Citation: *JF v Canada Employment Insurance Commission*, 2022 SST 1192

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	J. F.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	General Division Decision dated September 22, 2021 (GE-21-1505) (Rescind or Amend Application) Canada Employment Insurance Commission reconsideration decision (429786) dated August 16, 2021 (issued by Service Canada)

Tribunal member:	Angela Ryan Bourgeois
Type of hearing:	Teleconference
Hearing date:	August 17, 2022
Hearing participants:	Appellant
Decision date:	September 20, 2022
File number:	GE-22-554

Decision

[1] The application to rescind or amend is granted. The Appellant (Claimant) has proven that the earlier decision was based on a mistake about a material fact.

[2] I am changing the earlier decision. The appeal is allowed. The Canada Employment Insurance Commission (Commission) has not proven that the Claimant voluntarily left his job. So he isn't disqualified from receiving employment insurance (EI) benefits for this reason.

Overview

[3] The General Division can change one of its decisions if the applicant presents new facts or proves that the earlier decision was made without knowledge of, or was based on a mistake as to, some material fact.

[4] The Claimant wants me to change the decision issued by the General Division on September 22, 2021 (Decision).[1]

[5] In the Decision, the General Division upheld the Commission's decision that the Claimant was disqualified from receiving EI benefits because he had quit his job at X (employer) without just cause.[2]

[6] After the General Division issued its decision, the Claimant applied to the General Division to have the Decision rescinded or amended.

[7] The General Division refused the Claimant's application (the Amendment Decision). The Claimant appealed. The Appeal Division rescinded the General Division's Amendment Decision. It returned the amendment application to a different member of the General Division. This is the matter that is now before me.

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[1] See Tribunal file number GE-21-1505.
[2] This is a disqualification from receiving EI benefits under sections 29 and 30 of the *Employment Insurance Act.*

[8] I have to decide if the Claimant has met the requirements to reopen the file so the Decision can be changed. If so, I have to decide if the Decision should actually be changed.

[9] As ordered by the Appeal Division, I have not been provided with a copy of the Amendment Decision.

Issues

[10] Has the Claimant met the requirements that would allow me to change the Decision?

[11] If he meets the requirements, should I change the Decision? In other words, has the Commission proven that the Claimant voluntarily left his job? If so, has the Claimant proven that he had just cause to leave?

Analysis

Reopening the file

[12] The General Division may change (amend) its decision if new facts are presented or if it is satisfied that the decision was made without knowledge of, or was based on a mistake as to, some material fact.[3]

[13] The Claimant says that the General Division didn't review the following:

a) J. write-up

b) Schedule (electronic)

c) W. write-up (acknowledgement of attack)

d) Itinerary - flight to the USA

[3] See section 66(1) of the *Department of Employment and Social Development Act.*

e) Itinerary - flight dates to return to Canada[4]

[14] The Claimant provided the itineraries, but asked the Tribunal to get the other information.

[15] On March 17, 2022, I wrote to the Claimant. I explained that the Tribunal doesn't investigate or gather evidence. It is up to the parties to provide the evidence upon which they wish to rely.

[16] I gave the parties until April 1, 2022, to file additional documents. Neither party did so.[5]

[17] As the write-ups and schedule are not before me, the only information I can consider when it comes to the application to change the Decision are the itineraries.

[18] I understand that the Claimant doesn't have the write-ups or schedule.[6] I know he asked the employer for the documents but the employer refused.[7] But only documents that are before me can be considered in the application to change the Decision.

– **Are the itineraries new facts?**

[19] No. The itineraries are not new facts.

[20] To be considered "new facts," the facts must have:

- happened after the decision was made
- or, if they happened before the decision was made, could not have been discovered by a claimant acting diligently.[8]

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[4] See RAGD2-9.
[5] The Appeal Division ordered that the Claimant be allowed to submit additional documents and arguments. See paragraph 14 of the Appeal Division decision dated February 15, 2022. I gave both parties a chance to file additional documents and arguments. See page RGD3-2.
[6] The work schedule was given to employees electronically through a mobile phone app. The Claimant no longer has access to the information on the app.
[7] See email exchanges between the Claimant and the employer starting on page GD12-7.
[8] *Canada (Attorney General) v Chan*, 178 N.R. 372 FCA

[21] In the Claimant's case, the Decision was made in September 2021, and the flights were in 2020 and March 2021. So if he had been acting diligently, he could have discovered his itineraries before the Decision was made.

– **Was the decision made without knowledge of or was based on a mistake as to some material fact?**

[22] The itineraries show the following:

- On February 9, 2020, the Claimant booked a flight to the United States departing on February 10, 2020.
- On February 24, 2020, he booked a return flight departing on March 4, 2020.

[23] In the Decision, the General Division found that the Appellant left Canada immediately after his last day of work on January 31, 2020.

[24] The General Division didn't know that the Claimant didn't book his flight until February 9, 2020, or that his departure date was February 10, 2020. When asked by the General Division about when he left Canada, the Claimant couldn't recall the date.

[25] The question now is whether these dates are material facts upon which the decision was based?

[26] I find that they are material facts upon which the decision was based. This is because in paragraph 32 of the Decision, the General Division wrote:

> I am also troubled by the fact that the Appellant failed to confirm the date he left Canada to visit his family in the USA. That date would show whether he was, in fact, still in Canada and available for work after January 31, 2020 – and for how long. This would support his statements that he was watching the scheduling app and following-up with the employer about not being scheduled for work. However, by failing to confirm the date he left Canada, it looks like he wants to avoid an inconvenient fact. And it supports the employer's statements that the Appellant was scheduled for work after January 31, 2020, but just stopped showing up – since he could not have shown up for work if he was outside of Canada.

