Citation: *MK v Canada Employment Insurance Commission*, 2021 SST 612

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Applicant:	M. K.
Representative:	S. K.
Respondent:	Canada Employment Insurance Commission

Application to amend or rescind decision:	Social Security Tribunal – General Division – Employment Insurance Section, decision dated May 26, 2021

Tribunal member:	Paul Dusome
Type of hearing:	Teleconference
Hearing date:	August 23, 2021
Hearing participants:	Applicant Applicant's representative
Decision date:	August 26, 2021
File number:	GE-21-1101

Decision

[1] The Applicant has not proven 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 for a decision to be reopened and changed.[1] The party who applies is "the Applicant." In this case, the Applicant is the Claimant, not the Canada Employment Insurance Commission (Commission).

[3] The Tribunal originally decided that the Applicant had not proven that she was available for work. This was based on her being a full-time student, and not rebutting the presumption that a full-time student is not available. The Applicant has filed new information with this application. She thinks that this decision should be changed, because she has documentary evidence that she was willing to work full-time while in school and that she had no classes in the February to April 2021 quarter semester. She has also raised an issue of natural justice, also known as procedural fairness. She did not receive the reminder call from the Tribunal before the hearing. As a result, she and her representative (her mother) were not properly prepared for the hearing. In the end, the Applicant wants the decision to be changed to grant her employment insurance (EI) benefits while she was attending school from December 28, 2021 until the end of school in June 2021.

Issue

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

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[1] Section 66 of the *Department of Employment and Social Development Act* allows decisions to be rescinded or amended.

Analysis

[5] The Tribunal cannot simply reopen a decision when an applicant asks it to do so. Rather, the Tribunal can reopen and change a decision for only the following two reasons:

1. New facts are presented to the Tribunal or
2. The decision was made without knowing about, or it was based on a mistake about, some material fact[2]

[6] Both of these reasons involve me looking at whether the new information affects[3] the issue in the original decision. For new facts, the court has said that I have to look at whether the new information is "decisive."[4] For the second reason I have to look at whether the information is about a "material fact."[5]

[7] It makes sense that, for both reasons, the Applicant has to show that the new information affects the decision. This is because the Applicant is asking me to change the decision in light of this new information. If the information would not affect—or change—the decision, then there is no point in reopening it.

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

[8] The issue in the decision sought to be changed was whether the Applicant was not available for work because she was a full-time student. The Applicant says that the documentary information is important enough to affect the decision, because it confirms that she was able to, and wanted to, work full-time hours, and that she had no classes in the February to April 2021 period. She was therefore available for work. There was

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[2] Section 66 of the *Department of Employment and Social Development Act*.
[3] *Canada (Attorney General) 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."
[4] *Canada (Attorney General) v Chan*, A-185-94, sets out the legal test for new facts.
[5] Section 66 of the *Department of Employment and Social Development Act.*

also unfairness in not receiving information from Tribunal staff before the hearing, so that she was not properly prepared to participate in the hearing.

[9] On the other hand, the Commission says that she was not available, because her availability was restricted by her being a full-time student. The documents the Applicant has put forward are not "new facts". They were known at the time of the hearing. They are not decisive. The Commission made no submission on the natural justice issue.

[10] I find that the information is relevant, and may be important enough to affect the issues in the decision, because the documentary evidence relates to the issues of full-time work, and the demands of the schoolwork. The information about the natural justice issue relates to the procedural fairness of a process or a hearing. The importance of that issue is confirmed by the fact that a breach of natural justice by the General Division is a reason for appealing its decision to the Appeal Division. I will deal with the two issues involving documentary evidence (full-time work, and school attendance), then deal with the natural justice issue last, under the heading "The natural justice issue".

[11] The document about full-time work would not affect the decision for the following reasons. That document is an "Employee Availability Form" from her employer, for which she has worked from September 2019 to the present. In 2020 and 2021, she was laid-off for several periods due to COVID shutdowns. The document is dated September 6, 2020, signed by her and her employer. In it, the Applicant states she is available seven days of the week, from six to eight hours per day. She states a preference for 40+ hours. She was aware of the document before the hearing, but did not obtain a copy of it until after the hearing. I do not need to review the new facts or material facts test, because the document would not change the decision. The document confirms my finding at paragraph [32] of the decision that the Applicant was willing to work full-time. That finding is in favour of the Applicant on one of the issues she had to prove, namely, a desire to return to the labour market, as set out in paragraph [33] of the decision. Because this document would not change that finding, or the decision, I need not consider it further.

