



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *Canada Employment Insurance Commission v. D. E.*, 2016 SSTADEI 318

Tribunal File Number: AD-14-494

BETWEEN:

**Canada Employment Insurance Commission**

Appellant

and

**D. E.**

Respondent

---

**SOCIAL SECURITY TRIBUNAL DECISION**  
**Appeal Division – Appeal Decision**

---

DECISION BY: Pierre Lafontaine

HEARD ON: June 7, 2016

DATE OF DECISION: June 17, 2016

## **REASONS AND DECISION**

### **DECISION**

[1] The appeal is granted, the decision of the General Division on the issue of write-off is set aside and the appeal of the Respondent before the General Division is dismissed.

### **INTRODUCTION**

[2] On August 27, 2014, the General Division of the Tribunal concluded that the Appellant did not exercise its discretion in a judicial manner when it decided not to write-off all or part of an outstanding amount that the Respondent owed following an overpayment.

[3] The Appellant requested leave to appeal to the Appeal Division on September 10, 2014. Leave to appeal was granted on March 26, 2015.

### **TYPE OF HEARING**

[4] The Tribunal held a telephone hearing for the following reasons:

- The complexity of the issue under appeal;
- The fact that the credibility of the parties is not anticipated being a prevailing issue;
- The information in the file, including the need for additional information;
- The requirement under the *Social Security Tribunal Regulations* to proceed as informally and quickly as circumstances, fairness, and natural justice permit.

[5] The Appellant was represented at the hearing by Mathieu Joncas. The Respondent was present at the hearing.

## **ISSUE**

[6] Did the General Division have jurisdiction to determine the issue of the overpayment write-off?

## **THE LAW**

[7] Subsection 58(1) of the *Department of Employment and Social Development Act* states that the only grounds of appeal are the following:

- (a) the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;
- (b) the General Division erred in law in making its decision, whether or not the error appears on the face of the record; or
- (c) the General Division 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.

## **ARGUMENTS**

[8] The Appellant submits the following arguments in support of the appeal:

- Only the Appellant has discretion to render a decision with regards to a write-off of the Respondent's debt;
- The General Division lacks the proper jurisdiction to make a decision regarding the write-off of the Respondent's debt;
- No decision was rendered by the Appellant with respect to the Respondent's request for write-off for reasons of undue hardship under paragraph 56(1)(f) of the *Employment Insurance Regulations* (the "Regulations");
- The General Division erred in taking over the powers of write-off given only and exclusively to the Appellant.

[9] The Respondent submits the following arguments against the appeal:

- He respectfully asks that the Tribunal contact the Appellant in order to obtain by settlement a total write-off of his debt using the Appellant's discretion under paragraph 56(1)(f) of the *Regulations*;
- He doesn't understand why he is involved in this appeal and why the decision of the General Division is not followed by the Appellant;
- He doesn't believe that the case of *Steel v. Canada (AG)*, 2011 FCA 153 solved the issue of jurisdiction to write-off a debt.

### **STANDARD OF REVIEW**

[10] The Appellant submits that based on a modified standard of review analysis as well as jurisprudence from the Supreme Court of Canada and the Federal Court of Appeal, the Appeal Division should apply a correctness standard on questions of law and a standard of reasonableness on questions of fact or mixed questions of law and fact – *Chaulk v. Canada (AG)*, 2012 FCA 190

[11] The Respondent did not make any representations regarding the applicable standard of review.

[12] The Tribunal notes that the Federal Court of Appeal in the case of *Canada (AG) v. Jean*, 2015 FCA 242, indicates in paragraph 19 of its decision that when the Appeal Division “acts as an administrative appeal tribunal for decisions rendered by the General Division of the Social Security Tribunal, the Appeal Division does not exercise a superintending power similar to that exercised by a higher court”.

[13] The Federal Court of Appeal further indicates that “not only does the Appeal Division have as much expertise as the General Division of the Social Security Tribunal and thus is not required to show deference, but an administrative appeal tribunal also cannot exercise the review and superintending powers reserved for higher provincial courts or, in the case of "federal boards", for the Federal Court and the Federal Court of Appeal”.

