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

Citation: *CE v Canada Employment Insurance Commission and X*, 2021 SST 25

Tribunal File Number: AD-20-768

BETWEEN:

C. E.

Appellant

and

Canada Employment Insurance Commission

Respondent

and

X

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Decision by: Shirley Netten

Date of Decision: January 13, 2021

Canada

DECISION AND REASONS

Decision

[1] The request to set aside the withdrawal is granted.[1] The appeal will proceed.

Overview

[2] C. E. (Appellant) claimed Employment Insurance (EI) benefits in February 2020. She said that she had quit her job for health reasons. The Canada Employment Insurance Commission (Commission) eventually accepted that the Appellant qualified for benefits because she had just cause for leaving her job.

[3] The Appellant's former employer, X (Employer), successfully appealed this decision. The Social Security Tribunal's General Division decided that the Appellant did not meet the test for just cause. This disqualified the Appellant from receiving the benefits she had claimed (some of which she had already received).

[4] The Appellant requested, and was given, permission to appeal to the Tribunal's Appeal Division. Before the deadline for written submissions and before the hearing, the Appellant withdrew her appeal. The Appeal Division confirmed the withdrawal and closed the appeal file.

[5] Three and a half weeks later, the Appellant asked to continue with her appeal. The Appellant's representative and the Employer have now provided their arguments about this request. I have decided to set aside the Appellant's withdrawal. This allows the Appellant's appeal to proceed.

[1] This decision talks about setting aside the withdrawal rather than re-opening the appeal. This keeps the focus on what is actually needed for the appeal to continue. It also avoids confusion between an attempt to revive an appeal that was previously withdrawn (as in this case) and an attempt to re-open an appeal after a final decision has been issued. Applications to rescind or amend a final decision are routinely described as applications to "re-open", at this Tribunal.

Issue

[6] The issue to be decided is whether the Appellant's withdrawal should be set aside, so that her appeal can proceed. This decision addresses the following questions:

a) Does the Tribunal have the authority to set aside a withdrawal?

b) What approach should the Tribunal follow generally?

c) Should I set aside the Appellant's withdrawal?

The Tribunal can set aside a withdrawal

[7] The *Social Security Tribunal Regulations* (Regulations) explain how and when a person may withdraw their appeal or application.[2] The Regulations do not say anything about whether, or in what circumstances, a withdrawal can be set aside and a withdrawn appeal may proceed. Although rare, the Tribunal has occasionally allowed a withdrawn appeal to continue.[3] The parties do not dispute the Tribunal's authority to do so.

[8] Tribunals and courts have treated their approach to setting aside withdrawals and discontinuances[4] as a matter of procedure.[5] The Regulations indicate that the Tribunal can provide for "any matter concerning a proceeding."[6] Administrative tribunals also have inherent powers in relation to their procedures. As the Supreme Court of Canada has said, tribunals are "masters in their own house."[7] When legislation doesn't outline the procedures to follow, tribunals can adopt their own procedures as long as they are fair. Accordingly, I am satisfied that the Tribunal has the discretion to set aside a withdrawal.

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[2] Section 14 of the Regulations.
[3] None of these decisions have been published.
[4] "Discontinue" and "discontinuance" in the courts mean the same thing as "withdraw" and "withdrawal" at tribunals.
[5] For example, the Immigration and Refugee Board regulates this in their rules of procedure, and the Social Benefits Tribunal, the Federal Court of Appeal, and the Saskatchewan and British Columbia Courts of Appeal rely on general or inherent procedural powers. This is discussed directly in *Philipos v Canada (Attorney General)*, 2016 FCA 79 (CanLII) at paras 9-12.
[6] Section 4 of the Regulations.
[7] *Prassad v Canada (Minister of Employment and Immigration)*, 1989 CanLII 131 (SCC).

What approach to setting aside a withdrawal should the Tribunal follow?

– **Context matters**

[9] The Regulations state that the Tribunal "must proceed by way of analogy" if a question of procedure is not dealt with in the Regulations.[8] But the Regulations do not describe any procedures that are similar to setting aside a withdrawal. In this situation, the Tribunal should proceed in a way that is consistent with the Regulations and their purpose. I agree with the Appellant's representative that the general principle found in the Regulations provides some guidance:

> These Regulations must be interpreted so as to secure the just, most expeditious and least expensive determination of appeals and applications.[9]

[10] In other words, the Tribunal's mandate is to deliver justice in a way that is simple, quick, and fair. Its procedures should reflect that goal.

