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

Citation: *B. B. v Canada Employment Insurance Commission*, 2020 SST 387

Tribunal File Number: GE-20-902

BETWEEN:

B. B.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Amanda Pezzutto

DATE OF DECISION: April 21, 2020

DECISION

[1] The Claimant has proven that there is a reason to reopen and change the Tribunal's original decision. This means that I have the authority to rescind the original decision and replace it with a new decision.

[2] I find that there is not enough evidence proving that the Claimant chose to quit his job. The Commission has not met its burden of proving that the Claimant voluntarily left his job. I am allowing the Claimant's appeal.

OVERVIEW

[3] A party can apply to the Tribunal to ask for a decision to be reopened and changed.[1] The Claimant is the party who applied to change the Tribunal decision.

[4] The Tribunal originally decided that the Claimant voluntarily left his job without just cause. The Claimant filed new information and asked the Tribunal to change its decision. The Tribunal did not change its decision and the Claimant appealed to the Appeal Division. The Appeal Division decided that the General Division's decision was not fair. The Appeal Division sent the application to rescind or amend back to the General Division for a new decision. This means that I must make a new decision on the Claimant's request to rescind or amend the original decision.

[5] The Claimant thinks the Tribunal should change its decision because he says that he did not quit his job. He argues that he was on medical leave but he could not return to work once he recovered. The employer hired a replacement while he was on leave. He wants the Tribunal to change its decision and allow him to receive benefits.

PRELIMINARY MATTERS

[1] Section 66 of the *Department of Employment and Social Development Act* allows for decisions to be rescinded or amended.

[6] After the Appeal Division returned the application to rescind or amend to the General Division, I gave both parties 30 days to file any additional documents or submissions. Both the Commission and the Claimant made further submissions.

[7] I have decided that no hearing is necessary. I find that there is enough evidence in the appeal file for me to make a decision on the record.

ISSUE

[8] I have to decide whether I should rescind or amend the original decision the Tribunal made in file GE-19-2876. This means I have to consider the following questions:

- Are there new facts?
- Did the Tribunal make the decision without knowledge of some material fact? Did the Tribunal make a mistake as to some material fact?

ANALYSIS

[9] The Tribunal cannot simply reopen a decision when an applicant asks it to do so. The Tribunal can only amend or rescind a decision in specific situations. The Claimant must show that:

- There are new facts; or
- The Tribunal made the decision without knowledge of a material fact or based the decision on a mistake as to some material facts.[2]

[10] For something to be considered "new facts," it has to meet one of the following conditions:

- It happened after the Tribunal made its decision; or

[2] Section 66 of the *Department of Employment and Social Development Act*.

- It happened before the Tribunal made its decision, but the Claimant could not have discovered the new facts even if he was acting diligently.

[11] The new facts must also be decisive of the issue.[3] This means that the new facts must have a real possibility of changing the decision.

[12] Even if there are not any new facts, the Claimant can also ask the Tribunal to rescind or amend a decision if the Tribunal made its decision without knowing about a material fact, or made a mistake about a material fact.[4]

[13] To make a decision, I will first decide whether there are new facts. Then, I will decide whether the Claimant has shown that the Tribunal made its decision without knowing about a material fact, or that the Tribunal made a mistake about a material fact.

Are there new facts?

[14] The Claimant has not proven that his evidence is new. He has not provided new facts.

[15] After the Tribunal made its decision, the Claimant provided another piece of evidence. He submitted an email he sent to his employer on his last day of work. The email talks about taking medical leave.

[16] The Claimant sent the email to his employer on June 29, 2018. This was his last day of work. The Tribunal made its original decision on September 18, 2019.

[17] The email existed before the Tribunal made its original decision. The Claimant did not create and send this email after the Tribunal made its decision. This means that the email did not arise after the Tribunal made its decision.

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[3] *Canada (Attorney General) v Chan*, A-185-94, sets out the legal test for new facts.
[4] In *Badra v. Canada (Attorney General)*, 2002 FCA 140, the Federal Court of Appeal says that there is a difference between "new facts" and making a mistake about a material fact. In *G.C. v. Canada Employment Insurance Commission*, 2019 SST 1234, the Appeal Division held that the law allows the General Division to rescind or amend its original decision if there are new facts **or** the decision was made without knowledge of, or a mistake as to, a material fact. I do not have to follow Appeal Division decisions, but I choose to rely on the Appeal Division decision because it is useful in this case.

[18] The Claimant has not explained why he did not provide this email to the Tribunal sooner. He wrote the email, and so I think it is likely that he could have provided this information to the Tribunal before the Tribunal made its original decision.

[19] The email is not a new fact. The Claimant sent the email to his employer before the Tribunal made its original decision. If the Claimant was acting diligently, he could have given the Tribunal the email before the Tribunal made its original decision.

Did the Tribunal make the decision without knowledge of some material fact? Did the Tribunal make a mistake as to some material fact?

[20] I find that the Tribunal made its original decision without knowledge of a material fact.

[21] With his application to rescind or amend the original decision, the Claimant provided a copy of an email he sent to his employer on his last day of work. In his email, the Claimant says that he is confirming his medical leave. He says that he needs time to improve his health and hopes to return to work the following year if his position is still available.

[22] In its original decision, the Tribunal decided that the Claimant voluntarily left his employment. The Tribunal relied on the employer's statements on the Record of Employment (ROE) to make its findings. The Tribunal did not have the Claimant's email referring to a medical leave of absence when it made its original decision.