[14] The Federal Court of Appeal concludes that when the Appeal Division “hears appeals pursuant to subsection 58(1) of the *Department of Employment and Social Development Act*, the mandate of the Appeal Division is conferred to it by sections 55 to 69 of that Act.”

[15] The mandate of the Appeal Division of the Social Security Tribunal, as described in *Jean*, was later confirmed by the Federal Court of Appeal in *Maunder v. Canada (AG)*, 2015 FCA 274.

[16] In accordance with the above instructions, unless the General Division failed to observe a principle of natural justice, erred in law, 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, the Tribunal must dismiss the appeal.

## **ANALYSIS**

### **The facts**

[17] In his claim for regular benefits effective July 1, 2012, the Respondent indicated that he was employed until June 28, 2012. The record of employment from his employer dated July 1, 2012, listed a “shortage of work” as the reason for the end of employment. On August 10, 2012, the employer issued an amended record of earnings indicating a complete severance from employment and the payment of \$1,089.22 in vacation pay and \$1,461.54 in lieu of notice. On September 11, 2012, the Appellant informed the Respondent that the separation monies were considered earnings that had to be allocated and that he would receive a notice of debt. On September 15, 2012, the Appellant issued to the Respondent a notice of debt in the amount of \$1,197.00.

### **Decision of the General Division**

[18] The General Division found that it had jurisdiction to write-off part of the overpayment amount and that the Respondent could afford to pay the amount of \$436.80 without undue hardship. The General Division accordingly wrote off 40% of the amount owing.

**Did the General Division have jurisdiction to determine the issue of the overpayment write-off?**

[19] The Appellant argues that the General Division exceeded its jurisdiction in making a decision with regard to the issue of write-off. The Appellant submits that the General Division relied wrongfully on the concurring judgment of Stratas J.A. in the FCA decision of *Steel* to give itself jurisdiction since the concurring opinion of Stratas J.A. does not form part of the Court's judgment in *Steel*, and unlike the constant jurisprudence on the issue of write-off, it is not a binding authority in this matter.

[20] The Respondent submits that it should be between the Tribunal and the Appellant to settle this issue and to write-off in full his debt. He submits however that the *Steel* decision did not resolve the question of jurisdiction regarding the issue of write-off.

[21] In *Steel*, the claimant was liable to pay back an overpayment of benefits and he claimed he had requested the Commission to write off that liability under subsection 56(1) of the *Regulations* because of "undue hardship." The majority of the Federal Court of Appeal, without effectively deciding the jurisdictional issue, found that:

"[30] In the absence of a decision there is no basis upon which the Board or the Umpire could decide the issues Mr. Steel wishes to raise concerning a write-off of his indebtedness. He is not a "person who is the subject of a decision of the Commission" who may appeal from the decision to the Board. Nor is there a decision that could be judicially reviewed in the Federal Court. The question Mr. Steel wishes to raise simply does not arise on this record. There is no justiciable issue."

[22] Despite the majority position, Justice Stratas was of the opinion that the jurisdictional question could not be avoided and that the Court had the duty to first determine the issue. He stated the following:

[54] In this case, Mr. Steel became liable to pay back an overpayment of benefits. He says that he requested the Commission to write off that liability under subsection 56(1) of the *Employment Insurance Regulations*, SOR/96-332 because of "undue hardship". Mr. Steel contends that the Commission decided against his request for a write-off.

[55] Accordingly, Mr. Steel has pursued appeals to the Board of Referees and the Umpire under subsection 114(1) and section 115 of the *Employment Insurance Act*, S.C. 1996, c. 23. These provisions, set out in the schedule to my colleague's reasons, allow a "claimant" or an "other person" to appeal to the Board of Referees and the Umpire. From there, a judicial review may be brought to this Court under section 118 [...] of the *Act*.

