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

[TRANSLATION]

Citation: *L. B. v Canada Employment Insurance Commission*, 2020 SST 62

Tribunal File Number: GE-19-4066

BETWEEN:

L. B.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Employment Insurance Section

DECISION BY: Lucie Leduc

DATE OF DECISION: January 16, 2020

Canada

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] The Appellant was the subject of a decision by the Tribunal's General Division on August 14, 2019. After the General Division dismissed her appeal, the Appellant filed an appeal with the Tribunal's Appeal Division. Meanwhile, she also filed an application with the General Division to rescind or amend the August 14, 2019, decision, which is the subject of this decision.

[3] To rescind or amend a previous decision, the Tribunal must be satisfied that a person has presented a "new fact" or a "material fact." In this case, the Appellant filed three Social Security Tribunal decisions and indicated that she had filed a complaint with the Office of the Privacy Commissioner of Canada. The Tribunal reviewed the Appellant's application and finds that no new material fact has been raised or presented in this case. As a result, since none of the elements raised are determinative to the issue decided on August 14, 2019, the Tribunal found that it did not meet the "material fact" criterion and that the three decisions are not "new" because they existed at the time of the August 19, 2019, decision.

PRELIMINARY MATTERS

[4] 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.

ISSUE

[5] The Tribunal must determine whether the Appellant provided additional evidence that constitutes a new fact or a material fact.

ANALYSIS

[6] For the Tribunal to be able to rescind or amend an earlier 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[.]

[7] 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." The second allows it to be based on a material fact that was unknown at the time of the decision.

Issue: Has the Appellant provided additional evidence that constitutes a new fact or a material fact?

[8] The Appellant filed an application to amend a decision that the Tribunal made earlier on August 14, 2019. In her application, the Appellant states that she obtained information that she did not have at the time of the hearing leading to the August 14, 2019, decision. She indicates that she filed a formal complaint with the Office of the Privacy Commissioner of Canada in August 2019 and that the complaint was being processed. She attached a few Social Security Tribunal decisions to her application to amend the decision. These decisions were not in the appeal file when the member made her decision.

New facts

[9] The Tribunal finds that, in her application to amend the decision, the Appellant did not present a new fact for the reasons that follow.

[10] The Federal Court of Appeal clarified the test for "new facts."[1] These facts must have happened after the decision was rendered or before but could not have been discovered by a claimant acting diligently.

[11] In this case, the Tribunal finds that having filed a complaint with the Office of the Privacy Commissioner does not constitute a new fact to this issue because it relates to a completely different issue with another body and another jurisdiction. Having an active complaint shows only that the Appellant is using the remedies available to her. If the results of this process were to constitute new facts to this appeal, the Appellant could then apply to the Tribunal for review. However, the mere fact of having filed a complaint does not constitute a new fact because it brings nothing new to this issue. Since the Tribunal is an independent decision-making body that is not bound by the decisions of other administrative bodies, the Appellant's use of the remedies available to her is irrelevant to this issue.

[12] The Appellant also filed three Social Security Tribunal decisions. The first is from the Tribunal's Appeal Division and dated April 13, 2017. The second is from the General Division and dated April 24, 2014. The third is also from the General Division and dated May 15, 2017. I note that these three decisions were issued well before the decision that the Appellant is seeking to amend. They are therefore not new since they existed and could have been discovered by the Appellant before the August 14, 2019, decision.

[13] Furthermore, these decisions do not constitute facts relating to the present case; they are part of the Appellant's arguments. When a person files earlier decisions in support of their appeal, they do not constitute facts, but rather decisions that a party wishes to add to the authorities that will be considered in the analysis of the law to which the issue relates.

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[1] *Canada (Attorney General) v Chan*, [1994] FCJ No 1916 and confirmed by the Court in *Canada (Attorney General) v Hines*, 2011 FCA 252.

[14] Based on the evidence submitted, 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.

Material fact

[15] 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)?

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

[17] 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."[2] The case law does not offer an interpretation of what a material fact means. 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.

[18] 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 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).

[19] In this file, the August 14, 2019, decision is about the allocation of earnings as well as a penalty imposed on the Appellant. After reconsidering the evidence the Appellant filed with the application, the Tribunal is unable to find that it could have had a major influence on the result of the case. The Tribunal finds that the evidence is irrelevant to the issue of earnings and allocation as well as to the penalty that was the subject of the August 14, 2019 decision. The only fact that comes out of the Appellant's application to amend the decision is that she filed a complaint with

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

the Office of the Privacy Commissioner. However, the Tribunal finds that the mere fact of having filed a complaint with the Office of the Privacy Commissioner of Canada with no other details does not affect the August 14, 2019, decision. It is a completely separate remedy that the Appellant chose to pursue.

[20] The Tribunal understands that the Appellant wishes to file complaints where possible and pursue all the remedies available to her, including with the Office of the Privacy Commissioner. However, pursuing these remedies is not essential to the issue the Tribunal decided in its August 14, 2019, decision.

[21] 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 document submitted satisfies the requirements of section 66(1)(a) of the DESD Act. There is therefore no reason to rescind or amend the Tribunal's August 14, 2019, decision.

[22] I understand from the Appellant's application that she is frustrated that the recording of her July 11, 2019, hearing is unavailable. She submits that it shows a lack of transparency on the part of the Commission and that it has something to hide. The Tribunal points out that the Commission has nothing to do with the Tribunal's recordings. Unfortunately, the recording is not available because of technical issues. Although the member recorded the hearing and saved the recording file in the Appellant's Tribunal file, the recording does not work when trying to access it. It is an unfortunate isolated incident and the Tribunal is very sorry about it. The Tribunal member would benefit if and sincerely wishes that the recording were available for the Appeal Division's analysis. However, for reasons out of its control, the link to the audio file does not work.

[23] The Appellant also submits that the fact that the recording is not available for review by the Appeal Division violates the *Canadian Charter of Rights and Freedoms*. However, it is an application to rescind or amend under section 66 of the DESD Act that is currently before the Tribunal. The Tribunal's jurisdiction is limited to that one issue. Furthermore, the Appellant has already filed an appeal of the August 14, 2019, decision with the Appeal Division. The Tribunal

respects the Appeal Division's jurisdiction to determine how it will deem relevant the fact that the recording is unavailable, which falls under its jurisdiction and not that of the General Division. The General Division has jurisdiction to decide only on the issue relating to section 66 of the DESD Act.

CONCLUSION

[24] The appeal is dismissed.

Lucie Leduc
Member, General Division – Employment Insurance Section

HEARD ON:	N/A
METHOD OF PROCEEDING:	On the record
APPEARANCES:	N/A