[12] I will consider the school attendance document, and the natural justice issues below, to assess whether the information is important enough to change the decision.

Has the Applicant shown that there are new facts?

[13] The next thing that the Applicant has to prove[6] to show that there are "new facts" is that they happened:

- After the decision was made or
- Before the decision was made, but could not have been found before that time by someone acting diligently[7]

[14] The Applicant has not met the first part of the "new facts" test on the school attendance issue.

– When did the information arise?

[15] The information respecting the school attendance issue arose before the hearing. The Commission based its submissions on this information being within the personal knowledge of the Applicant prior to the hearing. The Applicant testified that she had this information before the hearing. As the parties are not in disagreement that the Applicant knew about this information before the hearing, I accept as a fact that the Applicant knew of this information prior to the hearing.

[16] However, for information known to the Applicant prior to the hearing to be considered as a "new fact" that will lead to reopening the decision, the Applicant must show that the information could not have been found before the hearing by someone acting diligently.[8] The Applicant cannot do this, because she did in fact know this information prior to the hearing.

[17] The Applicant does not succeed on the "new facts" test for reopening the decision. However, I must consider the other test for reopening: whether the decision

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[6] The Applicant has to prove this on a balance of probabilities which means it is more likely than not.
[7] *Canada (Attorney General) v Chan*, A-185-94, sets out the legal test for new facts.
[8] Section 66 of the *Department of Employment and Social Development Act*.

was made without knowing about, or was based on a mistake about, some material fact.[9]

– **Not knowing about, or mistake about, some material fact**

[18] I can also change a decision if it was made without knowing about, or it was based on a mistake about, some material fact. The courts have not yet stated a test for deciding what that phrase requires. In one court case, an adjudicator made a decision in the absence of a document that would provide evidence to either support or challenge the Commission's claim that a claimant had made false statements. The court ruled that, in the absence of that key evidence, the adjudicator's decision was based on a mistake as to a material fact.[10] The Applicant has proven that the information relates to a material fact, namely evidence to prove her school attendance in the period February to April 2021.

[19] The Applicant did not make submissions on this point. The Commission said simply that the additional information "is not a mistake as to material facts."

[20] I find that the evidence about the school schedule does not support a finding that the decision was made without knowing about, or based on a mistake about, some material fact.

[21] The new document relating to the school schedule for the February to April 2021 period consists of screen shots of pages from the Applicant's school board app that she accesses electronically. The Applicant testified that she was aware of the schedule prior to the hearing. There are three screenshots of two weeks: March 8 to 12, 2021, and April 19 to 23, 2021. On each of the three screenshots, one day is highlighted, and below is the notation "There are no courses to show for the selected day." The two screenshots of March 8 to 12 show Thursday (D2) highlighted on one, and Friday (D3) highlighted on the other. The screenshot for April 19 to 23, 2021, shows Thursday (D1) highlighted. The screenshots show the days of the week labelled from D1 to D4 on a

[9] Section 66 of the *Department of Employment and Social Development Act*.
[10] *Badra v Canada (Attorney General)*, 2002 FCA 140.

rotating basis. The Applicant testified that these screenshots show that she had no courses during the entire week, despite the notation referring to the selected day.

[22] Despite the Applicant's testimony, I have difficulty accepting that the documents prove that she had no courses in the period from February to April 2021. First, the three documents only show two weeks out of the quarter semester, and each only deals with one day of the week. Second, the documents show one highlighted day, and state, "there are no courses to show for the selected day". The notation does not state "for the selected week" or "for the selected semester". That contradicts the Applicant's testimony, rather than supporting it. The screen shots shows three out of the four days on the rotating schedule: D1, D2 and D3, but not D4. That leaves open the possibility that there were courses on D4. These considerations, combined with the Claimant's inconsistencies and my reasons set out in paragraph [31] of the May 26, 2021 decision, persuade me that the new information is not important enough to affect the decision. My decision on the school attendance issue for February to April 2021 remains unchanged.