[56] On the existing authorities of this Court, Mr. Steel is not a "claimant": *Cornish-Hardy v. Board of Referees (Unemployment Insurance Act, 1971)*, [1979] 2 F.C. 437 (C.A.), affd 1980 CanLII 187 (SCC), [1980] 1 S.C.R. 1218 and *Canada (Attorney General) v. Filiatrault* (1998), 235 N.R. 274 (F.C.A.).

[57] Therefore, the jurisdictional issue boils down to whether Mr. Steel is an "other person" under subsection 114(1) and section 115 of the *Act*. If Mr. Steel is an "other person", then he can appeal to the Board of Referees and the Umpire and, from there, can apply to this Court for judicial review under section 118 of the *Act*. If Mr. Steel is not an "other person", then his only recourse is by way of judicial review from the Commission's refusal to the Federal Court under sections 18 [...] and 18.1 [...] of the *Federal Courts Act*, R.S.C., 1985, c. F-7.

[58] For some time now, this Court has held that persons aggrieved by write-off decisions made by the Commission have to proceed by way of application for judicial review to the Federal Court: *Cornish-Hardy and Filiatrault*, both above. The appeal and review route involving the Board of Referees, the Umpire and this Court is not available.

[59] However, *Cornish-Hardy* and *Filiatrault* arose under different statutory provisions: just before a statutory reform in 1996, these provisions were subsection 79(1) and section 80 of the *Unemployment Insurance Act*, R.S.C., 1985, c. U-1. These provisions were more limited than subsection 114(1) and section 115 of the current *Act*. Subsection 79(1) only allowed a "claimant" or "an employer of the claimant" to appeal from a decision of the Commission to the Board of Referees. Section 80 allowed "the Commission, a claimant, an employer or an association of which the claimant or employer is a member" to appeal from a decision of the Board of Referees to the Umpire. Neither provision allowed an "other person" to appeal.

[60] Although subsection 114(1) and section 115 of the current *Act* are broader in that they allow an "other person" to appeal, our Court has continued to follow the position in *Cornish-Hardy* and *Filiatrault*: *Buffone v. Canada (Minister of Human Resources Development)*, 2001 CanLII 22143 (FCA), 2001 CanLII 22143 (F.C.A.); *Canada (Attorney General) v. Mosher*, 2002 FCA 355 (CanLII); *Canada (Attorney General) v. Villeneuve*, 2005 FCA 440 (CanLII) [...].

[61] In each of *Buffone*, *Mosher* and *Villeneuve*, this Court regarded the jurisdictional issue as settled. The reasons of each case suggest that the Court had not received any submissions on the relevant statutory provisions. In each case, the Court had before it a benefits recipient without legal representation.

[...]

[74] 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 Mr. Steel, 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.

[75] In my view, this interpretation should be tested by examining Parliament's overall purpose behind this administrative scheme, as shown by the specific statutory provisions it adopted: *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42 (CanLII), [2002] 2 S.C.R. 559; *Chrysler Canada Ltd. v. Canada (Competition Tribunal)*, 1992 CanLII 68 (SCC), [1992] 2 S.C.R. 394. This administrative scheme is aimed at diverting issues relating to employment insurance from the court system into the more informal, specialized, efficient adjudicative mechanisms set up by Parliament. My interpretation of "other person" is consistent with, and furthers that aim.

[76] 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.

[77] The statements in *Buffone*, *Mosher* and *Villeneuve* that suggest a different answer to the jurisdictional question in this case are best regarded as not being the considered opinion of the panels that decided them. Further, to the extent that *Cornish-Hardy* and *Filiatrault* bar persons like Mr. Steel from appealing to the Board of Referees and the Umpire under subsection 114(1) and section 115 of the *Act*, they should no longer be followed. Those cases were decided under the former *Act* which, unlike the current *Act*, did not allow "other person[s]" to appeal.

[78] Therefore, in my view, Mr. Steel was an "other person" under subsection 114(1) and section 115 and could appeal to the Board of Referees and the Umpire and, under section 118, could apply for judicial review in this Court. Therefore, this Court has jurisdiction."