[11] I also agree with the Appellant's representative that the Tribunal should take an approach that is appropriate to its decision-making context. The Tribunal hears appeals about Employment Insurance, Canada Pension Plan benefits, and Old Age Security – key components of Canada's social safety net. The people who appeal their entitlement to these benefits are often vulnerable. The vast majority represent themselves at the Tribunal, or are represented by a friend or family member. Very few have the benefit of professional representation. Given this context, the Tribunal's approach should be as straightforward and non-technical as a fair process permits.

– **Withdrawals are meant to be final**

[12] At the Tribunal, an appeal comes to an end if the member issues a final decision, or if the appellant withdraws. In both cases, there is an expectation of finality.[10] In both cases, the appeal file is closed.

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[8] Section 3(2) of the Regulations.
[9] Section 2 of the Regulations.
[10] Theoretically, after withdrawing an appeal, an individual could file a new appeal, since there was no final determination of the issue under appeal. In practice, they would likely have passed the 30- or 90-day deadline to appeal, which means that they would have to apply for an extension of time (and, usually, show a continuing

[13] "Withdrawal" is not a complex concept, in and of itself. The basic consequence of withdrawing an appeal at the Tribunal is usually obvious: the previous decision remains in effect, since the Appellant is no longer appealing it. Upon receiving a withdrawal, the Tribunal advises all parties in writing that the withdrawal is final and the file is closed.

[14] Finality is important in any recourse system, including at this Tribunal. A withdrawal is a simple way for an appellant to end their appeal unilaterally, when the issue is no longer in dispute or when they no longer want to proceed. The other parties are entitled to rely on a withdrawal, and to trust that the previous decision is in effect. If withdrawals were easily reversed, they would no longer be an efficient and reliable method of ending appeal proceedings.

– **Exceptional circumstances are needed, going to the root of the decision to withdraw**

[15] Because finality is important, there must be exceptional circumstances to justify setting aside a withdrawal. It is not enough to have a change of heart, a change in approach (such as collecting new evidence or securing representation), or a change in perspective (such as reassessing the likelihood of winning). There must have been a problem related to the decision to withdraw. As the Federal Court of Appeal put it in a case called *Philipos*, "[o]nly some fundamental event that strikes at the root of the decision to discontinue can warrant the resurrection and continuation of a discontinued proceeding."[11]

[16] In their analyses, the courts have focused on mistakes, duress, misrepresentation, and procedural misunderstandings, affecting the decision to discontinue proceedings.[12] Decision-makers have considered similar circumstances for withdrawals at tribunals, and have also asked whether the decision to withdraw was adequately informed, or whether there was a misunderstanding about the consequences of the withdrawal.[13] For example, the Immigration and

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intention to appeal). They may also have passed the one-year point, after which no extension of time is possible. See sections 52 and 57 of the *Department of Employment and Social Development Act* (DESDA).

[11] *Philipos v Canada (Attorney General)*, 2016 FCA 79 (CanLII) at para 20.

[12] See, for example, *Adam v Ins. Corp. of B.C.*, 1985 CanLII 584 (BC CA); *Warford v Zyweck*, 2002 BCCA 221 (CanLII); *Daniele v Johnson*, 1999 CanLII 19921 (ON SCDC); *Singh v Street et al.*, 1990 CanLII 7820 (SK CA); *Philipos v Canada (Attorney General)*, 2016 FCA 79 (CanLII).

[13] See, for example, *Lu v. Canada (Citizenship and Immigration)*, 2010 CanLII 92950 (CA IRB); *Jean-Vernet v Canada (Citizenship and Immigration)*, 2012 CanLII 61361 (CA IRB); *Ohanyan v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1078; *1308-08514 (Re)*, 2016 ONSBT 2117 (CanLII); *1709-07708 (Re)*, 2018 ONSBT 2055 (CanLII).

