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

[TRANSLATION]

Citation: *RL v Canada Employment Insurance Commission*, 2018 SST 1447
Tribunal File Number: GE-17-2442

BETWEEN

R. L.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Employment Insurance Section

DECISION BY: Lucie Leduc

HEARD ON: Decision on the record

DECISION DATE: July 16, 2018

Canada

REASONS AND DECISION

OVERVIEW

[1] The Appellant had initially established Employment Insurance (EI) benefit periods effective October 5, 2014, and November 8, 2015. The Canada Employment Insurance Commission (Commission) later cancelled those periods. It claimed that the Appellant did not meet the qualification requirements, specifically that he had not had an interruption of earnings. Following the Appellant's appeal, the Tribunal heard the dispute and made a decision about whether the Appellant qualified for benefits for those periods. The Tribunal found that the Appellant had shown that an interruption of earnings had occurred for the benefit period starting October 5, 2014, since he had provided proof of at least seven consecutive days outside the country after the start of the benefit period. However, the Tribunal decided that the Appellant had not shown that an interruption of earnings had occurred for the benefit period starting November 8, 2015, since in that case, his proof of time outside the country was dated before the start of his benefit period. As a result, the Tribunal disqualified the Appellant from receiving benefits for this period.

[2] The Appellant then filed a request for reconsideration of the Tribunal's decision based on a new or material fact. In support, he submitted proof of time outside the country after the period of work initiating the initial claim for benefits.

[3] The Tribunal must decide the following issues:

a) Is the Appellant's proof of time outside the country a new or material fact?
b) If so, should the Tribunal's initial decision be rescinded or amended?

PRELIMINARY ISSUES

[4] The hearing was held on the merits for the following reasons:

a) The member decided that a new hearing was not necessary.
b) There are no gaps in the information in the file or need for clarification.
c) Credibility is not a prevailing issue.

ANALYSIS

[5] The relevant legislative provisions are reproduced in the annex to this decision.

Issue 1: Is the Appellant's proof of time outside the country a new or material fact?

[6] The Appellant filed an application to rescind or amend an earlier Tribunal decision. In support of his application, the Appellant provided proof of a trip in January 2016 to show an interruption of earnings for a benefit period that began in November 2015. The evidence was not in the Tribunal's file at the time the member made her decision.

[7] For the Tribunal to rescind or amend an earlier decision involving the *Employment Insurance Act* (EI Act), it must meet the requirements of section 66(1)(a) of the *Department of Employment and Social Development Act* (DESD Act), which are as follows:

> **66(1)** The Tribunal may rescind or amend a decision given by it in respect of any particular application if
>
> > **(a)** in the case of a decision relating to the *Employment Insurance Act*, new facts are presented to the Tribunal or the Tribunal is satisfied that the decision was made without knowledge of, or was based on a mistake as to, some material fact[.]

[8] The Tribunal finds that the Appellant's new evidence is a material fact for the reasons that follow.

[9] Section 66(1)(a) of the DESD Act has two different tests, and a decision can be rescinded or amended if either of those tests is met. The first test allows a decision to be rescinded or amended based on "new facts." The second part of section 66(1)(a) applies when it is shown that "the decision was made without knowledge of, or was based on a mistake as to, some material fact."

New facts

[10] The test for "new facts" was clarified in *Canada (Attorney General) v Chan*, [1994] FCJ No 1916 (*Chan*) and confirmed by the Federal Court of Appeal in *Canada v Hines*, 2011 FCA 252. These facts must have happened after the decision was made or before but could not have

been discovered by a claimant acting diligently. Also, the facts must be determinative of the issue.

[11] In this case, the Tribunal finds that the evidence presented existed at the time of the hearing. Since the evidence refers to a stay outside the country from January 22 to January 29, 2016, and the hearing took place on April 27, 2017, the facts happened before the hearing. So, the Tribunal finds that the proof of stay—the invoice—was available, and the Appellant could have provided it at the time of the hearing, which he did not do.

[12] The Appellant alleges that the Tribunal member provided an unusual (and potentially erroneous) interpretation of the EI Act regarding the notion of an interruption of earnings. He argues that he was not aware of the burden he had to meet, because of this new interpretation, and that this is why he did not provide the relevant evidence. It is well established that ignorance of the law is not good cause, either on appeal or on reconsideration. If, however, the Tribunal member made an error of law, the Appellant should have instead applied for leave to appeal to the Tribunal's Appeal Division.

