Federal Court Cour fédérale

**Date: 20220224**

**Docket: T-320-21**

**Citation: 2022 FC 253**

**Ottawa, Ontario, February 24, 2022**

**PRESENT: The Honourable Madam Justice McVeigh**

**BETWEEN:**

**SANJAY MAHESHWARI**

**Applicant**

**and**

**ATTORNEY GENERAL OF CANADA**

**Respondent**

# JUDGMENT AND REASONS

## I. Introduction

[1] This is an application for judicial review of a decision by the Canada Employment Insurance Commission ("the Commission") not to write off the Applicant's employment insurance ("EI") debt because it arose from misrepresentations on his EI application and reporting forms. The decision-maker found that the text of section 56 of the *Employment*

*Insurance Regulations* (SOR/96-332) [*EI Regulations*] did not afford them the discretion to even consider whether such a write off was appropriate.

[2] This is a difficult case from a human perspective, given his submissions on his personal circumstances. However, from a legal perspective, I cannot grant this judicial review, and I find that the decision was reasonable given the evidence before them at the time of the decision as well as the legislative constraints.

## II. Background

[3] In August 2014, his then employer laid off the Applicant. That same month, the Applicant applied for EI benefits, indicating on his application that he was not self-employed and was unemployed. He received these benefits from November 2014 until July 2015.

[4] The Applicant states that, after losing his job he hoped to use his engineering experience with his own business to earn an income in order to support his family. To this effect, the Applicant registered a business number in hopes of striking out as his own business. However, he states that he encountered difficulty in his self-employment because of downturns in market conditions pertaining to oil and gas. The Commission at the time they granted his unemployment application did not know about the Applicant's application for a business number and benefits began to flow to the Applicant. The benefits were paid because he self-reported to the Commission that between December 2014 and July 2015, he was unemployed and not self-employed. In May 2018, the Commission received information from the Canada Revenue Agency ("CRA") that the Applicant had – in December 2014 – made the aforementioned

application for a business number. As a result, the Commission requested additional information. In response, the Applicant provided verbal as well as a letter and supporting materials, which advised the Commission that he had begun operating a business in December 2014. He indicated that he incorporated with his wife but that he had no employees other than himself. He admitted to this misrepresentation of his employment status whilst receiving EI benefits.

[5] As a result, the Commission determined that the Applicant was not eligible for the EI benefits he had received from November 2014 to July 2015. This was because he was self-employed, rather than unemployed, as he indicated on his application for EI benefits. The Applicant received an "overpayment" of EI of $16,345, which lead to a debt on the part of the Applicant ("the Overpayment Decision"). In oral argument, the Applicant testified that at least two (2) times in this period, his business was contracted by other companies to provide services that only lasted a short period of time and for the past 2 years, he has been unemployed as a result of the COVID-19 pandemic.

[6] In response to the Overpayment Decision, the Applicant requested that the Commission write off this debt because he said his company never made money and he has applied for a number of jobs but is still unemployed. In their decision, communicated to the Applicant on March 13, 2020 and further communicated on May 28, 2020, the Commission concluded that they are unable to grant the Applicant's request, as none of the conditions by which an overpayment can be written off had been met. These conditions are set out in ss. 56(1) and 56(2) of the *EI Regulations*.

## III. Issue

[7] The sole issue in this case is whether the Overpayment Decision was reasonable.

## IV. Standard of Review

[8] As set out by the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], at paragraph 23, "where a court reviews the merits of an administrative decision … the starting point for the analysis is a presumption that the legislature intended the standard of review to be reasonableness." I see no reason in this case to deviate from this general presumption. As such, the standard of review in this case is reasonableness.

[9] In conducting reasonableness review, a court is to begin with the principle of judicial restraint and respect for the distinct role of administrative decision-makers (*Vavilov* at para 13). When conducting reasonableness review, the Court does not conduct a *de novo* analysis or attempt to decide the issue itself (*Vavilov* at para 83). Rather, it starts with the reasons of the administrative decision-maker and assesses whether the decision is reasonable in outcome and process, considered in relation to the factual and legal constraints that bear on the decision (*Vavilov* at paras 81, 83, 87, 99).

[10] A reasonable decision is one that is justified, transparent, and intelligible to the individuals subject to it, reflecting "an internally coherent and rational chain of analysis" when

read as a whole and taking into account the administrative setting, the record before the decision-maker, and the submissions of the parties (*Vavilov* at paras 81, 85, 91, 94-96, 99, 127-128).

## V. Analysis

### A. *Preliminary Issues*

[11] The Respondent requested that the Style of Cause be amended to have the Respondent the Attorney General of Canada. I agree.

[12] The Respondent submitted that much of pages 20-79, 84, and 86-94 of the Applicant's Application Record is new evidence that was not before the decision-maker and thus should not be considered on Judicial Review (*Sharma v Canada (Attorney General)*, 2018 FCA 48 at para 7; *Bernard v Canada (Revenue Agency)*, 2015 FCA 263).

[13] The Applicant submits that the documents are relevant and should be considered.

[14] I will not consider the noted documents, as they were not before the decision-maker and do not meet the test of being an exemption to the hard and fast rule.

