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

Citation: *A. A. v Canada Employment Insurance Commission*, 2019 SST 1540

Tribunal File Number: GE-19-3518

BETWEEN:

A. A.

Appellant (Claimant)

and

Canada Employment Insurance Commission

Respondent (Commission)

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Employment Insurance Section

DECISION BY: Linda Bell

DATE OF DECISION: December 3, 2019

Canada

DECISION

[1] The application to rescind or amend the General Division's June 26, 2019, decision is refused. This is because the Claimant has not presented new facts. Nor has he proven that the decision was made without knowledge of or includes a mistake of a material fact.

[2] On November 28, 2019, the Commission provided additional submissions. These submissions are not relevant to the application to rescind or amend. The Commission states that they made an error when imposing the disqualification retroactively. This error resulted in an overpayment of benefits. The Commission says that they should have imposed the disqualification on February 24, 2019. This would have prevented an overpayment of benefits. The Commission says that their error will be corrected when the appeal is returned to them. So I suggest that the Claimant contact the Commission to discuss this correction further.

OVERVIEW

[3] The Claimant submitted an appeal to the Employment Insurance General Division on April 17, 2019. It was assigned appeal number GE-19-1759. The issue under appeal is the Commission's decision that the Claimant lost his employment due to misconduct. I issued my decision on June 26, 2019, dismissing the appeal.

[4] The Claimant attended the May 30, 2019, hearing, and was responsive in English. The Claimant was evasive when asked a direct question and provided contradictory testimony. He also refused to answer my direct questions. It was not clear whether his behaviour was in relation to the fact that English is his second language. So I adjourned the hearing to June 20, 2019, and arranged for an interpreter to attend. As supported by the audio recordings, the Claimant continuously refused to follow my directions or to speak clearly. He also refused to answer my direct questions. His behaviour was upsetting to the interpreter as described by her on the audio recording.

[5] The decision for the appeal to the General Division was issued on June 26, 2019. Then the Claimant submitted an appeal to the Appeal Division with documentary evidence. The Appeal Division cannot consider new facts. The Claimant was told that if he wished to present new facts he could submit an application to rescind or amend the June 26, 2019, decision. This

application must be submitted to the General Division. His appeal to the Appeal Division was placed on hold (in abeyance) until the application to rescind or amend is finalized.

ISSUES

[6] Has the Claimant presented evidence that meets the test of new facts?

[7] Was the June 26, 2019, decision made without knowledge of or based on a mistake as to some material fact**,** relating to the issue under appeal?

ANALYSIS

[8] A decision may be rescinded or amended if the Tribunal Member is satisfied that all four criteria are met. These are set out below.[1]

1) New facts are presented to the General Division, or the Tribunal Member is satisfied that the decision was made without knowledge of a material fact, or the decision was based on a mistake as to some material fact;
2) If an application to rescind or amend a decision is made within one year after the day on which the decision is communicated to the Claimant;
3) Each person who is a subject of the decision may make only one application to rescind or amend; and
4) The request to rescind or amend is submitted to the same Division that rendered the decision.

[9] The Claimant's application to rescind or amend meets the requirements of item 2, as listed above. This is because it was received by the Tribunal less than four months after the initial decision was rendered.[2]

[10] This is the Claimant's first application to rescind or amend the June 26, 2019, decision. This application is before the Employment Insurance General Division. This is the same Division

[1] Section 66 of the *Department of Employment and Social Development Act* (*DESD Act*)
[2] Subsection 66(2) of the *DESD Act*

that rendered the June 26, 2019, decision. Accordingly, I find the Claimant's application to rescind or amend meets the criteria listed in items 3 and 4, above.[3]

[11] An application to rescind or amend a decision is not an opportunity to argue or reargue the merits of the appeal.

[12] The decision rendered on June 26, 2019, is final and binding. To open this decision and rescind or amend it, the Claimant must present evidence that meets the test of new facts. If new facts are not presented, then the Claimant must satisfy the Tribunal Member that the decision was made without knowledge of a material fact or was made with a mistake as to some material fact relating to the original issue under appeal.[4] In this case, the issue under appeal is whether the Claimant lost his employment on June 22, 2018, due to misconduct.

Did the Claimant present new facts?

[13] No. The test requires that for the facts to be new, they must have happened after the decision was rendered or prior to the decision being rendered and could not have been discovered by a claimant acting diligently. These new facts must also be decisive of the issue to be rendered.[5]

[14] As evidence of new facts, the Claimant provided written statements about being told to take a break from work. He also speaks about his return to work and being placed on the optimization team. He provided copies of text messages dated May 7, 2018, and June 14, 2018, and Employment Standards information regarding written termination notice. He also provided printouts from the internet listing news reports dated September 27, 2019. These internet reports state that the employer is removing their services from Calgary and other North American cities.

