Citation: *Z. S. v. Canada Employment Insurance Commission*, 2014 SSTAD 349

Appeal No. 2011-2270

BETWEEN:

Z. S.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division – Appeal

SOCIAL SECURITY TRIBUNAL MEMBER: Mark BORER

DATE OF DECISION: December 2, 2014

DECISION: Appeal dismissed

DECISION

[1] The appeal is dismissed.

INTRODUCTION

[2] On December 22, 2011, a panel of the board of referees (the "Board") determined that the appeal of the Appellant from the previous determination of the Commission should be denied. In due course, the Appellant appealed that decision to an umpire.

[3] On April 1, 2013 the Appeal Division of the Social Security Tribunal of Canada ("the Tribunal") became seized of any appeal not heard by an umpire by that date.

[4] On September 12, 2014 an in-person hearing was held. Counsel for the Appellant and counsel for the Commission appeared and made submissions.

THE LAW

[5] To ensure fairness, this matter will be examined based upon the Appellant's legitimate expectations at the time of the appeal to the Office of the Umpire. For this reason, the present appeal will be decided in accordance with the legislation in effect immediately prior to April 1, 2013.

[6] According to subsection 115(2) of the *Employment Insurance Act* ("the Act") which was in effect before April 1, 2013, the only grounds of appeal are that:

> (a) the board of referees failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;
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> (b) the board of referees erred in law in making its decision or order, whether or not the error appears on the face of the record; or
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> (c) the board of referees based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

[7] Both the Appellant and the Commission note that recent decisions of the Federal Court have established a new standard of review to be applied in appeals from one level of the Immigration and Refugee Board to another, and that this new standard may one day apply to this Tribunal. Notwithstanding this they both agree that the existing jurisprudence of the Federal Court of Appeal regarding the appropriate standard of review in employment insurance appeals is binding upon me and applies to this appeal.

[8] As such, the parties submit, and I agree, that the standard of review for questions of law and jurisdiction is that of correctness, while the standard of review for questions of fact and mixed fact and law is reasonableness.

ANALYSIS

[9] This case has a long procedural history stretching back many years. Many of the legal issues originally raised in this matter were dealt with by the Federal Court of Appeal in *Steel v. Canada (Attorney General)* (2011 FCA 153), but the issue of whether or not the Board or an umpire (now the General Division and the Appeal Division of this Tribunal) have jurisdiction to consider write-off decisions of the Commission was not.

[10] Following the *Steel* decision, the Commission made certain determinations regarding the requests for write-off made by the Appellant. The Appellant was not satisfied with these determinations, and so appealed to the Board.

[11] In their decision, the Board made factual findings regarding the situation of the Appellant and after considering the law held that they did not have the jurisdiction to consider write-off decisions of the Commission. They then dismissed the appeal. The Appellant appealed further to the Appeal Division.

[12] Having considered the detailed and well-reasoned written and oral submissions of the parties, I find myself in agreement with the Commission and the Board that I do not have the jurisdiction to review overpayment decisions and that this appeal must therefore fail.

[13] Jurisdictional questions regarding write-offs have been considered by the courts many times, stretching back at least to *Cornish-Hardy v. Canada (Board of Referees)* (1 SCR 1218) in 1980. In that case, the Supreme Court of Canada upheld a Federal Court of Appeal decision stating that write-off determinations by the Commission were not reviewable by the board of referees or an umpire and must be appealed to the Federal Court directly.

[14] This ruling was followed by others, and little changed until 1996 when the legislation governing appeals to the board of referees and an umpire changed. Where previously only a claimant, the Commission, or an employer could appeal to the board of referees, now an "other person" was also entitled to do so. The Appellant here submits that this change means that the Board had jurisdiction to hear appeals of write-off decisions made by the Commission because a debtor is an "other person".