B. *Legislative Framework*

[15] Parliament has legislation in which the Employment Insurance Commission can write off a debt, such as the one at issue in the instant case. Such circumstances are outlined in s. 56(1) of the *EI Regulations*, which reads as follows:

> 56 (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;
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> (b) the debtor is deceased;
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> (c) the debtor is a discharged bankrupt;
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> (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.
>
> (Emphasis added)

[16] S. 56(2) of the *EI Regulations* also contains certain provisions whereby benefits received more than twelve months before the debt is established may be written off:

> 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.
>
> [Emphasis added]

[17] Under s. 56, there is a two-step process, the first step determining eligibility within the ambit of the section, and the second step being whether the discretion will be exercised to write

off the matter. As set out in *Bernatchez v Canada (Attorney General)*, 2013 FC 111 [*Bernatchez*], quoting Justice Lemieux in *Allard v Canada (Attorney General)*, 2001 FCT 789 at paragraphs 30 and 46 [*Allard*], "the circumstances set out in section 56 of the Regulations are conditions precedent to the exercise of the Commission's discretion; **if the applicant fails to establish that he meets one of the conditions precedent**, the Commission will not be able to exercise any discretion" [emphasis added].

[18] The onus is on the Applicant to provide the basis for meeting step one. I note the closing remarks of Mr. Justice Harrington in *Desrosiers v Canada (Attorney General)*, 2007 FC 769 at paragraph 33, that "writing off a debt is an exceptional mechanism that is intended for very specific cases, considering that the amounts in question belong to the common good."

[19] Thus, this analysis begins with the question of whether the circumstances set out in s. 56(1) or s. 56(2) apply in the instant case. The Commission concluded that they did not and I must determine whether this was reasonable.

[20] The Applicant at the hearing submitted that he fits within the hardship section (s. 56(1)(f)(ii)). Turning first to s. 56(1), and in light of the statutory framework, I will consider whether any of these paragraphs ought reasonably to apply.

[21] The amount of the debt is more than $100 and the debtor is not dead so paragraphs (a) and (b) do not apply. The debtor did not allege to be bankrupt in his materials before the decision-maker so paragraphs (c) and (d) do not apply.

[22] With regards to s. 56(1)e, the overpayment clearly did arise 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. So s. (e) i and ii cannot be used because there was an misrepresentation, or false or misleading declaration or representation, made by the Applicant. In this case it was his indication in the relevant EI forms that he was unemployed, and was not self-employed, when in fact he was self-employed with his start up business, "Pertplan Management Controlin" (page 103 of the Certified Tribunal Record lists the company as being spelt this way).

[23] The Applicant indicated to the decision-maker that his company made no money, and that he had to invest $40,000 in it. But he did admit that he had two contracts – which turned out to be short-term – during the time he received benefits. One contract turned out to be short term because he was laid off along with several hundred other people, given that the pipeline project did not proceed. He had anticipated it may be short term, and at the hearing mentioned another short-term employment though the circumstances of this project are unclear; however, the specifics details are immaterial to this analysis. But in order to be considered under (e) i and ii those circumstances are immaterial given he made a misrepresentation, or a false or misleading statement that he was not self-employed while he in fact was, and received employment insurance. The Applicant at the hearing indicated he is an immigrant and did not know how it worked, but that is not a factor that is considered at step one. This contravenes paragraph (e), and it is irrelevant whether the Applicant knew it was false or misleading. It is clear that paragraph (e) does not apply to allow the write off.

[24] Finally, regarding paragraph (f) though there is at least some argument that the Applicant's financial circumstances may be dire enough to engage this as he says it has been suffered hardship from not having a job. However, there was no financial evidence before the Commission regarding his hardship or any other evidence to fit within this section. Based on the evidence before the decision-maker, it was reasonable for the Commission to conclude that s. 56(1)(f)(ii) did not apply in the instant case on the material then before the decision-maker.

[25] Next, I turn to s. 56(2). The relevant time in which the EI payments were made to the Applicant was November 2014 – July 2015, while the Commission was only alerted as to potential issues with the Applicant's claim in May 2018. Thus, in line with s. 56(2), the benefits were received well over twelve months before the debt was established. An examination of both paragraphs given the "and" linking (a) and (b) of s. 56(2) show that it is not violated as paragraph (a) reads similarly to s. 56(1)(e), and because the overpayment stems from the Applicant's misrepresentation or misstatement regarding his employment status the section cannot apply.

[26] Barring situations – such as those indicated in ss. 56(1) and (2) – indicating mistake by the Commission, or other unique, relevant, and pressing circumstances, it would be difficult to conclude that the Commission's decision not to exercise their discretion was unreasonable.

[27] Having established that neither s. 56(1) nor s. 56(2) apply in the instant case, the conditions precedent for the Commission even having the discretion to consider whether the

write off the debt resulting from the overpayment are not met (*Bernatchez* at para 30, and *Allard* at paras 30 and 46).

[28] In light of the Applicant's circumstances, the Court did canvas the Respondent, who confirmed that other options – such as a payment plan – or another application with evidence focused on s. 56 (1) f(ii) **may** still be open to the Applicant if he chooses.

[29] The Respondent did not seek costs and none are ordered.

**JUDGMENT IN T-320-21**

**THIS COURT'S JUDGMENT is that:**

1. The Style of Cause be amended and the Respondent should be substituted to be the "Attorney General of Canada";

2. The matter is dismissed;

3. No costs are awarded.

"Glennys L. McVeigh"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | T-320-21 |
| **STYLE OF CAUSE:** | SANJAY MAHESHWARI v ATTORNEY GENERAL OF CANADA |
| **PLACE OF HEARING:** | HELD BY VIDEOCONFERENCE |
| **DATE OF HEARING:** | FEBRUARY 17, 2022 |
| **JUDGMENT AND REASONS:** | MCVEIGH J. |
| **DATED:** | FEBRUARY 24, 2022 |

**APPEARANCES:**

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| Sanjay Maheshwari | FOR THE APPLICANT, ON HIS OWN BEHALF |
| Ian McRobbie | FOR THE RESPONDENT |

**SOLICITORS OF RECORD:**

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| Attorney General of Canada<br>Gatineau, Quebec | FOR THE RESPONDENT |