facts do not meet the materiality test, nor has he shown that the Tribunal rendered its decision without knowledge of or based on a mistake of fact. Therefore, the Tribunal will not amend or rescind its decision of March 12, 2018.

OVERVIEW

[2] The Appellant made an application for benefits on June 13, 2016. The Respondent denied the Appellant benefits because he did not prove his availability because he did not submit proof of a new work permit (authorization from Canada Immigration Commission) for the period of June 12, 2017 to December 19, 2017. However, the Appellant submitted proof on December 19, 2017 that he had obtained a new work permit and the Respondent made submissions that the Tribunal should dismiss the appeal with modification.

[3] The Appellant appealed to the General Division of the Social Security Tribunal (Tribunal). On March 12, 2018 the Tribunal dismissed the appeal with modification as the Tribunal agreed that the Applicant had not proven his availability for the period of June 12, 2017 to December 19, 2017; but had done so as of December 20, 2017. On June 25, 2018 the Tribunal received an application from the Applicant to rescind or amend its decision.

ISSUES

1. Did the Applicant meet the conditions to have the Tribunal consider his application to rescind or amend its decision?
2. If so, did the Applicant present new facts, material to the decision, based on which the Tribunal can rescind or amend its decision, or is the Tribunal satisfied that the decision was made without knowledge of or based on a mistake as to some material fact?

ANALYSIS

[4] The Tribunal may rescind or amend a decision if new facts are presented to it, or if the Tribunal is satisfied that the decision was made without knowledge of, or was based on a mistake

as to some material fact under paragraph 66(1)(a) of the *Department of Employment and Social Development Act* (DESD Act).

Issue 1: Did the Applicant meet the conditions to have the Tribunal consider his application to rescind or amend its decision?

[5] An application to rescind or amend a decision must be made within one year after the day on which the decision is communicated to the Claimant under subsection 66(2) of the DESD Act. Each person who is the subject of a decision can only make one application to rescind or amend that decision under subsection 66(3) of the DESD Act.

[6] The Tribunal finds that the Applicant has met the legislative conditions required to have his application to rescind or amend the Tribunal's decision considered. The Tribunal rendered its decision on March 12, 2018, and the Applicant submitted his application on June 24, 2018. The Applicant indicated the decision was communicated to him on March 22, 2018 and he submitted his application approximately 3 months later. From this, the Tribunal finds that the application was submitted within one year after the day on which the decision was communicated and the Applicant did not file any other applications to rescind or amend.

Issue 2: Did the Applicant present new facts, material to the decision, based on which the Tribunal can rescind or amend its decision, or is the Tribunal satisfied that the decision was made without knowledge of or based on a mistake as to some material fact?

[7] For facts to be considered "new", they must have happened after the decision at issue was rendered or, if they happened before the decision was rendered, it must be demonstrated that the alleged new facts could not have been discovered by a Claimant acting diligently. Finally, the new facts must be decisive of the issue to be decided (*Canada (Attorney General) v. Chan*, A-185-94).

[8] The Applicant submitted on June 25, 2018 in his application to rescind or amend the Tribunal's decision that while he was waiting for the decision of his appeal to the Tribunal to be rendered; he went into his Service Canada account and discovered there was "detailed information" from the Respondent that on February 6, 2018 his claim was re-evaluated a

decision was made that they no longer consider that he was not available for work for the period from June 12, 2017 to December 19, 2017. The Applicant took a screen shot of this page from his Service Canada account (RAGD2-7). The Applicant also demonstrated that on the screen shot from his Service Canada Account there was the same note dated on March 22, 2018 that his claim had been re-evaluated and a decision has been made (RAGD2-6).

[9] The Respondent submits that upon review of the information provided by the Applicant, the Respondent determined that it will not amend or rescind their original decision. The Tribunal finds that the Respondent has not conceded the issue before the Tribunal.