[23] The Federal Court recently had the opportunity to reconsider the issue of jurisdiction over write-offs in *Bernatchez v. Canada (AG)*, 2013 FC 111. The Court stated the following:

[23] Before examining the merits of the applicant's application for judicial review, consideration must be given to the appropriate forum for hearing this dispute. At the hearing, I raised this issue on my own initiative, and I invited the parties to make representations on this point in light of the concurring reasons of Justice Stratas of the Federal Court of Appeal in *Steel v Canada (Attorney General)*, 2011 FCA 153



(CanLII), 418 NR 327. In that case, Justice Stratas was of the view that since the *Employment Insurance Act* came into force, SC 1996, c 23 [EIA], “a claimant or other person” and not simply a “claimant”, as was the case previously, may appeal a decision of the Commission to the Board of Referees then to the Umpire (see subsection 114(1) and section 115 of the *EIA*). It follows that, even in write-off cases, a decision by the Commission may be appealed to the Board of Referees, the Umpire and then the Federal Court of Appeal, in accordance with section 118 of the *EIA*.

[24] The applicant made no further representations on this point. On the other hand, the Attorney General submitted that the Federal Court is always the appropriate forum to hear an application for judicial review regarding a write-off decision by the Commission, insofar as Justice Stratas’ reasons did not bind this Court.

[25] It is true that Justice Stratas’ reasons are *obiter dictum*, which the majority did not agree with. It is also accurate to maintain that a write-off is not part of the Board of Referees’ expertise because a person makes such a request as a debtor not as a claimant. That being said, Justice Stratas’ reasoning appears unassailable to me. The previous jurisprudence was based on the fact that section 79 of the *Unemployment Insurance Act*, RSC 1985, c U-1, conferred a right of appeal on a claimant only, which excluded a person who was asking for debt forgiveness because that person was not acting as a claimant but a debtor. Parliament amended that provision in 1996 by introducing subsection 114(1) of the *EIA*, which provides that “a claimant or other person who is the subject of a decision of the Commission” may appeal that decision to the Board of Referees and the Umpire. I would accordingly be inclined to agree with this argument and to dismiss the applicant’s application for judicial review on this ground alone. However, two reasons lead me to examine his application on the merits.

[26] First, the respondent correctly submits 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 by the Commission refusing to write off an overpayment cannot be appealed to the Board of Referees: see, inter alia, *Cornish-Hardy v Canada (Board of Referees)* (1979), [1979] 2 FC 437 (available on QL) (CA), aff’d by 1980 CanLII 187 (SCC), [1980] 1 SCR 1218; *Canada (Attorney General) v Idemudia*, 236 NR 359 at para 1, 86 ACWS (3d) 253; *Buffone v Canada (Minister of Human Resources Development)*, [2001] FCJ No. 38 at para 3 (QL); *Canada (Attorney General) v Mosher*, 2002 FCA 355 (CanLII) at para 2, 117 ACWS (3d) 650; *Canada (Attorney General) v Villeneuve*, 2005 FCA 440 (CanLII) at para 16, 352 NR 60.”

[24] The General Division understandably adopted the views and reasoning of Justice Stratas in rendering its decision in the present matter. However, Justice Stratas’ reasons are an *obiter dictum* with which the majority of the Federal Court of Appeal did not agree. The

General Division simply could not ignore the numerous decisions of the Federal Court of Appeal issued before and after the statutory amendment enacted in 1996 to the effect that, after a decision of refusal by the Commission on a request for write-off, a claimant needs to proceed~~s~~ by an application for judicial review to the Federal Court.

[25] In view of the above, the Tribunal has no choice but to intervene and set aside the decision of the General Division on the issue of write-off.

[26] It is interesting to note, in conclusion, that the new section 112.1 of the *Employment Insurance Act* precludes a claimant from requesting a review by the Commission of a write-off decision and, consequently, from appealing to the General Division. With this legislative change, it would seem that Parliament was content with the interpretation given over the years by the Courts on this jurisdiction issue.

## **CONCLUSION**

[27] The appeal is granted, the decision of the General Division on the issue of write-off is set aside and the appeal of the Respondent before the General Division is dismissed.

*Pierre Lafontaine*  
Member, Appeal Division