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

[TRANSLATION]

Citation: *L. P. v Canada Employment Insurance Commission*, 2019 SST 1579

Tribunal File Number: GE-19-3644
GE-19-3645

BETWEEN:

L. P.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Employment Insurance Section

DECISION BY: Catherine Frenette

HEARD ON: December 11, 2019

DATE OF DECISION: December 17, 2019

Canada

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] In a decision made on January 3, 2019, the Tribunal's General Division found that the Appellant was not on a week of unemployment for the benefit periods starting January 31, 2016, and February 26, 2017. The Tribunal determined that the Appellant had not rebutted the presumption that a claimant who engages in the operation of a business is considered to have worked a full working week because their involvement in the business was more than limited. The Appellant appealed that decision to the Tribunal's Appeal Division. The Appeal Division dismissed the appeal.

[3] On October 18, 2019, the Appellant filed an application to rescind or amend the General Division decisions. With that application, the Appellant's representative filed transaction reports for three of the Appellant's company's bank accounts for three periods: from February 17, 2015, to February 28, 2016; from February 29, 2016, to February 28, 2017; and from March 1, 2017, to February 28, 2018.

[4] The Appellant's representative asks the Tribunal's General Division to accept the transaction reports to amend its finding about the established time test to rebut the presumption. The Appellant's representative asks the Tribunal to amend its decision.

[5] Therefore, the Tribunal must determine whether it must amend or rescind the decisions made on January 3, 2019.

PRELIMINARY MATTERS

[6] The hearing for this file was handled at the same time as file GE-19-3645 for the same Appellant and files GE-19-3640, GE-19-3642, GE-19-3643, GE-19-3646, GE-19-3647, GE-19-3648, GE-19-3649 for the company's co-shareholders because they involve common questions of law and fact.

ISSUES

[7] Are the transaction reports "new facts"?

[8] Are the transaction reports "material facts"?

[9] Is the Tribunal satisfied that the decision was made before these "material facts" were known or that the decision was based on a mistake as to these facts?

ANALYSIS

[10] The Tribunal may rescind or amend a decision given by it:

> a) if new facts are presented; or
>
> b) if the Tribunal is satisfied that the decision was made without knowledge of, or based on a mistake as to, some material fact.[1]

Are the transaction reports "new facts"?

[11] The concept of "new facts" means a fact that happened after the decision was given or before the decision was given but that could not have been discovered by a claimant acting diligently.[2]

[12] In this file, because the reports are for transactions between February 17, 2015, and February 28, 2018, they are therefore facts that happened before the decisions from January 3, 2019, were made.

[13] The Federal Court of Appeal established two criteria for determining whether the Tribunal can rescind or amend its decision when "new facts" from before the decision are presented:

> a) The fact could not have been discovered by a claimant acting diligently; and

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[1] *Employment Insurance Act* (Act), s 66(1)(a).
[2] *Canada (Attorney General) v Chan*, A-185-94.

b) The fact must be decisive of the issue.[3]

[14] The Tribunal must therefore examine these two criteria.

Could the transaction reports have been discovered by a claimant acting diligently?

[15] The Tribunal must determine whether the Appellant could have produced this evidence if he had acted diligently.[4]

[16] The Tribunal is of the view that the transaction reports could have been discovered by a claimant acting diligently.

[17] First, the Appellant knew about the facts contained in the transaction reports because he knew that his company had bank accounts in which there were transactions. The Appellant had the opportunity to prepare the documents before the General Division hearing.

[18] Then, the Appellant did not show due diligence in assessing his evidence and the documents to produce at the hearing before the General Division.[5]

[19] The Appellant's representative pointed out that the transaction reports were not filed as part of the hearing before the General Division because she believed that the documents submitted were enough for the Tribunal to allow the appeal.

[20] However, the Appellant should have assessed the evidence that he intended to produce before the General Division and acted accordingly.[6] The Federal Court of Appeal determined that an appellant: "must determine, prior to a hearing, what documents should be produced to establish his or her case and who must exercise reasonable diligence to locate these documents."[7] The Appellant cannot use section 66(1) of the Act to make up for a change in strategy.

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[3] *Chan*, *supra* note 2.
[4] *Canada (Attorney General) v Hines*, 2011 FCA 252.
[5] *Reinhardt, supra*.
[6] *Reinhardt v Canada (Attorney General)*, 2016 FCA 158; see also *Chan*, *supra* note 2.
[7] *Reinhardt, Ibid.*

[21] Moreover, the fact that the Commission did not give the Appellant the opportunity to file these documents as part of the reconsideration request is not decisive because he had the opportunity to do so before the Tribunal's General Division.

[22] Considering that the Appellant knew about the facts contained in the transaction reports and that he had the opportunity to produce them as evidence at the hearing, the Tribunal is of the view that the Appellant did not act as a diligent claimant.[8]

[23] This criterion is not met.

If so, are the transaction reports decisive of the issue to be decided?

[24] Since the Tribunal found that the transaction reports could have been discovered by a claimant acting diligently, it does not have to answer that question.

