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

Citation: *DA v Canada Employment Insurance Commission*, 2020 SST 940

Tribunal File Number: GE-20-1876

BETWEEN:

D. A.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Employment Insurance Section

DECISION BY: Lilian Klein

DATE OF DECISION: October 14, 2020

Canada

DECISION

[1] The Applicant has not proved that there is a reason to reopen and change the Tribunal's original decision. This means that the original decision stands.

OVERVIEW

[2] A party can apply to the Tribunal to ask it to reopen and change a decision. The party who applies is "the Applicant."

[3] On May 26, 2020, I decided that the Applicant lost his job for misconduct because he tested positive for drug use on a day when he reported for duty as a subway operator. This violated his employer's Fitness for Duty policy. I found that his actions amounted to misconduct. Since he lost his job for this reason, he was disqualified from receiving EI benefits.

[4] The Applicant has filed new information with the Tribunal.[1] Based on this information, he wants me to change my decision that he lost his job because of misconduct.

[5] I can only change my decision if the new information meets certain criteria. I explain these criteria below.

[6] I decided that another hearing was not necessary because the Applicant's information was self-explanatory. I did not need any further clarification.

ISSUE

[7] Has the Applicant proved that there is a reason for reopening the original decision? If so, I must decide how the original decision changes.

ANALYSIS

[8] I cannot simply reopen a decision when an applicant asks me to do so. I can only reopen and change a decision for the following two reasons:

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[1] S 66 of the *Department of Employment and Social Development Act* (DESD Act) allows for decisions to be rescinded or amended based on new facts..

1. New facts are presented to me, or

2. I made a decision without knowing about some material fact or based my decision on a mistake about a material fact.

[9] Both of these reasons involve me looking at whether the new information affects the issue in the original decision.[2]

[10] For new facts, the court has said that I have to look at whether the new information is "decisive."[3] For the second reason, I have to look at whether the information is about a "material fact."[4]

[11] If the information does not affect—or change—the decision, then there is no point in reopening it.

What new information did the Applicant submit?

[12] The Applicant submitted the following documents with his application:

- An email from the lab that administered his drug tests
- The results of these tests
- A chart showing the employer's oral fluid test cut-off levels

Is the information significant enough to affect the issue in the decision?

[13] The issue in the decision is whether the employer dismissed the Applicant because of misconduct. The Applicant argues that his new information is significant enough to affect the decision because it shows that the employer did not follow its own drug testing policies. He says this means that his dismissal was unfair.

[14] The Applicant says the email from the lab proves that the employer gave it instructions to limit testing of his second sample to drug component alone. He says the chart of drug cut-off

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[2] *Attorney General of Canada v Chan*, A-185-94, refers to new facts that are "decisive" while section 66 of the Department of Employment and Social Development Act refers to some "material fact."
[3] *Chan*, see above, sets out the legal test for new facts.
[4] Section 66 of the DESD Act.

levels for employees shows that the employer was required to test his second sample for drug levels too.

[15] The Commission says the Applicant did not submit any new facts. It argues that the additional documents relate to arguments he already made before I rendered the decision. The Commission says this means that he does not meet the conditions set out in law to reopen and change the decision.

[16] I find that his new documentation is not significant enough to affect my findings because it raises no new facts or issues that I overlooked in my original decision. I already considered this evidence in my decision.

[17] The email from the lab confirms how the Applicant's second sample was tested, but adds nothing new to the facts of his case. He already reported that the lab only tested his second sample for drug component.[5]

[18] The official records of his drug tests confirm results that he has already reported. They add no new facts.

[19] The Applicant already submitted a chart showing the employer's drug cut-off levels.[6] This is in line with the argument he has repeatedly expressed that his second sample should have been tested for drug level. He says the employer's policy states this requirement but he has not submitted that part of the policy. On its own, the chart adds no new facts.

[20] In short, the Applicant's new information is credible but it does not help prove or disprove, either directly or indirectly, the facts and arguments I already considered in my decision. It has no additional relevance that I must consider.

[21] As I stated in my decision, my role was not to decide if the Applicant's employer wrongfully dismissed him by failing to test his second sample for drug level as well as

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[5] GD3-38.
[6] RGD2-2.

component.[7] My role was to consider whether the Applicant was dismissed for misconduct because he failed a random drug test on a day when he reported for duty as fit to work.[8]

[22] The Applicant never disputed that he used marijuana the day before he was due to work as a subway operator. He did not dispute that he failed a random drug test, but argued that his levels were only high because he had been a recreational user of marijuana for decades. In his opinion, he was perfectly fit and able to operate a subway despite testing above the acceptable limits for the drug. However, his conduct violated his employer's no tolerance Fitness for Duty policy.[9]

[23] The court has found that using "impairing" substances such as alcohol or drugs before work is wilful and reckless behaviour that falls under the legislation's interpretation of misconduct.[10]

[24] Given these factors, I find that the Applicant has not submitted any new facts that warrant me reopening and changing my decision.

[25] Having made this finding, is not necessary for me to decide whether the Applicant met the other conditions that would allow me to reopen the decision. Since his new information would not affect my findings, my original decision stands, without any change.

CONCLUSION

[26] The application is dismissed.

Lilian Klein

Member, General Division - Employment Insurance Section

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[7] *Attorney General of Canada v McNamara*, 2007 FCA 107.

[8] To be misconduct under the *Employment Insurance Act*, a claimant's conduct has to be willful, that is, conscious, deliberate, or intentional. There is misconduct if a claimant knew, or should have known, that his actions would stop him performing an essential part of his job, making dismissal a real possibility.

[9] Under the employer's Fitness for Duty policy, "consuming alcohol or drugs during work hours and the time leading up to working hours (where the negative effects would still be experienced in work hours) is strictly prohibited" (GD3-32).

[10] *Attorney General of Canada v. Wasylka*, 2004 FCA 219.

METHOD OF PROCEEDING:	On the Record
APPEARANCES:	D. A., Appellant