Federal Court  Cour fédérale

Date: 20190418

Docket: T-1561-17

Citation: 2019 FC 499

Ottawa, Ontario, April 18, 2019

PRESENT: The Honourable Madam Justice McVeigh

BETWEEN:

AHMED IBRAHIM

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review by Ahmed Ibrahim [the "Applicant"] in respect of a September 19, 2017 decision ["Decision"] of the Social Security Tribunal ["SST"] of Canada Appeal Division ["Appeal Division"]. The Appeal Division denied the Applicant leave to appeal from a Social Security Tribunal General Division ["General Division"] decision on April 28, 2017.

[2] The General Division decision dismissed the Applicant's appeal from a reconsideration decision, finding that the Canada Employment Insurance Commission ["Commission"] did not err in assessing a penalty against the Applicant for knowingly making a false statement to the Commission.

II. Background

[3] The Applicant has represented himself throughout these proceedings.

[4] The Applicant was seasonally employed with the City of Calgary's Finance division as a Labourer Park Maintenance worker. In 2012, 2013, and 2014, the Applicant claimed regular Employment Insurance ["EI"] benefits following separation from his regular seasonal employment with the City of Calgary. Each year, the Applicant renewed his claims for benefits and reported vacation pay.

[5] On November 13, 2015, the Applicant submitted an application to reactivate his benefit period. During the online application process before filling out each report he was asked whether he was receiving other money. On each of these web forms for the following reporting periods, the Applicant answered "No":

i. November 1, 2015-November 14, 2015;
ii. November 15, 2015-November 28, 2015; and
iii. November 29, 2015-December 12, 2015.

[6] However, while the Applicant clicked on the forms to say that he was not receiving any other money, the Applicant in fact received $2399.93 in vacation pay from the City of Calgary as a result of his separation from employment. The Applicant has maintained throughout the process that he inadvertently misclicked on the "No" option each time he filled out the report. On March 4, 2016, the Commission phoned the Applicant. During that phone call, the Applicant confirmed that he received vacation pay from his employer. When asked as to why he did not declare this, the Applicant claimed that he thought this would be done "automatically" when the Record of Employment ["ROE"] from the City of Calgary was sent.

[7] The Commission determined that there was an overpayment of $875.

[8] On May 17, 2016, the Commission determined that the Applicant had knowingly made false or misleading statements by failing to declare his period of employment on his renewal application and by failing to declare his vacation pay on the report.

[9] The Commission noted that the Applicant's full history had been reviewed, and that this was the second incident of improper reporting. The Commission noted that on March 15, 2013, there had been a previous incident of improper reporting. In that situation, they did not levy a monetary fine, but in a letter the Applicant was warned that if there were acts or omissions in the future, prosecution could result.

[10] After a review of all the factors, the Commission imposed a penalty of $875 for two false representations which was 100% of the overpayment value. He was also given a notice of violation that required him to work more hours to qualify for EI benefits in the future.

[11] On June 1, 2016, the Commission received a request for reconsideration of their decision from the Applicant. The only error alleged was the Applicant saying that he disagreed with the decision as it had been done "by error, I did not declare vacation pay".

[12] On September 1, 2016, the Commission issued a letter of reconsideration. This letter stated that the penalty of $875 would be reduced to $656. As well, the Commission reversed their decision that the Applicant would need more insurable hours to qualify for benefits. In arriving at this decision, the Commission noted that the Applicant had "certain language issues" and that he was only contesting the fraudulent aspect because he had no intention to defraud the Commission. Therefore, the Commission considered the language barrier to be a mitigating circumstance and reduced the penalty to 75% of the overpayment.

[13] The Applicant appealed the reconsideration decision to the General Division. A hearing at the General Division occurred on March 22, 2017.

A. *General Division Decision*

[14] During the hearing, the Applicant argued:

i. That he uses his home computer and sometimes when he clicks a button, he incorrectly misclicks.

ii. He had thought that when his employer sent the ROE, that this would constitute the appropriate disclosure; and

iii. That when the Commission contacted him on March 4, 2016, the agent was threatening and was unprofessional.

[15] The General Division examined section 38 of the *Employment Insurance Act*, SC 1996, c 23 ["*EIA*"]. Section 38 of the *EIA* allows the Commission discretion to impose a penalty on a claimant when the Commission becomes aware of facts that in its opinion establish that a claimant made a false or misrepresenting statement.

