Citation: *LM v Canada Employment Insurance Commission*, 2023 SST 306

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	L. M.
Respondent:	Canada Employment Insurance Commission

Decision under appeal	Canada Employment Insurance Commission reconsideration decision (476385) dated May 12, 2022 (issued by Service Canada)

Tribunal member:	Glenn Betteridge
Type of hearing:	On the Record
Decision date:	January 27, 2023
File number:	GE-22-3968

Decision

[1] I am not going to rescind or amend my decision in appeal GE-22-1954, dated October 7, 2022 (original decision) because L. M. (the Claimant) hasn't met the legal test for me to do that.

[2] She hasn't shown there are new facts about a legal issue in her appeal that would lead me to change my decision on that issue.

[3] And she hasn't shown that I made the original decision without knowing a material fact or that I made a mistake about a material fact in the original decision.

[4] So I am dismissing her application to rescind or amend the original decision.

Overview

[5] In appeal file GE-22-1954, I dismissed the Claimant's appeal of the Canada Employment Insurance Commission's (Commission) reconsideration decision. I decided she was not eligible to receive Employment Insurance (EI) benefits because she was suspended then lost her job for a reason the *Employment Insurance Act* (EI Act) considers to be misconduct. This is what the Commission had decided.

[6] The appeal hearing was held on September 21 and 29, 2022. I made my decision on October 7, 2022, in writing. I will refer to this as the "original decision".

[7] On November 29, 2022, less than two months later, the Claimant field an application to rescind or amend my decision (application).

[8] In her application she says there are new facts that support her argument that her conduct wasn't misconduct under the EI Act. She says that her employer's mandatory COVID vaccination policy didn't apply to her because she was not a healthcare worker, didn't give healthcare services, and had always worked from home in

an administrative role.[1] She sent in many documents to support these new facts. I will review these documents in my analysis.

[9] I have to decide if I should rescind or amend the original decision.

Matters I considered first

Tribunal's power to rescind or amend a decision

[10] The Tribunal has the legal power to decide whether to rescind or amend a decision if a claimant:[2]

- has applied within one year after the decision was communicated to them;
- hasn't previously made an application to rescind or amend the decision; and
- applied to the Division that made the original decision.

[11] The Claimant hasn't previously made an application to rescind or amend the original decision to the General Division. And she filed this application within one year of when she received the decision. (I included the relevant dates in the Overview section, above.)

[12] So, I find I have the legal power to decide the Claimant's application to rescind or amend.

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[1] See RAGD2 and RAGD2A.
[2] See section 66(2) and (3) of the *Department of Employment and Social Development Act* (DESD Act), which was in force when the Claimant applied.

Decision on the record

[13] I decided to make this decision on the record. [3] In other words, I have made this decision based on the documents in the Tribunal's file, without a hearing.

[14] I made this decision on the record for two reasons.

- First, I heard from the Claimant during her appeal hearing. So she had an opportunity to make her legal argument about why her conduct was not misconduct under the EI Act.
- Second, I don't need to hear her testify about this application (which is made up of the Tribunal application form she completed and her supporting documents). I read the entire application. Her reasons were clear, and I didn't have any questions for the Claimant.

[15] So I find it isn't unfair to the Claimant to decide her application on the record.

[16] And I find it isn't unfair to the Commission, which is the other party to this application. The Tribunal sent it the Claimant's application to rescind or amend (and supporting documents) and gave the Commission an opportunity to respond, which it did by the deadline.[4]

[3] See section 48 of the *Social Security Tribunal Regulations* in force when the Claimant filed her application to rescind or amend.
[4] See RAGD3.

Issue

[17] Should I rescind or amend the original decision?

Analysis

[18] An application to rescind or amend a Tribunal decision is not an opportunity to argue or re-argue a legal issue in that decision.

