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

Citation: *J. S. v. Canada Employment Insurance Commission,* 2017 SSTADEI 431

Tribunal File Number: AD-17-579

BETWEEN:

J. S.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Shirley Netten

HEARD ON: November 17, 2017

DATE OF DECISION: December 8, 2017

Canada

REASONS AND DECISION

PERSONS IN ATTENDANCE

Appellant: J. S.
Respondent's representative: S. Prud'Homme
Observer: C. S.

OVERVIEW

[1] In April 2014, the Appellant applied for maternity and parental benefits under the *Employment Insurance Act* (Act), opting to be exempt from completing biweekly reports. As required by s. 26.1 of the *Employment Insurance Regulations* (Regulations), in her application she agreed to inform Service Canada immediately if she worked, if she received money, or if any situation arose affecting her benefits, while she was receiving them. She also agreed to confirm to Service Canada, following her last payment, that she had declared any situation or earnings affecting her benefits.

[2] The Appellant received maternity and parental benefits from May 11, 2014 to April 25, 2015, by direct deposit. As a result of a subsequent application for benefits in 2016, the Respondent learned that the Appellant had previously returned to work on February 2, 2015. After being informed in August 2016 of the undeclared earnings, the Appellant advised that she had written to Service Canada in January 2015 about her plan to return to work in February 2015; she wrote that she was "unsure of processing times, so I knew I would hear eventually from you. Time passed and glad we are now sorting it out." The resulting overpayment of $6,168 (for parental benefits paid between February 2 and April 25, 2015) was not disputed by the Appellant.

[3] As set out in its decision of October 18, 2016, the Respondent determined that the Appellant had not declared her earnings from employment from February to April 2015 (which covered seven biweekly periods), and concluded that she had "knowingly made these false representations." A penalty was imposed "for 7 false representations," and a notice of violation was issued. Upon reconsideration, the Respondent maintained its decisions, but reduced the penalty due to mitigating circumstances.

[4] The Appellant's appeal to the Social Security Tribunal of Canada (Tribunal), on the issues of the penalty and violation, was dismissed by the Tribunal's General Division on July 17, 2017. I granted leave to appeal this decision, on September 15, 2017.

ANALYSIS

[5] The history of this appeal reflects confusion with respect to the application of the penalties described in ss. 38(1)(*a*) and (*e*) of the Act, in the context of an exemption from biweekly reports and payment of benefits by direct deposit. These penalty provisions read as follows:

> 38 (1) The Commission may impose on a claimant, or any other person acting for a claimant, a penalty for each of the following acts or omissions if the Commission becomes aware of facts that in its opinion establish that the claimant or other person has
>
> (a) in relation to a claim for benefits, made a representation that the claimant or other person knew was false or misleading; […]
>
> (e) being the payee of a special warrant, knowingly negotiated or attempted to negotiate it for benefits to which the claimant was not entitled;

[6] As has been recognized by the Respondent, s. 38(1)(*c*) (which addresses a failure to declare certain earnings) became inoperative in August 2001, as a result of the repeal of s. 15 of the Regulations. Moreover, no penalties have been established specifically in relation to a claimant's obligations (if not completing biweekly reports) to promptly declare earnings and to confirm entitlement and earnings at the end of the benefit period, under s. 26.1 of the Regulations.

[7] The Respondent's initial decision of October 18, 2016 did not identify the paragraph under which the Appellant's penalty was issued, referencing only "false representations." Notations in the underlying Service Canada memorandum of the same date include the following: "Pursuant to section 38 of the Act, the Commission may impose a penalty for any misrepresentation which is knowingly made by the claimant"; "A false statement was made.

Yes. The false statement was knowingly made. Yes."; and, "claimant accepted 7 direct deposits."

[8] The Respondent's reconsideration decision of November 25, 2016[1] did not mention any basis for the penalty. The memorandum of November 30, 2016 outlined the "legal test" as "for the imposition of a penalty, the false statement must be made 'knowingly.'" After reviewing the lack of contact between May 2015 and September 2016 and the failure to make enquiries, the Service Canada agent concluded as follows:

> […] the evidence reasonably suggests the claimant knowingly made false/misleading statements by knowingly negotiated [sic] payments that she wasn't entitled to receive and failing to inform the commission about any money she had received while in receipt of Employment Insurance benefits.