Refugee Board reinstated an appeal where an appellant "was under a mistaken belief that her permanent resident status was resolved" at the time of her withdrawal.[14]

[17] There have been examples across the spectrum at the Tribunal: a withdrawal faxed in error; a representative not acting on the appellant's instructions; an appellant who withdrew because she thought a family member could not represent her; an appellant who was misinformed about the need for withdrawal by Service Canada.

[18] I see no need to restrict the types of problems associated with a withdrawal that would justify setting it aside. A broad approach recognizes the wide range of circumstances that may arise, particularly for parties who do not have professional representation. Whether there was a problem going to the root of the decision to withdraw is a finding of fact to be made on the evidence, including the timing of the request, in each case.

– **Prejudice to the other parties must be considered**

[19] As I said earlier, the other parties are entitled to rely on a withdrawal as final. Setting it aside may hurt or disadvantage them. For example, so much time may have passed since the withdrawal that the other parties would have difficulty presenting their case. Or, following the withdrawal, Service Canada may have taken some action that benefited another party. Any benefit to the appellant of setting aside the withdrawal has to be weighed against any harm or disadvantage to the other parties.[15]

[20] Whether there would be prejudice to another party is a finding of fact to be made on the evidence, and timeliness may be relevant here as well.

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[14] *Chahal v Canada (Citizenship and Immigration)*, 2013 CanLII 98579 (CA IRB) at para 5.
[15] This approach is consistently followed by both courts and tribunals. See, for example, *Philipos v Canada (Attorney General)*, 2016 FCA 79 (CanLII); *Warford v Zyweck*, 2002 BCCA 221 (CanLII); *Jean-Vernet v Canada (Citizenship and Immigration)*, 2012 CanLII 61361 (CA IRB); and *1308-08514 (Re)*, 2016 ONSBT 2117 (CanLII).

– **It isn't necessary to consider the appellant's chance of success on the merits**

[21] In *Philipos*, the court identified "reasonable prospect of success" on the appeal as an important consideration.[16] There are several reasons why I would not include this as a factor in deciding whether to set aside a withdrawal at the Tribunal.

[22] First, there is little benefit to adding this requirement. The test has a low threshold, and few requests to set aside a withdrawal would be denied for this reason. There are other mechanisms available at the Tribunal to weed out appeals that are bound to fail.[17] And, the goal of judicial economy highlighted in *Philipos* is less compelling in these circumstances. Requests to set aside a withdrawal are very rare at the Tribunal and, if revived, appeals typically proceed efficiently on the merits.

[23] Second, people without legal training are unlikely to understand what is meant by a "reasonable prospect of success." The concept is not well suited to the Tribunal context, where most appellants are self-represented. A layperson might fairly assume that it requires a likelihood of success, when it does not.

[24] Third, in many cases the parties and the decision-maker would have to address the substance of the appeal, rather than just the circumstances surrounding the withdrawal and the impact of setting it aside. Unnecessarily complicating our procedures is inconsistent with the goal of delivering justice simply and quickly.

– **There could be other relevant circumstances**

[25] This decision doesn't rule out the possibility of other relevant circumstances, such as bad faith or abuse of process, that could influence a decision about setting aside a withdrawal.

– **The process of deciding whether to set aside a withdrawal must be fair**

[26] There are always two, and sometimes three, parties to an appeal at the Tribunal. We can't assume that the responding party or parties won't care if the withdrawal is set aside. For the

[16] *Philipos v Canada (Attorney General)*, 2016 FCA 79 (CanLII) at para 21.
[17] See sections 53(1) and 58(2) of the DESDA.

Tribunal's procedure to be fair, we have to give all parties the opportunity to make their arguments about the request. And, after deciding whether to set aside a withdrawal, the Tribunal should give the parties the reasons for that decision. The reasons need not be lengthy or formal.

– **Summary of approach**

[27] To summarize:

a) The Tribunal can decide whether to set aside a withdrawal, after giving the parties an opportunity to make and support their arguments.

b) Withdrawals are expected to be final, and so exceptional circumstances are needed for them to be set aside. Changing one's mind, approach, or perspective after withdrawing is not enough to justify setting aside the withdrawal.

c) There must have been a problem going to the root of the appellant's decision to withdraw. The merits of setting aside the withdrawal must outweigh the harm or disadvantage to another party.

d) The Tribunal should give the parties reasons for the decision. These may be given by endorsement (brief reasons in letter format).