[15] Although the majority in *Steel* did not ultimately rule on this jurisdictional issue, Justice Stratas in a concurring opinion held in that case that:

> "In my view, Parliament's decision to add the words "other person" to subsection 114(1) and section 115 of the current Act was intended to allow persons, such as [the Appellant] to appeal rulings on write-off requests to the Board of Referees and the Umpire, and then to proceed to this Court. Were it not so, it would be very difficult to see what Parliament had in mind when it added those words.
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> …
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> A Contrary interpretation would mean that the writing-off of liabilities to repay the overpayment of benefits, a matter related to the entitlement to employment insurance benefits, would be diverted from this informal, specialized, efficient regime into the slower, more formal, more resource-intensive court system. That interpretation makes no sense. Only the clearest of statutory wording, not present here, could drive us to such a result.
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> …

> Therefore, in my view, [the Appellant] was an "other person"… and could appeal to the Board of Referees and the Umpire..."

[16] If this were the end of the matter, I would be inclined to agree with Justice Stratas and allow the Appellant's appeal. However, several factors prevent me from doing so.

[17] First, I note the decision of the Federal Court in *Bernatchez v. Canada (Attorney General)* (2013 FC 111). In that case, the court discussed the jurisprudence regarding the jurisdiction of the Board to hear write-off appeals. In particular, Justice de Montigny held that:

> "…Justice Stratas' comments in *Steel* do not formally bind this Court until such time as the Court of Appeal adopts Justice Stratas' opinion and explicitly disregards the numerous decisions it has issued (before and after the statutory amendment enacted in 1996) to the effect that a decision of the Commission refusing to write off an overpayment cannot be appealed to the Board of Referees."

[18] Second, as noted in *Bernatchez* above, the Federal Court of Appeal has issued a number of decisions after the amendments of 1996 maintaining the rule that write-off decisions may not be appealed to the Board or an umpire. Although the Appellant correctly points out that these decisions do not specifically address the change in wording, they are decisions of the Federal Court of Appeal dispositive of the issue and I must assume that the court took all relevant statutory provisions into consideration before making those decisions.

[19] To be clear, I note the holding of Justice de Montigny that decisions such as *Canada (Attorney General) v. Villeneuve* (2005 FCA 440) remain binding. In *Villeneuve,* the court held that:

> "Finally, it is not necessary to elaborate on the issue at length, but forgiving, writing off or extinguishing a debt are not powers within the jurisdiction of an umpire sitting on a claimant's appeal against a decision by a board of referees…"

[20] In oral argument, the Appellant correctly conceded that if I found that the Board did not have jurisdiction over write-offs this appeal could not succeed. I agree with this statement, and as such this appeal must fail.

[21] Having come to that conclusion however, I note the decision of the Federal Court in *Campbell v. Canada (Attorney General)* (2002 FCT 811). In that decision, the court held that as long as the Commission exercises its discretion judicially, even the Federal Court is not entitled to intervene on write-off decisions. The court continued:

> "In the exercise of its discretion, can the Commission make a different finding of fact from the Board of Referees? I do not think so. The jurisprudence has established that the Board of Referees, which functions as a quasi-judicial body, is in a better position than the Commission, which does not function as a quasi- judicial body, to make findings of fact. The Board of Referees' findings are owed deference, not those of the Commission.
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> …
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> The Commission could not disregard the findings of fact made by the Board of Referees on that point.
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> By failing to take into account of the findings of fact of the Board of Referees, the Commission fettered its discretion and it cannot be said that it exercised its discretion judicially."

[22] In the case at hand, the Board reviewed the financial evidence before them and found that the Appellant is "for all intents and purposes bankrupt" and that to be forced to repay the debt owed would cause "undue hardship". I note that neither the Appellant nor the Commission challenged these factual findings before me, although they had every opportunity to do so.

[23] The Appellant has invited me to make a recommendation regarding the write-off. In the circumstances of this case, I decline to do so. I would, however, draw the attention of

the Commission to the above jurisprudence and the findings of fact made by the Board, as they may be of assistance to them in exercising their discretion judicially.

CONCLUSION

[24] Therefore, for the above reasons, the appeal is dismissed.

Mark Borer
Member, Appeal Division