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

[TRANSLATION]

Citation: *J. L. v. Canada Employment Insurance Commission,* 2017 SSTADEI 24

Tribunal File Number: AD-15-162

BETWEEN:

J. L.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Pierre Lafontaine

HEARD ON: January 24, 2017

DATE OF DECISION: January 26, 2017

Canada

REASONS AND DECISION

DECISION

[1] The appeal is dismissed.

INTRODUCTION

[2] On February 28, 2015, the General Division found that the Federal Court has sole jurisdiction to render a decision concerning a write-off.

[3] The Appellant requested leave to appeal to the Appeal Division on April 1, 2015. Leave to appeal was granted on June 12, 2015.

TYPE OF HEARING

[4] The Social Security Tribunal of Canada determined that the appeal would be heard via teleconference for the following reasons:

- the complexity of the issue or issues;
- the fact that the parties' credibility was not a key issue;
- the information on file, including the need for additional information;
- the need to proceed as informally and quickly as possible while complying with the rules of natural justice.

[5] The Appellant attended the hearing of September 6, 2016, and was represented by Stéphanie Lelièvre. Stéphanie Yung-Hing represented the Respondent. Only the attorneys attended the next hearing on January 24, 2017.

THE LAW

[6] Under subsection 58(1) of the *Department of Employment and Social Development Act*, the following are the only grounds for appeal:

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, regardless of whether the error appears on the face of the record; and

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.

ISSUE

[7] Did the General Division err in finding that it did not have the jurisdiction to decide on the issue of the overpayment write-off?

SUBMISSIONS

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

- The General Division erred in finding that it did not have the authority to render a decision on the write-off;
- Besides the *obiter dictum* of Judge Stratas of the Federal Court of Appeal in *Steel v. Canada (Attorney General)*, 2011 FCA 153, several judges and Tribunal members have been asked to provide an opinion since 2014;
- Since the 1996 reform, subsection 114(1) and section 115 of the *Employment Insurance Act* (Act) have allowed an “other person” to file an appeal with the Tribunal;

- Since 2014, multiple decisions have concurred with Judge Stratas's finding, and all concur that the case law is evolving and that the Federal Court of Appeal must re-examine the issue;

- The General Division did not exercise its discretion on the fact that the current law allows an "other person" to appeal from a decision of the Respondent to the Tribunal, and it did not consider the evolution of the associated case law and legislation.

[9] The Respondent submitted the following reasons against the Appellant's appeal:

- Since the decision by the Supreme Court of Canada in *Cornish Hardy v. Canada (Board of Referees)*, [1980] 1 SCR 1218, the case law has established that the Federal Court cannot reconsider decisions on write-offs;

- The General Division did not refuse to exercise its jurisdiction and, therefore, did not commit an error that would justify the Appeal Division's intervention.

STANDARDS OF REVIEW

[10] The Appellant made no submissions on the appropriate standard of review for this appeal.

[11] The Respondent submits that the appropriate standard of review for questions of law is correctness, and that the appropriate standard of review for questions of mixed law and fact is reasonableness. - *Pathmanathan v. Office of the Umpire*, 2015 FCA 50.

[12] The Tribunal notes that the Federal Court of Appeal in *Canada (Attorney General) v. Jean*, 2015 FCA 242, refers to paragraph 19 of its decision, 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 examined the issue by stating 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 concluded by emphasizing that "where it 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 Appeal Division's mandate set out in *Jean* was later confirmed by the Federal Court of Appeal in *Maunder v. Canada (Attorney General)*, 2015 FCA 274.

[16] So, 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

Facts

[17] The Appellant applied for regular Employment Insurance benefits effective June 23, 2013, and June 22, 2014, respectively. Noticing a major discrepancy between the rate of benefits for 2013 and the one for 2014, the Appellant contacted the Respondent to obtain explanations.

[18] On July 9, 2014, the Respondent wrote to the Appellant to follow up on her request for an explanation. In that correspondence, the Respondent explained that she had contacted the employer to confirm the correctness of the data entered in her Records of Employment (ROEs). As a follow-up to this discussion, it was established that the ROE from 2014 was correct, but that the one that the employer had completed in 2013 contained an error in the total amount of insurable earnings. The Appellant was notified that it is possible that she had

received benefits for which she was not qualified and, as such, upcoming correspondence would follow.

[19] On July 26, 2014, Service Canada sent a notice of debt to the Appellant explaining that she owed the Respondent $5,122.00.

Did the General Division err in finding that it did not have jurisdiction to render a decision on the write-off?

[20] When it dismissed the Appellant's appeal, the General Division concluded that, based on current case law, it did not have jurisdiction to make a decision on the write-off issue. It is the Tribunal's opinion that the General Division did not err in deciding as it did.

[21] In *Steel v. Canada (Attorney General)*, 2011 FCA 153, 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 *Employment Insurance Regulations* because of "undue hardship." The majority of the Federal Court of Appeal, without effectively deciding the jurisdictional issue, found that:

> 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 absence of a decision, Justice Stratas was of the opinion that the jurisdictional question could not be avoided and that it was the Court's duty to first decide on 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] 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 *supra*. 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 (F.C.A.); *Canada (Attorney General) v. Mosher*, 2002 FCA 355; *Canada (Attorney General) v. Villeneuve*, 2005 FCA 440 [...].

[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.

[…]

[69] Consider, as an example, the plight of Mr. Steel. The majority of this Court will decide this case without determining the jurisdictional issue he has placed before us. Then the Commission will rule on whether Mr. Steel is entitled to a write-off. Assuming the Commission rules adversely to him, he will have to choose a route of review without the benefit of a determination on the jurisdictional issue. If he chooses the wrong route of review, he will be forced to go back to where he was before and start all over again. In a case like this, too great a devotion to judicial minimalism can ensnare benefits recipients in a frustrating game of "snakes and ladders."

(…)

[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] 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 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 persons" 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.

[emphasis added by the undersigned]

[23] Although the Tribunal sympathizes with the Appellant, it cannot ignore the fact that a majority of the Federal Court of Appeal in *Steel* did not rule on the jurisdictional issue, despite the legislative amendment adopted in 1996.

[24] The Federal Court has had the opportunity to consider the issue of jurisdiction over write-offs in *Bernatchez v. Canada (Attorney General)*, 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, 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.
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> [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.
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> [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.
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> [emphasis added by the undersigned]

[25] When it dismissed the Appellant's appeal on the write-off issue, the General Division correctly acknowledged, that numerous decisions that the Federal Court of Appeal rendered before and after the statutory amendment enacted in 1996 in light of the Respondent's decision refusing to write off a sum convey that a claimant must proceed with an application for judicial review to the Federal Court.

[26] In conclusion, it is interesting to note that the new section 112.1 of the *Employment Insurance Act* precludes a claimant from requesting that the Respondent review 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 dismissed.

Pierre Lafontaine

Member, Appeal Division