[28] To be clear, this procedure is not needed in cases of Tribunal error (such as placing a withdrawal in the wrong appeal file or processing the withdrawal of a representative as a withdrawal of the appeal). In such circumstances, there is no need to set aside a withdrawal because the appellant did not withdraw. The Tribunal can simply correct its own clerical error.

The Appellant's withdrawal should be set aside

[29] In this case, the Appellant had appealed a General Division decision that disqualified her from receiving EI benefits. Even without representation, it would have been obvious to her that the General Division's disqualification decision would remain in effect when she withdrew. However, the Appellant was under the mistaken belief that, despite this disqualification, she would not have to pay back the EI benefits she had already received. Incorrect information from the General Division led her to that belief.

[30] At her hearing, the General Division member told her:

> Under the EI Act […] whatever happens here today, whatever decision I make, nobody is going to come knocking on [the Appellant's] door or sending her a letter saying "we want all our money back" that she's already been paid through Employment Insurance. It doesn't work that way. […] [M]onies paid out under circumstances such as this will not, you know, be payable or have to be paid back to the government. But it could put a stop to payments if I rule in favour of [the Employer].

[31] The General Division member was wrong. The *Employment Insurance Act* does not stop Service Canada from recovering an EI overpayment when the General Division overturns a favourable decision.[18] Soon after her withdrawal, the Appellant received a notice to repay the EI benefits she had received. She promptly contacted the Tribunal to try to revive her appeal.

[32] The Employer argues that there are no exceptional circumstances in this case, and that the Appellant "has not pointed to 'something that strikes at the root of [her] earlier decision to discontinue.'" I disagree. The evidence is overwhelming that there was a problem at the heart of the Appellant's decision to withdraw. I find that the misinformation from the General Division was a significant factor in the withdrawal decision. The Appellant would not have withdrawn if the General Division member had not assured her that she would keep the benefits she had already received.

[33] The Tribunal is accessible to self-represented parties, and the Appellant was not obliged or expected to retain a lawyer before withdrawing (as the Employer implies). The Appellant quite reasonably relied upon information given to her by the General Division member. She didn't fail to think through the consequences of her withdrawal; rather, she was led to a mistaken belief about those consequences. The facts of this case are unlike those in *Philipos*, where the court found that the appellant "had merely a change of heart."[19]

[34] Having accepted that there was a problem going to the root of the Appellant's decision to withdraw, I still have to consider the possibility of prejudice to the other parties.

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[18] It is likely that the member misunderstood section 114 of the *Employment Insurance Act*. This section only protects benefits that were paid as a result of a General Division decision, if overturned by the Appeal Division.
[19] *Philipos v Canada (Attorney General)*, 2016 FCA 79 (CanLII) at para 24.

[35] Only three and a half weeks passed between the Appellant's withdrawal and the request to revive the appeal. There were no practical consequences to the withdrawal other than the issuance of a notice to the Appellant to enforce the benefit overpayment. The Employer has not identified any specific harm or disadvantage to it, if the withdrawal were to be set aside. The Commission did not take any position, or make any arguments, about the Appellant's request. I find that setting aside the withdrawal would not lead to any significant prejudice to the other parties.

[36] There was a problem going to the root of the Appellant's decision to withdraw, namely misinformation about an important consequence of the withdrawal. The benefits of setting aside that withdrawal outweigh any harm or disadvantage to the other parties to the appeal. As a result, I am setting aside the Appellant's withdrawal, filed on October 19, 2020.

[37] While not relevant to setting aside the withdrawal, I acknowledge the Employer's position that the Appellant should have to repay the EI benefits she received. The Employer, along with the Appellant and the Commission, will be able to make arguments in support of or against the General Division's disqualification decision. Back in September 2020, the Appeal Division had scheduled this appeal for hearing, with a timeline for written arguments. The Appeal Division will now issue a new notice of hearing.

Conclusion

[38] The Appellant's withdrawal of October 19, 2020, is set aside. Her appeal will proceed.

Shirley Netten
Member, Appeal Division

REPRESENTATIVES:	Francesca Allodi-Ross, for the Appellant M. R., Employer