[13] In addition, the Appellant's arguments do not change the fact that the facts are not new in the sense that they did not happen after the decision was made, or even at the time of the hearing. As a result, the Tribunal finds that there are no new facts allowing it to reconsider its initial decision under section 66(1)(a) of the DESD Act.

Material fact or mistake as to some material fact

[14] What about the second part of section 66(1)(a) of the DESD Act, where the decision was made without knowledge of, or was based on a mistake as to, some material fact?

[15] The federal courts have given little clarification of the meaning of the second test in section 66(1)(a), but it seems to be accepted that it differs from "new facts" (see *Green*, 2012 FCA 313; *Badra*, 2002 FCA 140). Case law does not offer an interpretation of the second part of section 66(1)(a). The wording of section 66(1)(a) is almost identical to that of section 120 of the EI Act, which is now repealed. Despite this similarity, there is no case law on the former provision that would indicate how section 66(1)(a) should be interpreted.

[16] Without more precise guidance from the courts, it is difficult to determine the exact test to apply. The Tribunal will try to apply the meaning of "the decision was made without knowledge of […] some material fact" in the way that it considers most relevant and consistent to the spirit of the EI Act. The requirement that the fact be "material" means that the "fact" presented must be determinative in the case. This is based on the ordinary meaning of "material" and the notion that a decision cannot be amended without good cause. Section 66(1)(a) was described as a limited recourse mechanism that should remain an exceptional measure.

[17] If the Tribunal cannot determine the exact nature of the second test in section 66(1)(a), it presumes that this provision is limited to providing relief in cases where the mistake or ignorance of a material fact was beyond the applicant's control. This version of the provision is consistent with the essence of the test for "new facts," which allows for relief only where the applicant has been disadvantaged for reasons beyond their control. The difference between the two tests in section 66(1)(a), in practice, is that the second test may apply in situations where the "fact" in question was not a "new fact" within the meaning of section 66(1)(a), but a material fact that the Tribunal member was unaware of or had misunderstood.

[18] In this case, the Tribunal is not dealing with a material fact that it misunderstood because the fact (the stay outside the country) was not before the Tribunal. So, the Tribunal did not make a mistake about a material fact it was unaware of.

[19] However, the Tribunal finds that the evidence of the stay outside the country submitted with the Appellant's application to amend is a material fact, since it would likely have had a major impact on the outcome of the dispute. In addition, the Tribunal accepts the Appellant's argument that the Tribunal's interpretation, which he considers new, may have resulted in the failure to submit the evidence in question being beyond his control. The Tribunal agrees that its initial decision does not refer to a federal court decision to support its interpretation. The Tribunal notes, however, that the Appellant also did not file a decision in support of his position that the interruption of earnings could have occurred at any time during the qualifying period before the establishment of a benefit period. Faced with the issue, and in the absence of clear case law on this detail of the timing of the interruption of earnings, in its analysis, the Tribunal

applied its reasoning based on its interpretation of Parliament's intention and the consistency of the EI program.

[20] Nevertheless, as mentioned, the Tribunal acknowledges that its interpretation may have surprised the Appellant and accepts that the interpretation was beyond his knowledge and/or control. Furthermore, the Tribunal finds the evidence of the Appellant's stay outside the country after he stopped working material, since its decision is fundamentally based on this point—that is, the time of his stay. As the parties raised, similar evidence was considered relevant and allowed the Appellant to qualify for benefits in the case of another benefit period under appeal. So, it is only fair to say that it would be material in a nearly identical file except for the year of the period of unemployment. Failing to consider this evidence could be significantly disadvantageous to the Appellant, which would be against the spirit of a social program and the EI Act that governs us.

[21] The Tribunal is satisfied that the new evidence submitted by the Appellant meets the tests in section 66(1)(a) of the DESD Act, specifically the second one dealing with a material fact.

Issue 2: If so, should the Tribunal's initial decision be rescinded or amended?

