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

[TRANSLATION]

Citation: *S. P. v. Canada Employment Insurance Commission*, 2016 SSTGDEI 94

Tribunal File Number: GE-15-4301

BETWEEN:

S. P.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Charline Bourque

HEARING DATE: June 9, 2016

DATE OF DECISION: July 19, 2016

Canada

REASONS AND DECISION

PERSONS IN ATTENDANCE

The claimant, S. P., participated in the hearing by teleconference, accompanied by Élise Joyal-Pilon, counsel for the Centre communautaire juridique de l'Outaouais, Gatineau, acting as her representative.

INTRODUCTION

[1] The Appellant filed an EI claim effective September 19, 2014. On December 10, 2014, the Canada Employment Insurance Commission ("the Commission") notified the claimant that, upon receipt of new Record(s) of Employment from Jardin horticole CA-RA, S.A., the weekly benefit rate had now been established at $0.00 instead of $251.00 and the maximum number of weeks established was 0 instead of 17 weeks. The Commission also informed the claimant that she did not qualify for regular EI benefits as she had accumulated 651 hours of insurable employment between November 10, 2013 and September 13, 2014 but that, based on the unemployment rate in her region, she required 665 hours of insurable employment to qualify for benefits.

[2] On January 29, 2015, in response to her reconsideration request, the Commission informed the claimant that the decision concerning the benefit period not established had been upheld. The Commission added that the overpayment resulting from the voiding of the claim for benefits effective September 4, 2014 remained intact and unfortunately would be subject to no change. The Commission concluded from the new calculation that the claimant's claim for benefits could not be established because she did not have the required number of hours.

[3] The claimant appealed that decision to the Canada Social Security Tribunal ("the Tribunal") on December 23, 2015. On April 7, 2016, the Tribunal extended time to appeal before the Tribunal's General Division.

[4] This appeal was heard by the teleconference form of hearing for the following reasons:

a) the complexity of the issue or issues;

b) the information in the file, including the need for additional information;

c) this method of proceeding respects the requirement under the *Social Security Tribunal Regulations* to proceed as informally and quickly as circumstances, fairness and natural justice permit.

ISSUE

[5] The claimant has filed an appeal regarding the overpayment write-off under section 56 of the *Employment Insurance Regulations* ("the Regulations").

THE LAW

[6] Section 43 of the Act provides as follows:

> A claimant is liable to repay an amount paid by the Commission to the claimant as benefits
>
> *(a)* for any period for which the claimant is disqualified; or
>
> (*b*) to which the claimant is not entitled.

[7] Section 56 of the Regulations states:

> (1) A penalty owing under section 38, 39 or 65.1 of the Act or an amount payable under section 43, 45, 46, 46.1 or 65 of the Act, or the interest accrued on the penalty or amount, may be written off by the Commission if
>
> (a) the total of the penalties and amounts, including the interest accrued on those penalties and amounts, owing by the debtor to Her Majesty under any program administered by the Department of Employment and Social Development does not exceed $100, a benefit period is not currently running in respect of the debtor and the debtor is not currently making regular payments on a repayment plan;
>
> (b) the debtor is deceased;
>
> (c) the debtor is a discharged bankrupt;
>
> (d) the debtor is an undischarged bankrupt in respect of whom the final dividend has been paid and the trustee has been discharged;

(e) the overpayment does not arise from an error made by the debtor or as a result of a false or misleading declaration or representation made by the debtor, whether the debtor knew it to be false or misleading or not, but arises from

(i) a retrospective decision or ruling made under Part IV of the Act, or

(ii) a retrospective decision made under Part I or IV of the Act in relation to benefits paid under section 25 of the Act; or

(f) the Commission considers that, having regard to all the circumstances,

(i) the penalty or amount, or the interest accrued on it, is uncollectable,

(ii) the repayment of the penalty or amount, or the interest accrued on it, would result in undue hardship to the debtor, or

(iii) the administrative costs of collecting the penalty or amount, or the interest accrued on it, would likely equal or exceed the penalty, amount or interest to be collected.

(2) The portion of an amount owing under section 47 or 65 of the Act in respect of benefits received more than 12 months before the Commission notifies the debtor of the overpayment, including the interest accrued on it, may be written off by the Commission if

(a) the overpayment does not arise from an error made by the debtor or as a result of a false or misleading declaration or representation made by the debtor, whether the debtor knew it to be false or misleading or not; and

(b) the overpayment arises as a result of

(i) a delay or error made by the Commission in processing a claim for benefits,

(ii) retrospective control procedures or a retrospective review initiated by the Commission,

(iii) an error made on the record of employment by the employer,

(iv) an incorrect calculation by the employer of the debtor's insurable earnings or hours of insurable employment, or

(v) an error in insuring the employment or other activity of the debtor.