[27] This paragraph shows that the General Division put considerable weight on the Claimant's failure to provide evidence about when he left Canada. The missing information from the itineraries affected the weight the General Division gave to the Claimant's statements that he was available for, but not scheduled for work, and the employer's claim that the Claimant just stopped showing up for work.

– So, can I change the Decision?

[28] Yes. I am allowed to amend the Decision because the Decision was made without the knowledge of a material fact - when the Claimant booked his flight and left Canada to visit his father. These dates show that the Claimant was available for work until February 10, 2020, and call into question what the employer said about the Claimant not showing up for scheduled work.

Changing the Decision

[29] I am going to change (amend) the Decision because I am not satisfied that the Commission has proven that the Claimant voluntarily left his job.

– Disqualification for quitting a job without just cause

[30] The law says that you are disqualified from receiving EI benefits if you left your job voluntarily and you didn't have just cause.[9]

– The Claimant did not voluntarily leave his job

[31] The Commission has to prove on a balance of probabilities that the Claimant voluntarily left his job. It has not met this onus.

[32] To decide if the Claimant voluntarily left his job, in other words, quit, I have to look at whether he had the choice to stay or to leave the job.[10]

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[9] Section 30 of the *Employment Insurance Act* sets out this rule.
[10] 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.

[33] I find that the Claimant was not scheduled to work after January 31, 2020. This is why:

- The Claimant has repeatedly reported that he wasn't scheduled to work after January 31, 2020. He says he was watching the app to see when he was scheduled to work, but he wasn't scheduled.
- On his application form, he reported that he stopped working because of a shortage of work.[11]
- The Claimant couldn't provide a copy of his work schedule because he no longer had access to the scheduling app. He asked the employer for a copy of the schedule and the employer refused to provide it.[12]
- He reported that he would have continued to work if he had been scheduled to work. He explained that despite having to work with people who had harassed him, he would have continued to work just as he had been doing.[13] He couldn't afford not to work.
- The employer says the Claimant was scheduled to work.[14] It would have been easy for the employer to prove the Claimant was scheduled for work by providing his work schedule. By refusing to provide the schedule, it seems likely the schedule didn't support the employer's claims.

[34] Further, I agree with the Claimant that had he missed work, the employer's text message on February 10, 2020, wouldn't have been about a missed staff meeting – it would have said something about him missing scheduled work.

[35] I considered the employer's text messages on February 10, 2020 (he missed a staff meeting), February 14, 2020 (requesting to meet) and the March 6, 2020 letter of

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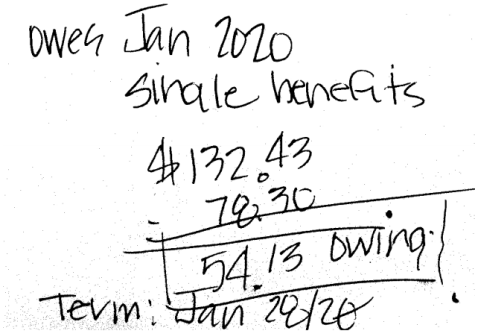
[11] See page GD3-10.
[12] See email requests on page GD12-13, GD12-11, and GD12-7, and the employer's response on page GD12-8.
[13] See page GD3-43, and the Claimant's testimony.
[14] See Supplementary Record of Claim on page GD3-54.

termination.[15] These suggest that the Claimant was still employed, even if he wasn't scheduled to work.

[36] However, the employer's handwritten note on the Claimant's last pay stub suggests that he was dismissed in January 2020. The pay cheque is marked VOID. This is what the employer wrote on the pay stub:



[37] I find this means that his benefits were terminated effective January 28, 2020.

[38] As the employer cancelled the Claimant's benefits as of January 28, 2020, I find it unlikely that he was scheduled to work in February 2020.

[39] When considered with the employer's refusal to provide the work schedule, I find the termination of the Claimant's benefits in January 2020 is strong evidence that the Claimant didn't have a job after January 2020, despite what the employer said in the text messages and letter.

[40] The Claimant thinks the employer may have stopped scheduling him for work because he complained about being physically assaulted by his coworkers. The employer refused to give the Claimant copies of his coworkers' written statements about these incidents.[16]

[41] I have given little weight to the text messages and letter because the employer withheld what was likely to be relevant information (schedule and coworkers' statements

[15] The text messages are on pages GD3-50 and GD3-51 and the letter is on page GD3-49.
[16] See page GD12-8.

about the physical assaults). The withholding of these documents makes me wonder if the Claimant could be correct to think that the employer stopped scheduling him for work because of his complaints. In such a situation, the text messages and letter could equally have been the employer papering the Claimant's file to show he had abandoned his job even though he wasn't scheduled to work.

[42] For these reasons, I find that the Commission hasn't proven that it is more likely than not that the Claimant voluntarily left his job. I am not satisfied that the Claimant could have continued working after January 31, 2020.

Conclusion

[43] The Claimant's application to amend the Decision is granted.

[44] The Claimant did not voluntarily leave his job. So he is not disqualified from receiving EI benefits for voluntarily leaving his job without just cause.

[45] The appeal is allowed.

Angela Ryan Bourgeois
Member, General Division – Employment Insurance Section