[25] As a result, the Tribunal finds that there are no new facts that could allow it to rescind or amend its January 3, 2019, decision.

Are the transaction reports "material facts"?

[26] The Act and case law provide no definition of what constitutes a "material fact." However, this criterion appears to differ from that of "new facts."[9] Therefore, "new facts" and "material facts" are not synonyms, but distinct concepts to assess separately.

[27] Now, to determine what constitutes a "material fact," it is necessary to rely on its usual meaning. The Larousse online dictionary defines the term "essential" [translation "material"] in this way:

> "What is necessary for something to exist: Air is essential to life.
>
> What is of great importance; main, crucial: The essential point of the trial."

[8] *Chan*, *supra* note 2.
[9] *Green v Canada (Attorney General)*, 2012 FCA 313; *Badra v Canada (Attorney General)*, 2002 FCA 140.

[28] The Tribunal accepts that the "material fact" is not only decisive as a "new fact," but it must be essential and of great importance in deciding the issue with respect to the original decision. Therefore, the "material fact" cannot simply be useful or beneficial to the issue.

[29] The Tribunal must determine whether the transaction reports were essential or of great importance in determining whether the Appellant was on a week of unemployment for the benefit periods starting July 15, 2015; July 16, 2016; and July 23, 2017.

[30] The Tribunal is of the view that the transaction reports are not "material facts." They are not essential or of great importance in the file because the Appellant already expressed these facts at the hearing before the General Division. The Appellant and his co-shareholders testified that they were not spending many working hours on their company when they claimed Employment Insurance benefits. In support of this claim, the appellants filed a table summarizing the weeks of benefits, the weeks of work, and the weeks where submissions were made during the years covered by the benefit claims.[10] As a result, the evidence has already been made but using a different source.

[31] The Appellant's representative pointed out that the transaction reports are "material facts" to analyze, on a weekly basis, the time test to show that the Appellant's engagement in the operation of the company was more than limited, to rebut the presumption.

[32] However, the Federal Court of Appeal in *Childs* rightly concluded that this criterion cannot be analyzed on a weekly basis:

> In any event, it is impractical to sanction a legal framework in which self-employment is determined by the number of hours a claimant works in any one week. To promote such an understanding would require the Boards of Referees to set the maximum number of hours a claimant is entitled to work in order to come within the "so minor" exception set out in subsection 43(1) of the *Regulations*.[11] Moreover, that approach would lead to the absurd result that in one week a claimant would be deemed to be self-employed, but not in others. In my view, the week-to-week

[10] GD8.
[11] For the purposes of this case, this relates to section 30(2) of the *Employment Insurance Regulations* (Regulations).

> analytical framework being advocated is incompatible with the legislative scheme as a whole.
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> To be entitled to unemployment benefits a claimant must not be working. Subsection 10(1) of the Act provides, "[A] week of unemployment for a claimant is a week in which he does not work a full working week". At the same time, subsection 43(1) of the *Regulations* **deems** a claimant to be working a full week where he or she is self-employed unless the exception in subsection 43(2) applies: that is to say "the employment is so minor in extent that the person would not normally follow it as a means of livelihood." It is implicit in these provisions that Parliament adopted the position that a person who is actively pursuing his or her business interests cannot be considered to be actively pursuing replacement employment. As Marceau J.A. stated in ***Jouan***, *supra*: "[T]he Act is designed to provide temporary benefits to those who are unemployed and actively seeking other work. It cannot be used to subsidize entrepreneurs who are starting their own businesses". Against this background, the true issue is whether the respondent was pursuing his work with Wecan as a means of earning his livelihood. That determination must be made in an objective fashion.[12]

[33] In that same decision, the Federal Court of Appeal concluded that the umpire had made an error by finding that the claimant had spent a limited amount of time on his employment as a self-employed person, among other things, because he had analyzed the hours worked on a weekly basis.[13]

[34] The Appellant's representative filed with the Tribunal a decision from another member of the General Division, which concluded that the Claimant had rebutted the presumption for the weeks during his company's off-season but not for the others. The Tribunal does not accept this decision. First, the Tribunal is not bound by a decision made by another member of the General Division. Moreover, the Tribunal relies on findings from higher courts, such as the Federal Court of Appeal, which sets out the criterion to apply.

[35] As a result, the evidence that the appellants' representative wanted to make using the transaction reports cannot rebut the presumption of engagement in the operation of a business of section 30(2) of the Regulations.

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[12] *Canada (Attorney General) v Childs*, A-418-97 at paras 11 and 12.
[13] *Ibid*, at para 13.

[36] The Tribunal finds that the transaction reports are not "material facts."

Is the Tribunal satisfied that the decision was made before these "material facts" were known or that the decision was based on a mistake as to these facts?

[37] Since the transaction reports are not material facts, the Tribunal does not have to answer that question.

CONCLUSION

[38] The appeal is dismissed.

Catherine Frenette
Member, General Division – Employment Insurance Section

HEARD ON:	December 11, 2019
METHOD OF PRODEEDING :	Videoconference
APPEARANCES:	L. P., Appellant France Simard, Representative for the Appellant