EVIDENCE

[8] The evidence in the file is as follows:

a) The claim for EI benefits filed September 19, 2014 (GD3-3 to GD3-10).

b) A Record of Employment (ROE) from Jardin horticole CA-RA indicating that the last pay day was September 12, 2014. The ROE shows 770 hours of insurable employment (GD3-11).

c) An ROE from Jardin horticole CA-RA amending the previous ROE and indicating that the last pay day was September 12, 2014. The ROE shows 618 hours of insurable employment (GD3-11). The employer indicated a correction to the last pay in ROE K01221149, entering 163.36 hours in lieu of cash for the claimant's vacation pay (GD3-14).

d) An ROE from Jardin horticole CA-RA indicating the last work day as November 15, 2015 and 33 hours of insurable employment (GD3-11). That ROE amends the ROE from page GD3-13 (GD3-12).

e) On January 29, 2015, the claimant informed the Commission that she was not challenging the fact that she had been told she did not have sufficient hours to qualify; she was challenging the overpayment and stated that it was up to the employer to repay it because it was responsible for the error. She submitted that, if it had provided the correct information at the outset, she would not have qualified for unemployment and would not have to repay the amount claimed from her (GD3-24).

f) The unemployment rates by EI economic region (GD3-21).

g) Proof of income from Emploi Québec dated June 6, 2016 (GD11-3).

h) A claim booklet (GD11-4).

i) Child care expenses (GD11-7).

j) A map from the Association québécoise des transports [Quebec transportation association] (GD11-9).

k) A decision report dated January 29, 2015 (GD11-12).

l) An average monthly budget (GD11-14).

m) Confirmation of a stay in detox from April 2 to 11, 2016 (GD11-16).

n) A lease (GD11-18/19).

o) Bank statements (GD11-21 to GD11-26).

p) A patient file (medication history) and pharmacological file (GD11-28 to GD11-32).

[9] The evidence adduced at the hearing by means of the Appellant's testimony was as follows:

a) The claimant was employed by Jardin horticole CA-RA. She was granted EI benefits but required to repay those benefits as a result of an error on the employer's part.

b) The claimant states that she suffers from back pain and is taking medication for stress. Since January 2015, she has received a diagnosis of depression and alcohol consumption (P1/P2). She has been unable to work since June 2015, a period of one year. She was therefore unable to work until June 29, 2015 and has not worked again since her last employment. She underwent therapy (P2) on her doctor's recommendation.

c) The claimant says that the debt associated with the overpayment has caused her financial stress, a fact that was emphasized in the medical report (P2).

d) The claimant's income comes from last-resort assistance, the family allowance and food aid, a housing allowance and spousal support. Her expenses amount to $1,186 a month, excluding food. She requires a vehicle to transport her child to and from school since no buses are available.

e) The claimant is the single mother of an eight-year-old child, has a college diploma in landscaping and has taken steps to find employment. She has also taken training as a construction site signaller (P10). She cannot go back to working in landscaping as a result of her back pain.

f) An overpayment write-off would relieve a great deal of stress and enable her to get ahead.

g) The claimant filed a claim for EI benefits at the same time she requested last-resort assistance. As she was receiving EI benefits, she did not begin receiving last-resort assistance until December 2014.

SUBMISSIONS OF THE PARTIES

[10] The Appellant made the following submissions:

a) The decision is unfounded in fact and in law.

b) The Appellant is not challenging the issue of insurable hours but did not think she should have to repay the benefits she received as a result of an error made by her employer. The claimant requests that the entire debt be written off.

c) The Appellant believes the Tribunal has the power to intervene, and, as the Commission has ruled on the write-off (P11), the Tribunal may render a decision on the matter.

d) A person may request reconsideration of any Commission decision.

e) The Appellant's representative referred to the Tribunal's decision in *D. E. A. v. Canada Employment Insurance Commission*, 2014 TSSGDAE 86, more particularly to paragraphs 87 to 94, in which the Tribunal analyzes its jurisdiction in write-off cases.

f) The Commission held that the debt could not be written off under subparagraph 56(1)(*f*)(i) without considering subparagraph 56(1)(*f*)(ii) and did not consider the undue hardship the claimant might be suffering.

g) This is a discretionary power of the Commission, and the Commission did not take the claimant's problems into consideration. The Commission contended that the claimant had to refer to the CRA but did not act fairly as it overlooked subparagraph 56(1)(*f*)(i) in rendering its decision. The Commission did not consider the claimant's family and financial situation.