[16] The General Division held that the onus was on the Commission to prove that a claimant knowingly made the false or misleading statement, at which point the onus shifts to the claimant to provide an explanation for the incorrect information. The General Division found that the Commission made out this onus, as the General Division member found it hard to believe that the Applicant, who had filed claims on a number of occasions in the past, did not know that declaring vacation pay would result in a delay of receiving benefits and that he did not realize he was receiving payments immediately.

[17] The General Division member found that even if she were to accept the Applicant's story that he made a mistake and hit the wrong button on each form, he had a responsibility to review and confirm that the responses provided were true. Had the Applicant done so, he would have caught any mistake he made.

[18] The General Division found, then, that the Applicant knowingly made a false representation to the Commission when he failed to report that he received vacation pay on November 10, 2016.

[19] The General Division found that the Commission had reasonably utilized its discretion in assessing a penalty, and that therefore the General Division could not intervene in the decision, as per *Canada (Attorney General) v Uppal*, 2008 FCA 388.

B. *Appeal Division Decision*

[20] The Applicant applied for leave to appeal the decision to the Appeal Division. On September 19, 2017, the Appeal Division released their Decision which denied leave to appeal.

[21] The Decision began by laying out the law, where in order to obtain leave to appeal, the Applicant must meet the low bar of raising at least one arguable ground on which an appeal might succeed.

[22] Under section 58(1) of the *Department of Employment and Social Development Act*, SC 2005, c 34 [DESDA], the only grounds of appeal are that:

> **(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.

[23] The Appeal Division found that the above could not be established at the leave to appeal stage. The Appeal Division further found that the Applicant did not set out any ground of appeal with a reasonable chance of success, but rather simply repeated his submission that he had previously made to the General Division member, that his false statements were the result of an honest mistake.

[24] In order to ensure that the self-represented litigant was afforded proper procedural fairness, the Appeal Division member sent a letter to the Applicant clearly asking for the Applicant to lay out any grounds of appeal and to provide concrete examples. The Applicant responded once again that he had made an honest mistake.

[25] Therefore, as the Appeal Division member determined that there was no reviewable error under section 58(1) of DESDA, the Appeal Division refused the application for leave to appeal.

III. Style of Cause

[26] The proper Respondent is the Attorney General of Canada, and the style of cause will be amended to replace the current Respondent, as per Rule 303(2) of the *Federal Courts Rules*, SOR/98-106.

IV. Issue

[27] The issue is:

A. Did the Appeal Division err in dismissing the application for leave to appeal the General Division decision?

V. Standard of Review

[28] In *Garvey v Canada (Attorney General),* 2018 FCA 118, Justice Gleason wrote for the Court in examining the case of an applicant seeking to set aside the decision of the SST-Appeal Division. Justice Gleason affirmed that the Appeal Division's Decision may be set aside only if it is unreasonable, "that being the applicable standard of review to be applied by this Court as was held in *Atkinson v. Canada (Attorney General),* 2014 FCA 187 (CanLII) at paras. 24-32".

VI. Relevant Provisions

[29] Relevant provisions are attached as Annex A.

VII. Analysis

[30] The Applicant submits that he did not knowingly make false representations and that there is no "substantial proof that the Applicant had knowingly made false representations". He submits that he repaid the full amount that he was overpaid, and also points towards the fact that his ROE was sent directly by the City of Calgary to Service Canada, which clearly noted that he had received vacation pay. Therefore, he thought they were aware that he had received vacation

pay. For that reason, the Applicant submits that he should not have a penalty imposed on him at all, even though he acknowledged he had already been granted relief in a reduction of the penalty and removal of further sanctions.

[31] The Applicant sought in this application that I remove the penalty of $656. The application will be dismissed for the reasons that follow.

[32] Section 58(2) of DESDA determines that leave to appeal a decision of the General Division may be granted by the Appeal Division only where the appeal has a reasonable chance of success. A reasonable chance of success means having some arguable ground upon which the proposed appeal might succeed.

[33] The EI regime, like our taxation system, is based upon the principle of self-reporting in the provision of benefits under the *EIA*. Innocent but false representations are not subject to penalties.