[19] To rescind or amend my original decision, the Appellant must show that:[5]

- there are new facts that would lead me to decide a legal issue differently; or
- I made the decision without knowledge of, or made a mistake about, a material fact relating to the original issue under appeal.[6]

[20] The legal issue in the Claimant's appeal (and in the original decision) was whether she was suspended then lost her job because of misconduct under the *Employment Insurance Act* (EI Act). In other words, the legal issue was whether she did something that caused her to be suspended and lose her job.[7]

[21] I decided that not following her employer's mandatory COVID vaccination policy was misconduct under the EI Act. So she is disentitled (because she was suspended) then disqualified (because she lost her job) from receiving Employment Insurance (EI) benefits. And this is what the Commission decided, so I dismissed her appeal.

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[5] This is the legal test set out in section 66 of the *Department of Employment and Social Development Act* that was in effect when the Claimant made her application to rescind or amend the decision.
[6] *Green v. Canada (Attorney General)*, 2012 FCA 313
[7] Section 30 of the *Employment Insurance Act* (EI Act) says that claimants who lose their job because of misconduct are **disqualified** from receiving benefits. Section 31 of the EI Act says that claimants who are suspended because of misconduct are **disentitled** from receiving benefits for a period of time.

New facts that decide a legal issue

[22] The law says facts are "new" if the Claimant shows the facts:[8]

- happened after the decision was rendered; or
- happened before the decision was rendered and the appellant could not have discovered them by acting diligently before the decision was rendered.

[23] The new facts must also be decisive of an issue that I decided in her appeal.[9] In other words, the new facts would lead me to change my decision about a legal issue.

The facts the Claimant sent to the Tribunal

[24] The Claimant sent documents to the Tribunal along with her application:[10]

a) An article about mandatory vaccination policies published by a law firm (X) (2021-06-29; updated 2022-04-10)

b) Hospital Employee's Union (HEU) news story about COVID vaccines (October 21, 2021)

c) Provincial Health Services Authority (PHSA) bulletin / communication (undated; refers to implementation dates for COVID vaccination policy, in September and October 2021))

d) Emails between Claimant and Provincial Health Services Authority (PHSA), including her questions and concerns about COVID vaccination (all dated 2021)

e) Emails among BC and First Nations health authorities about AEFI post COVID vaccine (dated January 5, 2021 through June 11, 2021)

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[8] *Canada (Attorney General) v. Chan*, [1994] F.C.J. No. 1916
[9] *Canada (Attorney General) v. Chan*, [1994] F.C.J. No. 1916
[10] See her application and documents at RAGD2, and other documents she sent to support her application at RAGD2A, RAGD4, RAGD5, and RAGD6.

f) New article from CP24 (published February 17, 2022)

g) Claimant's grievance (dated November 24, 2021)

h) SST decision in AL v CEIC (GE-22-1998; December 14, 2022, Member Mark Leonard)

i) Post from Ontario Civil Liberties Association website about SST decision in AL v CEIC (GE-22-1998; December 14, 2022, Member Mark Leonard) (December 19, 2022)

j) Article from Rebel News about SST decision in AL v CEIC (GE-22-1998; December 14, 2022, Member Mark Leonard) (December 22, 2022)

k) Web post from law firm website (Cassels Brock & Blackwell LLP) (undated)

l) Post from Bright HR (undated)

[25] In her application for rescind or amend, the Claimant argues these new facts:

- She isn't a healthcare worker and didn't work in a healthcare facility. So the mandatory vaccination order (provincial order) didn't apply to her. She refers to **document (c)**, above.

- She worked from home.

My decision about new facts that decide the issue

[26] I find the Claimant hasn't produced any new facts that would be decisive of the issue in her appeal.

[27] **Documents (a) through (g)** existed before I made my decision. She could have obtained them if she acted diligently—they were publicly available on the internet, were already in her email, or were created well before the date of the original decision. So none of the facts in these documents meet the legal test for new facts.

[28] **Document (h)** isn't a new fact in the Claimant's case. It's a Tribunal decision. It is law, not fact.

[29] Even if I am wrong about this, the decision in *AL v CEIC* (**document h**) isn't decisive of whether her conduct was misconduct under the EI Act. I am not bound to follow a decision of another member of the Tribunal. I can follow it if I find the reasoning in the decision is persuasive.