The natural justice issue

[23] I have determined that it is not proper for me to address the natural justice issue, for the following reasons.

[24] At the beginning of the August 23rd hearing, I outlined that a representative does not give evidence as a rule. For the purposes of this hearing, I allowed the representative to give evidence on the natural justice issue, as she was the person who spoke with the caller on the phone a few days after the May 17th hearing. She had the evidence on that issue. I did not permit the representative to testify about the two issues involving the work schedule and school schedule documents. That was because the Applicant had direct knowledge of those matters, and the general rule that a representative is not also a witness giving evidence.

[25] The representative testified as follows. Only after the hearing did the Applicant and her representative became aware of not having received a call from Tribunal staff

prior to the hearing. They learned of this when the representative received a call a few days after the hearing. The caller was collecting information about their satisfaction with the Tribunal process and hearing. The call from Tribunal staff would have helped them prepare for, and know what to expect at, the hearing. If they had received the pre-hearing call from the Tribunal, they would have been better prepared for the hearing, and could have provided all possible evidence documents. As the representative explained at this hearing on August 23rd, both she and the Applicant were confused and not prepared for the earlier hearing. The representative was not allowed to present evidence. She had received no reference to outside sources of help. If she had been told about legal help, she would have sought it. That would have allowed her to obtain guidance on what evidence and documents were needed and how to present them. The representative expected to give evidence at the May 17th hearing, but found that the Member (myself) would not allow that. She found the Tribunal's website unclear.

[26] The problem that this testimony presents to me is this. The main focus of the representative's evidence is on the missed Tribunal phone call, and the difficulties its absence presented to the Applicant and the representative in preparing for the hearing, and in participating at the hearing. There is also the testimony that I did not permit the representative to present evidence at the May 17th hearing. It is correct that I explained the role of the witness (to give testimony) and the role of the representative (to ask the Applicant questions, to summarize, not to give, evidence, and to make submissions as to why the Applicant should win her appeal). That raises the issue of whether I may have breached the rules of natural justice in ruling that the representative could not testify to give evidence. It implicitly raises the issue of whether I failed to provide information that Tribunal staff would have given, and whether such a failure was a breach of the rules of natural justice. It implicitly raises the issue of whether my conduct of the hearing on May 17th was a breach of the rules of natural justice. If I were to review the natural justice issue, when my own actions may be in question, I would violate the Applicant's right to have that issue decided by an independent and impartial tribunal. It would also violate that long-standing legal principle, "No man shall be judge in his own cause." For that reason, I will not rule on the natural justice issue. However, the issue must be dealt with by someone.

[27] One of the grounds for appealing from the General Division of the Tribunal to the Appeal Division is that the General Division failed to observe a principle of natural justice.[11] The Appeal Division is in a better position to give an independent and unbiased review of the natural justice issue. If the Applicant wishes to pursue the natural justice issue (or other issues) raised in the application to rescind or amend, she will need to ask the Appeal Division for leave to appeal the present decision. She would need to file an application for leave to appeal with the Appeal Division within 30 days.[12] In this case, there is already an appeal before the Appeal Division about my decision of May 26, 2021. That appeal is temporarily on hold while this application to rescind or amend is decided. That appeal does not deal with the issues in the application to rescind or amend decided here. A separate appeal is necessary.[13]

[28] With respect to both the full-time work and the school attendance issues, the Applicant has not met all of the requirements of either the new facts test, or the material fact test, so as to change my decision on those issues. Nor has she established that I should deal with the natural justice issue, rather than having the Appeal Division deal with that issue. This means that the decision will not be re-opened, and the original decision stands, without any change

Conclusion

[29] The application is dismissed.

Paul Dusome

Member, General Division - Employment Insurance Section

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[11] Section 58(1)(a) of the *Department of Employment and Social Development Act*.
[12] Sections 55 and 57(1)(a) of the *Department of Employment and Social Development Act.*
[13] See the “Overview” section in *PK v Canada Employment Insurance Commission,* 2020 SST 905 and 2020 SST 906.