[9] The Respondent did not clarify the statutory authority for the penalty in its submissions to the General Division, which asserted that the Appellant had "made misrepresentations by knowingly making false and/or misleading representations by accepting benefit payments which she knew she was not entitled to receive."

[10] In dismissing the Appellant's appeal, the General Division also failed to identify the applicable statutory provision. Nevertheless, the General Division confirmed the imposition of the penalty, addressing the question of whether the Appellant had made false representations as follows:

> **Were statements made knowingly by the Appellant?**
>
> [39] The Tribunal finds that the Appellant did not accurately report her earnings when she returned to work. The Tribunal determined that she waited until Service Canada started an investigation into the matter in September 2016, whereas she had an opportunity to contact Service Canada anytime throughout the year in 2015 or into 2016 as she knew she had received EI benefits to which she was not entitled to and she accepted the responsibility to accurately report them. The Tribunal finds the alleged first letter was not received, she did not write another letter, she did not continue to telephone, and she did not visit a Service Canada

[1] It is unclear why this letter was dated prior to the decision reportedly being made on November 30, 2016.

> office when she knew she had received and accepted 7 EI benefit payments to which she was not entitled to. The Tribunal recognizes that the Appellant stated that friends told her that the Canada Employment Insurance Commission would eventually contact her; however the Tribunal finds that waiting until an investigation starts from the Commission does not absolve the Appellant from her responsibilities of informing the Commission of her return to work and of her earnings she received from her employer because she returned to work early. The Tribunal recognizes the Appellant stated she sent a letter in January 2015; however she knew that she was receiving EI benefits to which she was not entitled to for 7 consecutive EI payments and her responsibility is to inform the Commission of any changes while on maternity and parental benefits.
>
> [40] The Tribunal finds that the Appellant **knowingly made false statements or representations to the Commission when she failed to report her earnings** to the Commission when she had returned to work while on her parental leave. There were **seven misrepresentations because she accepted seven EI payments** to which she was not entitled to receive.
>
> [emphasis added]

[11] The General Division subsequently reiterated its finding that the Appellant made false or misleading statements or representations "because she accepted benefits that she was not entitled to receive" and "did not demonstrate conclusive further action."

[12] One of the grounds of appeal under the *Department of Employment and Social Development Act* (DESDA), is that 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 (s. 58(1)(*c*)). *Canada (Citizenship and Immigration) v. Huruglica*, 2016 FCA 93 (CanLII), held that the standards of review applicable to judicial review of decisions made by administrative decision-makers are not to be automatically applied by specialized administrative appeal bodies. Rather, such appellate bodies are to apply the grounds of appeal established within their home statutes. The language of s. 58(1)(*c*) requires the Appeal Division to show some deference on factual errors: for the appeal to succeed, the impugned finding of fact must not only be material ("based its decision on") and incorrect ("erroneous"), but also made in a perverse or capricious manner or without regard for the evidence.

[13] I agree with the Appellant that the General Division's determination that she had made false representations was an erroneous finding of fact, made in a perverse or capricious manner. An omission (such as a failure to report, or inaction upon receipt of a direct deposit) does not constitute a "representation"; rather, a representation requires action, whether in verbal, written, visual, or other form. It is uncontroversial that the Appellant received her benefits by direct deposit, requiring no action on her part. It is also uncontroversial that the Appellant was not required to, and did not, complete biweekly reports. She did not make any representations with respect to her earnings between February and April 2015, and consequently there could not have been any false representations. There has been no suggestion that the Appellant's original estimate of the length of her parental leave in April 2014 was knowingly false, at that time. In my view, there was no evidence before the General Division that could possibly support the finding of false representations. That finding of fact was material to the decision, erroneous, and made in a perverse manner, i.e. contrary to the evidence; in other words, it was an erroneous finding of fact as contemplated by s. 58(1)(*c*) of the DESDA. The Respondent's representative concedes that there were no representations in the circumstances of this appeal, and agrees that s. 38(1)(*a*) was not applicable on the facts. She concedes that a reviewable error was made by the General Division.

[14] Pursuant to s. 59 of the DESDA, I may (among other things) give the decision that the General Division should have given. Both parties have agreed that this is appropriate in the circumstances of this appeal.