[34] I also note that the Applicant had been successful in having the fine reduced as well as having the necessity for a longer eligibility period struck. It was hard not to be struck by the Applicant and how troubling this is that he was found to have somehow cheating the system. But the General Division did consider everything in the record.

[35] In the original decision of the Commission dated May 17, 2016 (which was not overturned in reconsideration), the Commission stated that:

> Whenever the Employment Insurance commission determines there is misrepresentation on a claim for Employment Insurance benefits, it reviews the full history of the claim to determine whether this is the first incident of improper reporting or whether there has been previous improper reporting on the file. The number of incidents of improper reporting is a factor used in calculating the penalty amount.
>
> The evidence on your file indicates that this is your second incident of improper reporting or of omitting to provide information. You have one previous incident, which we notified you of in a letter dated March 15, 2013.

[36] This letter and previous incorrect advisement was relied on by the General Division when they imposed a penalty. The General Division considered that the Applicant had previously been warned that if he incurred another violation that he would be subject to a possible prosecution (para 6). The Commission policy regarding the maximum amount of penalty (section 39 of the *EIA*) is $50 for the first; 100% for the second improper reporting and 150% for the third occurrence. The overpayment was calculated to be $875 and the assessment was 100% as this was the second infraction. In the reconsideration, the amount of the penalty was reduced from the maximum to 75% which was $656.

[37] The General Division indicated that the exercise of discretion to reduce the penalty because of possible language barrier was done in a “judicial manner”. I do not disagree that before the Appeal Division there was no reasonable chance of success that an argument regarding the penalty being assessed for more because of it being a second infraction would succeed.

[38] The General Division analysed the timing of the report cards at the end of November and December 2015, and looked at the answers on the report. Each time, when the Applicant was asked if he received any other money, he answered "No". The General Division, in exercising their discretion, felt a penalty was appropriate.

[39] Before the Appeal Division, the Applicant failed to identify an arguable ground of appeal in respect to the decision of the General Division. Instead, he simply repeated his argument that the error was innocent and inadvertent.

[40] The Appeal Division, however, is not entrusted with reweighing the evidence at the leave to appeal stage. Rather, there is a statutory test it must consider, and I find that the Appeal Division properly considered this test. Under the test, leave will be granted only where the appeal has a reasonable chance of success under subsection 58(2) of the DEDSA on one of the three grounds found in subsection 58(1) (see paragraph 23 above).

[41] The jurisprudence supports that the Applicant's explanation of providing incorrect answers as a result of his ignorance that he did not know of the vacation pay is not sufficient to not have sanctions imposed (*Canada v Bellil*, 2017 FCA 104 at para 11). The Commission relied on the objective factors that the Applicant had submitted EI claims for many prior years and had identified his periods of work, pay and vacation pay. As well, the Commission took note of the Applicant's explanation that he misclicked when he checked the "No" button when asked if he received any other money. Checking a computer box once may be explainable, but if checked more than once at different times, objectively, it is less likely to be a misclick.

[42] Further, I find that the Applicant's explanation that the Commission should have known about the vacation pay automatically cannot succeed, as when the record is objectively examined, in the past years the Applicant had always informed the Commission of his vacation pay.

[43] The Applicant does not dispute he received vacation pay. The fact that he did not report the vacation pay to the Commission supports that he knowingly made a false statement to the Commission. This does not identify a ground of appeal under DEDSA, and mere disagreement with the outcome does not meet the test for granting leave.

[44] I find it reasonable finding that the Applicant would have had no reasonable chance of success at the Appeal Division and will dismiss this application.

[45] The Respondent did not seek costs and none are awarded.

JUDGMENT in T-1561-17

THIS COURT'S JUDGMENT is that:

1. The Style of Clause is amended to replace the respondent with the Attorney General of Canada;

2. The application is dismissed;

3. No costs are awarded.

"Glennys L. McVeigh"
Judge

Annex A

Employment Insurance Act (S.C. 1996, c. 23)

Penalties

Penalty for claimants, etc.