[30] **Documents (i) through (l)** aren't facts in the Claimant's case. They report and comment on legal developments, some of which are about the legal test for misconduct under the EI Act.

[31] Even if I am wrong about this, none of the **documents i through l** is decisive of whether her conduct was misconduct under the EI Act. They don't have the force of law. I don't have to follow them. This means no facts in these documents would change my decision. So these documents don't meet the legal test for new facts.

[32] Finally, the fact the Claimant worked from home isn't a new fact—she said it in her appeal. And she also made it clear in her appeal that she worked in administration and was not a healthcare provider. So these aren't new facts.

No knowledge or mistake about material facts

[33] I can also rescind or amend the original decision if I:[11]

- made the decision without knowledge of a material fact; or
- made a mistake in the decision in relation to a material fact.

[34] The Claimant says that I didn't have knowledge of, or made a mistake in relation to, her employer's mandatory COVID vaccination policy. She says it doesn't apply to her because she isn't a healthcare worker and didn't work in a healthcare facility.

[11] *Green v. Canada (Attorney General)*, 2012 FCA 313

[35] I considered the mandatory COVID vaccination policy at paragraphs 27 through 29 of the original decision.

- At paragraph 27, I wrote: “The employer had a mandatory COVID vaccination policy, which it provided to the Commission. The employer was required to have the policy by order of British Columbia`s Provincial Health Officer, dated October 14, 2021.” And I included citations to the employer’s vaccination policy and the Provincial Health Officer’s order.

- At paragraph 29, I wrote: “Under the vaccination policy the Claimant had a duty to get a first dose of COVID vaccine before October 26, 2021.”

[36] Under the Provincial Health Officer’s order:

- “health care services” includes administrative or managerial services[12]

- “staff member” mean, a person employed by, or working under contract to provide health care for, a regional health authority, the Provincial Health Services Society[13]

- “work” means to work for a regional health authority, the Provincial Health Services Society…

- staff members hired before October 26, 2021 must be vaccinated or have an exemption to work[14]

[37] The employer’s communication about its vaccination requirement states:

- On Sept. 13, 2021, Provincial Health Officer (PHO) Dr. Bonnie Henry announced that all health-care workers will need to be vaccinated against COVID-19. Further to this, we anticipate this pending order on mandatory vaccination will include all staff and physicians employed by B.C. health

[12] See GD3-51.
[13] See GD3-55.
[14] See GD3-57.

> authorities, as well as all students, researchers, fee-for service/ contract physicians, and all individuals and contractors who work, study or volunteer at our sites.[15] [I have added the underlining.]

[38] The paragraphs of the original decision cited above show that I had knowledge of the material facts—in other words, about what employees were covered by the provincial order and employer's vaccination policy. And I concluded—as did the Claimant's employer in its termination letter[16]—that its COVID vaccination policy applied to her.

[39] Although she might not agree with my finding, I didn't make a mistake about a material fact. I didn't:

- make the decision without knowledge of a material fact; or
- make the mistake in the decision in relation to a material fact.

Application to rescind or amend is not an opportunity to re-argue the appeal

[40] In her application, the Claimant disagrees with my interpretation and application of her employer's vaccination policy (which is based on the Provincial order) in the original decision. Essentially, she is saying I made an error when I decided the vaccination policy applied to her.

[41] But an application to rescind or amend a Tribunal decision is not an opportunity to argue or re-argue a legal issue in the original decision.

[42] She might have other legal avenues to argue that her employer's COVID vaccination policy didn't apply to her. To give one example, she has filed a grievance under the collective agreement between her union and her employer. To give another example, she can appeal my decision to the Social Security Tribunal's Appeal Division.

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[15] See GD3-45.
[16] See GD3-74.

Conclusion

[43] I have found the Claimant hasn't met the legal test for me to rescind or amend the original decision.

[44] So I am dismissing the Claimant's application.

[45] This means the original decision is unchanged, and in full force and effect.

Glenn Betteridge
Member, General Division – Employment Insurance Section