h) The representative further stated that she reiterated the arguments set forth in paragraphs 117 and following of the decision in *D.E.A.* respecting the Tribunal's jurisdiction in write-off decisions (GD11-33 to GD11-62).

i) Subparagraph 56(1)(*f)*(ii) should be applied and it is an egregious error that it was not. There is no prior condition in paragraph 56(1)(*f*) referring to undue hardship. The claimant showed that her situation was precarious and that she was finding it hard to make ends meet. Her expenses were reasonable and necessary, and the debt had undermined her financially and psychologically. She had taken charge of her life and completed therapy and training so that she could start off in a new direction. She was looking for work and continuing to contribute to an RESP for her son.

j) The $2,400 repayment constitutes undue hardship that contributes to her anxiety. Consideration must be given to the factors existing at the time of the decision. There is no indication that the Appellant's future will improve in the short, medium or long terms.

k) In addition to having to repay an overpayment, the Appellant was unable to receive last-resort assistance during that time as she was deemed to qualify for EI benefits.

l) The Appellant submits that the Commission indeed ruled on the write-off question.

[11] The Respondent made the following submissions:

a) The Commission would like to draw the Tribunal's attention to the fact that the notice of debt contains a clerical error. That document states that the overpayment arose because earnings were not deducted, whereas it should read as follows: "A change in the calculation resulted in an overpayment."

b) Subsection 7(2) of the Act states that an insured person meets the requirements necessary for receiving EI benefits if there is an interruption of earnings and if, during his or her qualifying period, that person held insurable employment for at least the number of hours indicated in the table in that subsection, based on the regional rate of unemployment applicable to that person.

c) In this case, the Claimant's qualifying period was established under paragraph 8(1)(*b*) as November 10, 2013 to September 13, 2014 because a prior benefit period effective November 10, 2013 had been established for the claimant (GD3-17 to GD3-18).

d) Based on the facts in the file, the Commission determined that the claimant was not an entrant or a re-entrant to the labour force under subsection 7(4) of the Act since she had accumulated at least 490 hours of activity in the labour market in the 52 weeks before her qualifying period (GD3-20 and GD3-21). Consequently, the claimant needed the number of insurable hours stated in paragraph 7(2)(*b*) of the Act (GD3-27 to GD3-28).

e) According to the table in subsection 7(2) of the Act and based on the unemployment rate of 7% in the region where the claimant was living, the minimum number of hours required to qualify to receive EI benefits was 665.

f) Unfortunately, the evidence shows that, following a correction the employer made after benefits had been paid, the claimant accumulated only 650 hours of insurable employment during her qualifying period.

g) Consequently, the Commission maintains that the claimant did not show that she qualified to receive EI benefits under subsection 7(2) of the Act.

h) Section 43 of the Act provides that a person who has received benefits to which that person is not entitled is liable to repay the amount paid by the Commission.

i) The claimant challenges the liability to repay the overpayment since that overpayment was established following the correction of an error by the employer.

j) The Commission reminds the Tribunal that the liability to repay benefits is not a decision of the Commission. If the claimant wishes to appeal that decision, she will have to turn to the Canada Revenue Agency (CRA).

k) The Commission submits that the case law supports its decision. The Federal Court of Appeal has confirmed the principle that the requirements of subsection 7(2) of the Act do not allow any discrepancy and provide no discretion (*Canada (AG) v. Levesque*, 2001 FCA 304).

l) In this case, the claimant accumulated 651 hours of insurable employment during her qualifying period, whereas she had to accumulate 665 hours in order to qualify.

m) The Federal Court of Appeal has confirmed the principle that subsection 8(1) of the Act provides for two possible qualifying periods and expressly states that the shorter of the two possibilities must be chosen (*Long v. Canada (AG)*, 2011 FCA 99).

n) The claimant previously established a benefit period on November 10, 2013. The qualifying period to establish the benefit period starting September 14, 2014 thus begins at the same time as the previous benefit period, on November 10, 2013, as it is the shorter of the two periods.

o) The Court has also confirmed the principle that hours that are accumulated outside the qualifying period cannot be used to qualify a claimant for benefits (*Haile v. Canada (AG)*, 2008 FCA 193).

p) In this case, the Commission used all the hours of insurable employment accumulated during the qualifying period, i.e. from November 10, 2013 to September 13, 2014.

q) The Commission submits in an additional argument (GD14) that, on December 5, 2014, upon receiving an amended ROE (GD3-12), it made a new calculation and notified the claimant on December 10, 2014 that she did not qualify for benefits starting on September 14, 2014 because she had not accumulated sufficient hours of insurable employment to do so (GD3-17 and GD3-18). The claimant was notified that she was liable to repay a benefit overpayment of $2,483 (GD3-19).

r) Subsection 56(2) of the Regulations provides that the Commission may write off an overpayment of benefits received more than 12 months before the Commission notifies the debtor of the overpayment.

s) In this case, despite the fact that the overpayment does not result from an error by the claimant or a false or misleading statement and that the overpayment is attributable to an error by the employer in the number of hours of insurable employment, the Commission

may not write off the overpayment because the claimant was notified of the overpayment less than 12 months after the payment.

t) Based on the facts in the file, the claimant was notified of the overpayment on December 10, 2014 in respect of benefits received between September 28 and November 29, 2014.