[15] The Commission states that the information provided by the Claimant is not new facts. This is because the text messages were part of the original representations. The Commission says the Member took the text messages into account when she dismissed the appeal. They also say that the Claimant refused to respond to the Member's questions when asked for details of the

[3] Subsections 66(3) and (4) of the *DESD Act*
[4] *Green v. Canada (Attorney General)*, 2012 FCA 313
[5] *Canada (Attorney General) v. Chan*, [1994] F.C.J. No. 1916

meeting between him and the employer. He also admitted to using the employer's cars for personal use.

[16] I confirm that the text messages the Claimant submitted as new evidence were before me and were considered when I issued my June 26, 2019, decision. I have referenced these test messages in paragraph [18] of that decision. I also considered his arguments regarding the different teams the Claimant was trained on and reference this in paragraph [25] of the June 26, 2019, decision. I find this evidence does not meet the test of new facts because it was before me and considered when issuing my decision.

[17] The Claimant provided news reports that were posted on September 27, 2019, three months after my decision was rendered. These reports state that the employer is withdrawing their services from Calgary. Although this may be evidence that the employer experienced a downturn in business, this is not a fact relevant to whether the Claimant's actions constituted misconduct. The issue is not whether there was a shortage of work more than a year earlier in May 2018, when the Claimant was told to take a break. The issue under appeal is whether the Claimant lost his employment on June 22, 2018, due to misconduct, when the employer found out he had been using the employer's cars for personal use.

[18] I find that the information relating to Employment Standards termination notice is not relevant to the issue of misconduct under the *Employment Insurance Act.* I also find this information could have been discovered by the Claimant and presented prior to the June 26, 2019, decision, had the Claimant acted diligently. He could have presented this information in writing with his April 17, 219, appeal or orally at the hearings; which he did not do. Therefore, this information does not meet the test of new facts.

Did the Claimant show that the decision was made without knowledge of or based on a mistake as to some material fact?

[19] No. I find the Claimant did not provide evidence that the June 26, 2019, decision was made without knowledge of or based on a mistake of a material fact relating to the issue under appeal.

[20] The Claimant argues that the decision was made without knowledge or consideration of the fact that the Commission failed to attend the hearing. While it is true, the Commission failed to attend the teleconference hearings held on May 30, 2019, and June 20, 2019, their absence was noted at the beginning of the hearing. At the outset of the hearing I explained to the Claimant that the Commission was not in attendance. I explained that the Commission did not indicate that they would be attending. Instead, they submitted their evidence and arguments in writing.

[21] The Commission's failure to attend the hearing does not lessen the weight of their documentary evidence that was submitted to the Tribunal prior to the hearing. The Notice of Hearing document clearly states that if a party does not attend the hearing, the Tribunal Member may proceed in the absence of the party if the Member is satisfied that the party has received the notice of hearing.[6] Further, I find that the Commission's absence at the hearing was not relevant to the issue that the Claimant lost his employment due to misconduct.

[22] The Claimant argued that the June 26, 2019, decision was based on a mistake of a material fact because I overlooked the text messages he provided in evidence and because I interrupted him. As set out above, the text messages were considered and referenced in paragraph [18] of the June 26, 2019, decision. I confirm that at times during the teleconference hearing I did speak at the same time when the Claimant was speaking. This was done in order to manage the hearing process and during my attempts to direct the Claimant to speak about relevant issues. These actions were not taken to avoid listening to the Claimant's submissions and do not constitute a mistake of a material fact.

[23] As stated above, an application to rescind or amend a decision is not an opportunity for the Claimant to reargue his case or to challenge the Commission's evidence that was before the Tribunal during the initial hearing. I find that the Claimant has failed to meet the test of new facts and has not satisfied me that the June 26, 2019, decision was based on a mistake or without knowledge of a material fact relating to the issue under appeal.

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[6] Subsection 12(1) of the *Social Security Tribunal Regulations* provides the authority to proceed in the absence of a party.

CONCLUSION

[24] The application to rescind or amend is refused. The June 26, 2019, decision, remains unchanged.

Linda Bell

Member, General Division - Employment Insurance Section

DATE OF DECISION	December 3, 2019
METHOD OF PROCEEDING:	On the Record
APPEARANCES:	None