[10] The Tribunal notes that the test is a two part test. The Federal Court of Appeal set out a two-part test for evidence to be admissible as a “new fact” in *Canada (Attorney General) v. MacRae*, 2008 FCA 82, at para. 16:

1. it must establish a fact that existed at the time of the original hearing but was not discoverable before the original hearing by the exercise of due diligence (the “discoverability test”), and
2. the evidence must reasonably be expected to affect the result of the prior hearing (the “materiality test”).

[11] There must be new facts and the new facts must also be decisive of the issue to be decided. The Tribunal finds that the Applicant has presented new facts, and they could not have been discovered by an Applicant diligently as the Tribunal finds he could not have been expected to be checking his Service Canada account daily when he had an appeal before the Tribunal. However, the Tribunal finds the Applicant did not meet the test of proofing that new facts were decisive of the issue to be decided; which was the issue of his availability. The Tribunal finds the Applicant did not provide new facts with material evidence to prove his availability.

[12] The Applicant did not provide evidence to the Tribunal that he received a work permit from the Canada Immigration Commission (CIC) for the period of June 12, 2017 to December 19, 2017 or that CIC sent him a work permit with a letter submitting that his work permit was retro-active to June 12, 2017. It is clear to the Tribunal that the Tribunal cannot rescind or amend its decision because the Applicant has not proven that the new facts that he has submitted meets the test of new facts that are decisive of the issue to be decided.

[13] Referring to the Federal Court decision in *Kent*, the Court stated that the test for materiality is met only “if the proposed new facts may reasonably be expected to affect the outcome”. *Mazzotta v. Canada (Attorney General)*, 2007 FCA 297, para. 45. The Tribunal finds that without further evidence from the Respondent or the Applicant as to evidence to prove the Applicant’s availability; the new facts submitted by the Applicant are not reasonably expected to affect the outcome to prove the Applicant’s availability, and allow the Tribunal to rescind or amend its decision. The Tribunal finds the new facts submitted have failed to meet the test of new facts with material evidence to prove his availability.

[14] In the absence of new, material facts from the Applicant, the Tribunal finds that there are no new facts based on which the Tribunal can rescind or amend its decision. For the same reason, the Tribunal also does not find that the decision was made without knowledge of or was based on a mistake as to some material fact.

[15] The Tribunal would like to point out the while an appeal is before the Tribunal the Respondent has no authority to review a decision that is before the Tribunal. Once a decision by the Commission is appealed; it is too late for the Commission to amend its decision (*Canada (Attorney General) v. Wakelin*, A-748-98).

[16] The Commission has offered no explanation as to why they reviewed their decision and they have not offered an explanation as to why in the review they stated that he was available from June 12, 2017 to December 19, 2017. They have not offered an apology if it was reviewed in error, and they have not offered an apology if they made a mistake by stating the Applicant was available when he was not available on his Service Canada Account.

[17] The Tribunal is very sympathetic and empathetic to the Applicant’s personal situation and his frustration with the circumstances of this process. However, the Tribunal cannot circumvent, re-write, or ignore the EI Act or EI Regulations even in the interest of compassion (*Knee v. Attorney General of Canada*, 2011 FCA 301). The Tribunal is bound by the law.

[18] The Tribunal has determined that the additional evidence submitted by the Applicant as new facts does not qualify as new facts as the evidence failed to meet the two-part test, and the

prior decision cannot be rescinded or amended as the Applicant has not proven his availability for the period of June 12, 2017 to December 19, 2017.

[19] In the final analysis, the Applicant has not proven that he has new facts that are decisive to the issue of availability and the new facts must reasonably be expected to affect the result of the prior hearing (“materiality test”). The Tribunal cannot rescind or amend its decision of March 12, 2018 as the Applicant has failed to meet the materiality test.

CONCLUSION

[20] The application to rescind or amend is dismissed, and the Applicant is not entitled to benefits for the period of June 12, 2017 to December 19, 2017.

Heather Hamilton
Member, General Division - Employment Insurance Section

HEARD ON:	October 29, 2018
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	A. S., Applicant