ANALYSIS

[12] The claimant states that she is not challenging the issue of insurable hours that resulted in the non-establishment of the benefit period. However, she did not think she should have to repay the benefits she received as a result of an error made by her employer. The claimant is requesting that the entire debt be written off.

[13] Subsection 112(1) of the Act provides as follows:

> A claimant or other person who is the subject of a decision of the Commission, or the employer of the claimant, may make a request to the Commission in the prescribed form and manner for a reconsideration of that decision at any time within
>
> (a) 30 days after the day on which a decision is communicated to them; or
>
> (b) any further time that the Commission may allow.

[14] Section 113 of the Act states:

> A party who is dissatisfied with a decision of the Commission made under section 112, including a decision in relation to further time to make a request, may appeal the decision to the Social Security Tribunal established under section 44 of the *Department of Employment and Social Development Act*.

[15] Thus, as provided by section 113 of the Act, the Tribunal may consider the reconsideration decisions issued by the Commission.

[16] The question is thus whether the Commission rendered a reconsideration decision concerning the write-off.

[17] The Tribunal is of the view that the claimant clearly challenged her liability to repay the overpayment since she was not responsible for it and that it was caused by an error made by her

employer on her ROE. That is what is stated in the reconsideration request she filed with the Commission on December 23, 2015 (GD3-24). That was her first communication with the Commission in response to the decision made following the change to the ROE as a result of which the claimant no longer had enough hours of insurable employment to qualify for EI benefits. That decision resulted in the establishment of an overpayment (GD3-17 to GD3-19).

[18] On January 29, 2015, the Commission communicated with the claimant concerning her reconsideration request. The Commission compiled the information obtained from the claimant (GD3-24) and prepared a decision report (GD11-12) in which it stated that no write-off was possible.

[19] The Commission then rendered a reconsideration decision for the benefit period not established that states that "the overpayment resulting from the voiding of your claim for benefits effective September 4, 2014 remains intact and unfortunately will be subject to no change." (GD3-25)

[20] The Tribunal therefore finds that the Commission had not addressed the question of the write-off when it reached the initial decision on December 10, 2014.

[21] The decision report (GD11-12) and the additional information (GD3-24) drafted by the Commission were prepared by the same officer that same day. It would be surprising if the same officer had revised his own decision in the space of a few hours. Consequently, the Tribunal finds that the decision report dated January 29, 2015 constitutes not a reconsideration decision on the write-off but rather an initial decision on the subject.

[22] The Tribunal further notes that, although the Commission was invited to provide details on the decision report, which it did not include in the file, the Commission merely repeated the sequence of events (GD14). However, the sequence of events does not show that the Commission initially rendered a decision on the write-off issue. The fact that it created an overpayment and issued a notice of debt does not show that the Commission considered the write-off issue. The Tribunal finds that the Commission rendered an initial decision on the write-off on January 29, 2015 but that it was not a reconsideration decision.

[23] Furthermore, as a result of an amendment made to the Act on December 16, 2014, section 112.1 of the Act provides, with respect to write-off decisions, as follows:

> A decision of the Commission made under the *Employment Insurance Regulations* respecting the writing off of any penalty owing, amount payable or interest accrued on any penalty owing or amount payable is not subject to review under section 112.

[24] The Tribunal notes that this section of the Act was in force when the claimant filed her reconsideration request with the Commission. Thus, even if the Commission had rendered a reconsideration decision on the write-off, it would have done so contrary to the Act in force.

[25] For these reasons, the Tribunal finds that it cannot render a decision on the question of the write-off as requested by the claimant.

[26] The Tribunal considered the decision in *D. E. A. v. Canada Employment Insurance Commission*, 2014 TSSGDAE 86, which was rendered by a member of the Tribunal on August 11, 2014. The Tribunal is of the view that it is not bound by the decision of another member, even though it takes that decision into consideration.

