Federal Court  Cour fédérale

Date: 20160502

Docket: T-1391-15

Citation: 2016 FC 482

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, May 2, 2016

PRESENT: The Honourable Mr. Justice Martineau

BETWEEN:

MOHAMED EL HADDADI

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] The applicant is seeking the setting aside of a decision made by the Social Security Tribunal Appeal Division (SST-AD) on July 16, 2015, in which he was refused leave to appeal a decision made by the Social Security Tribunal General Division (SST-GD). The SST-AD determined that the appeal in question had no reasonable chance of success, which the applicant is contesting today before this Court. He would therefore like to have the case remitted to the SST-AD for redetermination.

[2] The applicant is an apprentice plumber who received Employment Insurance (EI) benefits during an initial period beginning on July 22, 2012, and a second period beginning on July 21, 2013. On March 27, 2014, the Canada Employment Insurance Commission (Commission) determined that the applicant should not have received benefits for the periods spanning February 26, 2013 to April 7, 2013, and October 3, 2013, to December 23, 2013, because he was absent from Canada. The Commission ordered the applicant to pay back an overpayment of $9,747 and imposed two penalties—corresponding with each period of absence from Canada—totalling $4,874 (the penalty). On January 26, 2015, in response to a request for reconsideration, the Commission reduced the amount of the penalty by half. The applicant appealed to the SST-GD.

[3] Before the SST-GD, the applicant did not contest the fact that he was in Morocco during the two periods of absence in question. Claimants must, however, report any absences from Canada to Service Canada. Although the applicant was in Morocco from February 18, 2013, to April 7, 2013, and from September 25, 2013, to December 23, 2013, he systematically replied "no" (11 times) to the following question on the EI application form: "Were you outside Canada between Monday and Friday during the period of this report?" The applicant justifies his repeated failure to report his absences on the grounds that he misunderstood the question he was asked, because [TRANSLATION] "I thought instead [sic] that you were asking me if I had worked outside of Canada at [sic] that time."

[4] On June 4, 2015, the SST-GD maintained the Commission's reconsideration decision. The SST-GD concluded that the applicant was ineligible for EI benefits during his prolonged absences from Canada and that there was no need to modify the penalty imposed by the Commission. In that regard, the SST-GD noted in its decision:

> [TRANSLATION]
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> At the hearing, the claimant indicated that he had not read the "rights and responsibilities" section when he submitted his Employment Insurance application. That section clearly indicates that the claimant must "report any absences, either from your area of residence or from Canada" (GC-15-748/p. GD3-10), and the claimant attested that he had read and understood his rights and responsibilities (GE-15-748/p. GD3-12). The claimant also indicated that this was not his first Employment Insurance application. Lastly, the claimant indicated that he had not read the questions when he submitted his reports since one word identifies each of the sections where a response is required, and he knows that the answer is "no" to all the questions except the one about availability, to which he must answer "yes." The question on the claimant reports reads: "Were you outside Canada between Monday and Friday during the period of this report?"
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> In *Purcell*, the Court indicated that "in *Gates*, the Court also referred to the jurisprudence developed by Umpires respecting the burden of proof. According to that jurisprudence, the initial onus is on the Commission to prove that a claimant knowingly made a false or misleading statement. Once it appears from the evidence, however, that a claimant has wrongly answered a very simple question or questions on a report card, the burden shifts to the claimant to explain why the incorrect answers were given. Accepting this alternative approach, Linden J.A. went on to explain at page 22:
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> > . . . but the explanation offered may be readily acceptable. It depends on the evidence, the circumstances and the fact-finder's determination on the basis thereof. (See for example *Zysman v. Canada (Employment and Immigration Commission)*, {[1994] F.C.J. N. 1357 (C.A.) (QL)]. Thus, the fact-finder must decide on the balance of probabilities that the claimant subjectively knew that the report was false in order to penalize him or her. It is possible, though unlikely, for a claimant to

> be truly ignorant of some fact, even a simple one, when nearly everyone would know it."(*Canada (Attorney General) v. Purcell*, 1996 FCA A-694-94).

The Court is of the opinion that the claimant cannot simply state that he did not read his rights and responsibilities, that he did not read the questions when he prepared his report, or that he was unaware that he had to report any absences from Canada, but rather believed that he had to report his situation if he was working outside of Canada. The claimant says that he is an immigrant and as such does not understand all the intricacies of the *Employment Insurance Act*. The claimant, however, did not try to obtain information on that subject nor did he bother to read the information provided when he was completing his Employment Insurance application.

As a result, based on the evidence and the arguments made, the Court is of the opinion that, based on the balance of probabilities, the claimant subjectively knew that the report was false or misleading. Consequently, the Court finds that a penalty may be issued.

In *Uppal*, the Court established that "it is trite law that an Umpire cannot interfere with the quantum of a penalty unless it can be shown that the Commission exercised its discretionary power in a non-judicial manner or acted in a perverse or capricious manner without regard to the material before it" (*Canada (Attorney General) v. Uppal*, FCA #A-341-08).

The Commission took account of the fact that the claimant has financial problems and is bankrupt. As a result, the Commission reduced the penalty imposed to 25% of the overpayment amount for the acts or omissions, instead of maintaining the 50% penalty that had initially been imposed.

The Court is therefore satisfied that the Commission exercised its discretionary power in a judicial manner. Consequently, the Court cannot modify the amount of the penalty established by the Commission.

[5] On July 16, 2015, the SST-AD refused the claimant leave to appeal the decision of the SST-GD because his appeal had no reasonable chance of success. The SST-AD is of the opinion that the claimant did not cite any of the grounds of appeal stipulated in subsection 58(1) of the *Department of Employment and Social Development Act*, SC 2005, c. 34 [the Act], namely that the General Division failed to observe a principle of natural justice, erred in law or based its decision on an erroneous finding of fact.