[15] It is common ground that, in the absence of false or misleading representation, s. 38(1)(*a*) cannot apply. At the hearing of this appeal, the Respondent's representative submitted that the Appellant's penalty was, or ought to have been, imposed pursuant to s. 38(1)(*e*) of the Act, and that no other penalty provision applies. The relevant paragraph is restated here for ease of convenience:

> (e) being the payee of a special warrant, knowingly negotiated or attempted to negotiate it for benefits to which the claimant was not entitled;

[16] The Respondent's representative noted, correctly, that the Appellant was the payee of a special warrant. While the terminology may be confusing to a layperson, s. 77 of the Act explains that Employment Insurance benefits are "paid by special warrants drawn on the Receiver General" and issued electronically or by cheque.

[17] The Respondent's representative further relied upon Employment and Social Development Canada's reference tool, the *Digest of Benefit Entitlement Principles* (Digest), for her position that it does not matter whether a warrant is issued by cheque or is deposited directly into a claimant's account. Chapters 18.4.4.5 and 18.4.4.6 of the Digest include the following direction:

> This is the logic by which the Commission establishes misrepresentation on a no card penalty:
>
> EIA 38(1)(e) defines the act of being the payee of a special warrant, knowingly negotiated and to which the claimant was not entitled as an act to which a penalty applies;
>
> EIA 77(2) links all payments made from the EI fund, by warrant or electronic transfer of funds, to the definition of a special warrant; and
>
> Even if the claimant is using the direct deposit service, the act of accepting the payment can be defined as knowingly accepting a payment to which there was no entitlement.
>
> Each direct deposit for a one or two week payment constitutes one act of misrepresentation for the purposes of establishing the legal validation amount.
>
> […]
>
> Cashing a warrant means that a claimant has accepted the payment of Employment Insurance benefits. It does not matter whether the warrant is issued by cheque or is deposited directly into the claimant's account. Under EIA 38(1)(e), the Commission can count every warrant that a claimant has accepted as one count of misrepresentation, as long as the facts show that the claimant understood that he or she had no right to receive that payment.

[18] The author of the Digest thereby equates "knowingly accepting a payment" by direct deposit with "knowingly negotiated a payment."[2] I disagree: "negotiating" a warrant requires action rather than inaction, and likely refers to the cashing of a cheque. More importantly, the Federal Court of Appeal also disagrees with the Digest interpretation,[3] as set out in *Canada (Attorney General) v. Tamber*, 2009 FCA 351:

> [3] However, the Umpire made no error when he held that the infractions alleged to have been committed pursuant to paragraphs 38(1)(a) or (e) of the Act, based on the allegation that the claimant made misrepresentations by reference to the direct deposits, had not been established before the Board of Referees.
>
> [4] In particular, we are of the view that **the direct deposit of the benefits in the claimant's account cannot under any logic allow for the conclusion that the claimant comes within the four corners of paragraph 38(1)(e)**.
>
> [emphasis added]

[19] I gave the parties the opportunity to provide submissions with respect to *Tamber*, and, as a result, the Commission has now conceded this point. I am bound by the Federal Court of Appeal's decision in *Tamber*, and it is determinative of the balance of this appeal. There is no basis upon which a penalty could have been imposed upon the Appellant under s. 38(1)(*e*), since the payments in February, March and April 2015 were received by direct deposit.

[20] In the result, the penalty imposed upon the Appellant in October 2016, whether intended to have been imposed under ss. 38(1)(*a*) or (*e*), must be rescinded. Pursuant to s. 7.1 of the Act, a violation follows the imposition of a penalty or the finding of guilt in respect of certain offences. Consequently, having rescinded the penalty, the notice of violation must also be rescinded.

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[2] The Digest author also characterizes the acceptance of a direct deposit as a "misrepresentation" (even though referring to a penalty under s. 38(1)(*e*)), presumably contributing to the confusion with respect to the determination of a "representation" in the reporting-exemption situation.

[3] There is no mention of *Tamber* in Chapter 18 of the Digest, and it is unclear when 18.4.4.5 and 18.4.4.6 were written.

[21] I emphasize that the rescission of the Appellant's penalty and violation flows from the correct application of ss. 38(1)(*a*) and (*e*) as written. This decision in no way condones the Appellant's lengthy period of inaction (after her initial attempts) with respect to benefits received to which she was not entitled.

DISPOSITION

[22] The appeal is allowed. The July 2017 decision of the General Division is rescinded, and the following decision is substituted therefor:

> The penalty imposed upon the Appellant in October 2016, and amended in November 2016, is rescinded. The corresponding notice of violation issued in October 2016, and confirmed in November 2016, is rescinded.

Shirley Netten
Member, Appeal Division