[23] The Claimant's email directly contradicts the employer's statements. The employer told the Commission that the Claimant quit his job in June 2018, but the Claimant's June 2018 email says that the Claimant is confirming his medical leave of absence.

[24] The Tribunal did not know that the Claimant had emailed his employer about taking a medical leave of absence when it made the original decision. This means that the Tribunal made its original decision without knowledge of this fact.

[25] The Claimant and the Commission disagree about whether the Claimant voluntarily left his job. The Tribunal had to make a decision about whether the Claimant voluntarily left his employment. As a result, any evidence clarifying why the Claimant stopped working is material to question of whether the Claimant voluntarily left his job. I find that the Claimant's email is a

material fact because the Claimant sent it on his last day of work and it refers to the reason he stopped working.

[26] The Tribunal made its original decision without knowing that the Claimant sent his employer an email about taking medical leave on his last day of work. I find that the Tribunal made its original decision without knowledge of a material fact.

Should I rescind or amend the original decision?

[27] I will rescind the original decision and make a new decision.

[28] The law gives me the power to rescind or amend the decision. The law does not tell me when to amend and when to rescind a decision. I think it is likely that I can choose to rescind or amend a decision based on the individual circumstances of a case.

[29] In the original decision, the Tribunal found that the Claimant voluntarily left his job without just cause. This meant that the Claimant was indefinitely disqualified from receiving employment insurance benefits. I cannot amend this decision. Either the Claimant is disqualified from benefits, or he is not disqualified.

[30] Instead of amending the original decision, I choose to rescind the Tribunal's original decision. This means that I will make a new decision about whether the Claimant voluntarily left his job. If I find that he left his job voluntarily, I will consider whether he had just cause for leaving.

Did the Claimant voluntarily leave his job?

[31] I find that the Claimant did not leave his job voluntarily. The Commission has not proven that he chose to leave his job.

[32] Sometimes it is not clear whether a claimant has quit their job or stopped working for some other reason. To make a decision about whether they quit, I must consider a very simple question: did they have the choice to stay or to leave the job? If they had a choice, and they

chose to leave the job, then they have quit their job. The *Employment Insurance Act* calls this "voluntary leaving."[5]

[33] The Commission has the burden of proving that a claimant quit their job.[6] This means that it is up to the Commission to provide enough evidence to prove that the claimant voluntarily left their job.

[34] The Claimant and the employer disagree about why the Claimant stopped working. The Claimant has consistently said to the Commission and to the Tribunal that he did not quit his job. He argues that he took a medical leave of absence.

[35] The employer told the Commission that the Claimant quit his job for medical reasons in June 2018.

[36] The Commission argues that the Claimant was not on a leave of absence because he did not arrange a return to work date. The Commission also argues that the Claimant did not talk to the employer about returning to work until 10 months after his last day of work.

[37] The employer told the Commission that the Claimant quit his job in June 2018. However, the Commission did not ask the employer how the Claimant quit. The Commission did not ask the employer for a copy of the Claimant's resignation letter. The Commission did not ask the employer if they refused the Claimant's request for a medical leave of absence.

[38] Furthermore, the Commission has not submitted any evidence explaining what changed between June 29, 2018 – when the Claimant sent the email talking about his medical leave – and July 10, 2018, when the employer issued the ROE saying that the Claimant quit. It is not clear why the employer issued an ROE saying that the Claimant quit his job less than two weeks after the Claimant emailed them about taking a leave of absence.

[39] I think the Claimant's email is an important and reliable piece of evidence. I find that the Claimant's email proves that he asked the employer for a medical leave of absence before his last

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[5] In *Canada (Attorney General) v. Peace*, 2004 FCA 56, the Federal Court of Appeal says that a claimant has voluntarily left their job if they have a choice and they choose to leave.
[6] *Green v. Canada (Attorney General)*, 2012 FCA 313.

day of work. I also find that the email shows that the Claimant thought that he was leaving work to start a medical leave of absence. I acknowledge that the Claimant did not suggest a firm return to work date in his email, but he does talk about returning to work upon his recovery. I think it is likely that the Claimant thought he was starting a medical leave of absence when he stopped working.

[40] It is up to the Commission to prove, on a balance of probabilities, that the Claimant stopped working because he quit. The Claimant has consistently said that he stopped working because he took a medical leave of absence. He also provided a copy of an email to his employer talking about a medical leave of absence.

[41] The Commission has testimony from the employer stating that the Claimant quit. However, the Commission has not provided documentary evidence from the employer showing that the Claimant quit. There is no resignation letter. The Commission has not submitted evidence explaining what happened after the Claimant sent the email to his employer. The Commission did not ask the employer why the Claimant thought he was taking a leave of absence when he stopped working.

[42] I find, on a balance of probabilities, that the Claimant's evidence is more reliable. I find that it is likely that the Claimant did ask his employer for a medical leave of absence. I also find it is likely that the Claimant believed that the employer had granted him a medical leave of absence when he stopped working.

[43] The Commission has not met its burden of proving that the Claimant left his job voluntarily. I do not believe that the Claimant chose to leave his job.

CONCLUSION

[44] I am rescinding the original decision. I find that the Claimant did not voluntarily leave his job.

Amanda Pezzutto

Member, General Division - Employment Insurance Section

METHOD OF PROCEEDING:	On the Record
APPEARANCES:	None