[6] Subsections 58(1) and (2) of the Act stipulate:

58 (1) The only grounds of appeal are that	**58 (1)** Les seuls moyens d'appel sont les suivants :
(a) the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;	a) la division générale n'a pas observé un principe de justice naturelle ou a autrement excédé ou refusé d'exercer sa compétence;
(b) the General Division erred in law in making its decision, whether or not the error appears on the face of the record; or	b) elle a rendu une décision entachée d'une erreur de droit, que l'erreur ressorte ou non à la lecture du dossier;
(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.	c) elle a fondé sa décision sur une conclusion de fait erronée, tirée de façon abusive ou arbitraire ou sans tenir compte des éléments portés à sa connaissance.
(2) Leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success.	**(2)** La division d'appel rejette la demande de permission d'en appeler si elle est convaincue que l'appel n'a aucune chance raisonnable de succès.

[7] Before this Court, the claimant has reiterated that he made an honest mistake when he completed his EI report, that he is not a fraudster and that he had always intended to find a job in Canada during the periods he spent in Morocco:

> [TRANSLATION]
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> 9. The issue in this case originates with a bolded title written as follows: **Outside Canada**, so every time that I was [sic] filling out my Employment Insurance report which I filled out quickly as usual and as soon as I got to that question, I quickly read only the **Outside Canada** title in bold and I always answered no to that question because I thought that Employment Insurance wanted to know whether I was working outside of Canada.

[8] The respondent argues that the decision of the SST-AD is reasonable and an acceptable outcome, given the evidence on record and applicable law. Claimants outside of Canada are not entitled to receive benefits—other than the exceptions stipulated in the Regulations—and should not be able to shirk their responsibilities to report absences simply by claiming ignorance or claiming that they did not read or understand the question that was asked on the form. Furthermore, in the EI application duly completed by the applicant—who declared that he had read, understood and accepted his rights and responsibilities—it is stipulated that "you must report any absences from Canada" and that "if you knowingly withhold information or make a false or misleading statement, you have committed an act or omission that could result in an overpayment of benefits as well as severe penalties or prosecution."

[9] The reasonableness standard therefore applies to any review of a decision made by the SST-AD to refuse leave to appeal a decision made by the SST-GD (*Canada (Attorney General) v. Hines*, 2016 FC 112, at paragraph 28; *Tracey v. Canada (Attorney General)*, 2015 FC 1300, at

paragraphs 17, 21-22). This application for judicial review must therefore be dismissed. The applicant has misconceptions about the nature of this judicial review, as well as the limited scope of the powers of the SST-AD, the mandate of which is not to review all the evidence but to determine whether the SST-GD violated natural justice, erred in law or based its decision on an erroneous finding of fact. Both during his appeal before the SST-AD and before this Court today, the applicant simply reiterated an explanation that had already been considered and rejected by the SST-AD and the Commission, namely his claim that he had not understood that he had to report his absences from Canada.

[10] Subsection 37(b) of the *Employment Insurance Act*, SC 1996, c. 23, is clear: "Except as may otherwise be prescribed, a claimant is not entitled to receive benefits for any period during which the claimant . . . is not in Canada." However, section 55 of the *Employment Insurance Regulations*, SOR/96-332, lists an exception in cases where the claimant is outside Canada "for a period of not more than seven consecutive days to visit a member of the claimant's immediate family who is seriously ill or injured." In this case, the SST-GD took account of the fact that the applicant went to Morocco to visit his mother who is seriously ill. The SST-GD did note, however, that [TRANSLATION] "the Commission took this situation into consideration because it indicated that it granted the claimant a period of seven days for each of his trips to visit his ill mother." The conclusions of the Commission were not seriously contested by the applicant.

[11] Furthermore, pursuant to paragraph 38(1)(*a*) of the *Employment Insurance Act*, the Commission may impose on a claimant a penalty if the Commission becomes aware of the facts that in its opinion establish that the claimant has in relation to a claim for benefits, made a

representation that the claimant knew was false or misleading. The Commission must be satisfied not only that the representation is false or misleading, but also that the claimant knew it was. Therefore, based on a balance of probabilities, the claimant must have known that he was making a false or misleading representation (*Mootoo v. Canada (Minister of Human Resources Development)*, 2003 FCA 206). The SST-GD was able to use the evidence on the record to infer that the applicant knew that he was making a false or misleading representation and fully justified its decision not to modify the penalty imposed by the Commission. The applicant did not seriously contest the reasoning behind the SST-GD's rejecting the applicant's explanation.

[12] The conclusion reached by the SST-GD that the applicant's appeal had no reasonable chance of success was based on a review of the record and an assessment of the merit of the applicant's claims. The applicant did not claim that he was prevented from presenting his case or that the SST-GD erred in law in its decision. The only remaining ground for appeal is based on an "erroneous finding of fact that [the SST-GD] made in a perverse or capricious manner or without regard for the material before it." The fundamental problem, however, is that the applicant did not demonstrate how the finding of fact was erroneous or perverse. I therefore see no amenable, reviewable error that would justify this Court's allowing this application for judicial review. The SST-GD did not have to review all of the evidence, but rather had to determine only whether the applicant's appeal had a reasonable chance of success, given the grounds stipulated in his application for leave to appeal. Even if the applicant does not agree with the result, the decision of the SST-AD to refuse leave to appeal falls within the range of possible, acceptable outcomes which are defensible in respect of the facts and the law (*Dunsmuir v. New Brunswick*, 2008 SCC 9, at paragraph 47).

[13] The application for judicial review is dismissed without costs.

JUDGEMENT

THE COURT'S JUDGEMENT is that the application for judicial review be dismissed without costs.

"Luc Martineau"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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