[27] The Tribunal therefore considers that the case law concerning the Commission's write-off power is changing and that the Federal Court has addressed this jurisdiction and held as follows in *Bernatchez*:

> 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, 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…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…That being said, Justice Stratas' reasoning appears unassailable to me.

The Court then added:

> 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… (*Bernatchez v. Canada (Attorney General)*, 2013 FC 111)

[28] However, the Tribunal finds that the applicable case law in this case is that of the Federal Court of Appeal, not the Federal Court, or the dissenting opinion of the Federal Court of Appeal. Thus, until the Court of Appeal has expressed that opinion, the write-off may not be the subject of an appeal to the Tribunal. Consequently, relying on current case law, and as noted above, the Tribunal finds that it generally does not have jurisdiction to rule on the write-off question and that consideration of that issue is instead the privilege of the Federal Court.

[29] The Tribunal nevertheless wishes to point out that subsection 56(1) of the Regulations is to be construed independently from subsection 56(2). The Tribunal is of the view that the Commission should not limit its write-off decision to the fact that fewer than 12 months elapsed before the claimant was notified of the amendment to the decision, particularly where the error was made by her employer.

[30] Paragraphs 56(1)(*e*) and (*f*) of the Regulations state:

> (1) A penalty owing under section 38, 39 or 65.1 of the Act or an amount payable under section 43, 45, 46, 46.1 or 65 of the Act, or the interest accrued on the penalty or amount, may be written off by the Commission if
>
> > (e) the overpayment does not arise from an error made by the debtor or as a result of a false or misleading declaration or representation made by the debtor, whether the debtor knew it to be false or misleading or not, but arises from
> >
> > > (i) a retrospective decision or ruling made under Part IV of the Act, or
> > >
> > > (ii) a retrospective decision made under Part I or IV of the Act in relation to benefits paid under section 25 of the Act; or
> >
> > (f) the Commission considers that, having regard to all the circumstances,
> >
> > > (i) the penalty or amount, or the interest accrued on it, is uncollectable,
> > >
> > > (ii) the repayment of the penalty or amount, or the interest accrued on it, would result in undue hardship to the debtor, or
> > >
> > > (iii) the administrative costs of collecting the penalty or amount, or the interest accrued on it, would likely equal or exceed the penalty, amount or interest to be collected.

[31] Subsection 56(2) of the Regulations provides as follows:

> (2) The portion of an amount owing under section 47 or 65 of the Act in respect of benefits received more than 12 months before the Commission notifies the debtor of the overpayment, including the interest accrued on it, may be written off by the Commission if
>
> (a) the overpayment does not arise from an error made by the debtor or as a result of a false or misleading declaration or representation made by the debtor, whether the debtor knew it to be false or misleading or not; and
>
> (b) the overpayment arises as a result of
>
> (iii) an error made on the record of employment by the employer,
>
> (iv) an incorrect calculation by the employer of the debtor's insurable earnings or hours of insurable employment,

[32] The Tribunal is of the view that the Commission may render a write-off decision under subsection 56(1) of the Regulations to write off the overpayment claimed from the claimant, considering that the claimant is in no way responsible for the situation in which she finds herself and that she is affected by an overpayment as a result of an error made by her employer.

[33] The Tribunal further wishes to point out to the Commission that the wording of subsection 56(1) of the Regulations does not contain the expression “subject to subsection (2)” and that, consequently, subsection 56(1) of the Regulations may apply independently of subsection 56(2), which concerns overpayments received less than 12 months before the Commission notifies the claimant of that overpayment.

[34] The Tribunal therefore finds that the Commission is not justified in overlooking the existence of subsection 56(1) of the Regulations and should not limit its decision to the fact that the overpayment was made less than 12 months before the date on which it notified the claimant.

[35] The Tribunal finds that the claimant demonstrated the financial difficulties she is facing and that the Commission must consider them in rendering a decision on the write-off of an overpayment under subsection 56(1) of the Regulations.

[36] In conclusion, the Tribunal finds that the write-off decision was not the subject of a reconsideration and that the Tribunal does not have jurisdiction to render a decision on that question under section 113 of the Act. The Tribunal further finds that it does not have jurisdiction to render a decision on the write-off and that that jurisdiction falls to the Federal Court. The Tribunal nevertheless finds that the Commission cannot overlook subsection 56(1) of the Regulations in rendering a decision on the write-off, having regard to the fact that the claimant was in no way responsible for the situation in which she now finds herself.

CONCLUSION

[37] The Tribunal therefore finds that it is the Federal Court that has jurisdiction to render a decision on the write-off since no reconsideration decision was rendered under sections 112 and 113 of the Act.

[38] The appeal is dismissed.

Charline Bourque
Member, General Division - Employment Insurance Section