[22] Since the Tribunal has found on a balance of probabilities that the Appellant's proof of time outside the country from January 22 to January 29, 2016, is a material fact, the Tribunal can amend or rescind its July 10, 2017, decision in accordance with section 66(1)(a) of the DESD Act. The Tribunal finds that its July 10, 2017, decision needs to be amended with respect to the Appellant's benefit period effective November 8, 2015. The following amendments are prescribed:

[23] The Tribunal had decided that the Appellant had not met the requirements to establish a benefit period and qualify for benefits. Specifically, the Tribunal found that the Appellant had not shown an interruption of earnings from employment as required by section 7(2) of the EI Act (*Thériault v Canada (AG)*, 2008 FCA 283). To show an interruption of earnings, a claimant must be unemployed and without pay for seven consecutive days in accordance with section 14(1) of the *Employment Insurance Regulations* (Regulations).

[24] The Tribunal also found that it was logical and reasonable to find an interruption of earnings in the cases where the Appellant was outside the country without pay, without any benefit related to his job, without his cell phone, and without any benefit related to his work. Based on this reasoning, the Tribunal accepted the Appellant's travel invoices and determined that an interruption of earnings had occurred when he left the country for at least seven consecutive days on January 18, 2015, for the benefit period starting October 5, 2014. However, the Tribunal found that the Appellant had not shown an interruption of earnings for his benefit period starting November 8, 2015, because the Appellant's proof of his time outside the country occurred before the period of employment (January 18 to 25, 2015). The Tribunal interpreted the requirement in section 14(1) of the Regulations to mean that the interruption of earnings must occur **after** a period of employment and not before.

[25] The stay outside the country that was submitted as evidence at the hearing was found to have been before the period of employment. Therefore, the Tribunal did not find it relevant to the demonstration of the interruption of earnings. But the Appellant is now submitting new evidence of a stay outside the country from January 22 to January 29, 2016. In accordance with its interpretation in the initial decision from July 10, 2017, the Tribunal finds that the Appellant has now shown an interruption of earnings for the benefit period starting November 8, 2015. The Tribunal finds that this interruption occurred after [the Appellant] left the country for at least seven consecutive days on January 22, 2016. The Tribunal accepts the invoice for this trip as evidence and finds that this is when the Appellant neither worked nor benefited from the company's phone and therefore from any earnings within the meaning of the EI Act for seven consecutive days.

[26] The Tribunal notes that the July 10, 2017, decision about the Appellant's eligibility for the benefit period effective October 5, 2014, remains unchanged. The Tribunal's decision on the issue of the Appellant's unemployment status for his two benefit periods also remains unchanged.

CONCLUSION

[27] The appeal is allowed. This decision amends the July 10, 2017, decision.

Lucie Leduc
Member, General Division – Employment Insurance Section

SCHEDULE

APPLICABLE LAW

Department of Employment and Social Development Act

66 (1) The Tribunal may rescind or amend a decision given by it in respect of any particular application if

> **(a)** in the case of a decision relating to the *Employment Insurance Act*, new facts are presented to the Tribunal or the Tribunal is satisfied that the decision was made without knowledge of, or was based on a mistake as to, some material fact; or
>
> **(b)** in any other case, a new material fact is presented that could not have been discovered at the time of the hearing with the exercise of reasonable diligence.

(2) An application to rescind or amend a decision must be made within one year after the day on which a decision is communicated to the appellant.

(3) Each person who is the subject of a decision may make only one application to recind or amend that decision.

(4) A decision is rescinded or amended by the same Division that made it.

Employment Insurance Act

7 (1) Unemployment benefits are payable as provided in this Part to an insured person who qualifies to receive them.

(2) An insured person qualifies if the person

> **(a)** has had an interruption of earnings from employment; and
>
> **(b)** has had during their qualifying period at least the number of hours of insurable employment set out in the following table in relation to the regional rate of unemployment that applies to the person.

TABLE

Regional Rate of Unemployment	Required Number of Hours of Insurable Employment in Qualifying Period
6% and under	700
more than 6% but not more than 7%	665
more than 7% but not more than 8%	630

more than 8% but not more than 9%	595
more than 9% but not more than 10%	560
more than 10% but not more than 11%	525
more than 11% but not more than 12%	490
more than 12% but not more than 13%	455
more than 13%	420

(3) to (5) [Repealed, 2016, c. 7, s. 209]

(6) An insured person is not qualified to receive benefits if it is jointly determined that the insured person must first exhaust or end benefit rights under the laws of another jurisdiction, as provided by Article VI of the *Agreement Between Canada and the United States Respecting Unemployment Insurance*, signed on March 6 and 12, 1942.