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;

(b) being required under this Act or the regulations to provide information, provided information or made a representation that the claimant or other person knew was false or misleading;

(c) knowingly failed to declare to the Commission all or some of the claimant's earnings for a period determined under the regulations for which the claimant claimed benefits;

(d) made a claim or declaration that the claimant or other person knew was false or misleading because of the non-disclosure of facts;

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

(f) knowingly failed to return a special warrant or the amount of the warrant or any excess amount, as required by section 44;

(g) imported or exported a document issued by the Commission, or had it imported or exported, for the purpose of defrauding or

Pénalités

Pénalité : prestataire

38 (1) Lorsqu'elle prend connaissance de faits qui, à son avis, démontrent que le prestataire ou une personne agissant pour son compte a perpétré l'un des actes délictueux suivants, la Commission peut lui infliger une pénalité pour chacun de ces actes :

a) à l'occasion d'une demande de prestations, faire sciemment une déclaration fausse ou trompeuse;

b) étant requis en vertu de la présente loi ou des règlements de fournir des renseignements, faire une déclaration ou fournir un renseignement qu'on sait être faux ou trompeurs;

c) omettre sciemment de déclarer à la Commission tout ou partie de la rémunération reçue à l'égard de la période déterminée conformément aux règlements pour laquelle il a demandé des prestations;

d) faire une demande ou une déclaration que, en raison de la dissimulation de certains faits, l'on sait être fausse ou trompeuse;

e) sciemment négocier ou tenter de négocier un mandat spécial établi à son nom pour des prestations au bénéfice desquelles on n'est pas admissible;

f) omettre sciemment de renvoyer un mandat spécial ou d'en restituer le montant ou la partie excédentaire comme le requiert l'article 44;

g) dans l'intention de léser ou de tromper la Commission, importer ou exporter, ou faire importer ou exporter, un document délivré

deceiving the Commission; or

(h) participated in, assented to or acquiesced in an act or omission mentioned in paragraphs (a) to (g).

Maximum penalty

(2) The Commission may set the amount of the penalty for each act or omission at not more than

(a) three times the claimant's rate of weekly benefits;

(b) if the penalty is imposed under paragraph (1)(c),

(i) three times the amount of the deduction from the claimant's benefits under subsection 19(3), and

(ii) three times the benefits that would have been paid to the claimant for the period mentioned in that paragraph if the deduction had not been made under subsection 19(3) or the claimant had not been disentitled or disqualified from receiving benefits; or

(c) three times the maximum rate of weekly benefits in effect when the act or omission occurred, if no benefit period was established.

par elle;

h) participer, consentir ou acquiescer à la perpétration d'un acte délictueux visé à l'un ou l'autre des alinéas a) à g).

Maximum

(2) La pénalité que la Commission peut infliger pour chaque acte délictueux ne dépasse pas :

a) soit le triple du taux de prestations hebdomadaires du prestataire;

b) soit, si cette pénalité est imposée au titre de l'alinéa (1)c), le triple :

(i) du montant dont les prestations sont déduites au titre du paragraphe 19(3),

(ii) du montant des prestations auxquelles le prestataire aurait eu droit pour la période en cause, n'eût été la déduction faite au titre du paragraphe 19(3) ou l'inadmissibilité ou l'exclusion dont il a fait l'objet;

c) soit, lorsque la période de prestations du prestataire n'a pas été établie, le triple du taux de prestations hebdomadaires maximal en vigueur au moment de la perpétration de l'acte délictueux.

Department of Employment and Social Development Act (S.C. 2005, c. 34)

Grounds of appeal

58 (1) The only grounds of appeal are that

(a) the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to

Moyens d'appel

58 (1) Les seuls moyens d'appel sont les suivants :

a) la division générale n'a pas observé un principe de justice naturelle ou a autrement excédé ou refusé d'exercer sa compétence;

b) elle a rendu une décision entachée d'une

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.

Criteria

(2) Leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success.

erreur de droit, que l’erreur ressorte ou non à la lecture du dossier;

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.

Critère

(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.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1561-17
STYLE OF CAUSE:	AHMED IBRAHIM v CANADA EMPLOYMENT INSURANCE COMMISSION
PLACE OF HEARING:	CALGARY, ALBERTA
DATE OF HEARING:	FEBRUARY 7, 2019
JUDGMENT AND REASONS:	MCVEIGH J.
DATED:	APRIL 18, 2019

APPEARANCES:

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Ms. Sandra Doucette	FOR THE RESPONDENT

SOLICITORS OF RECORD:

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