

Federal Court



Cour fédérale

Date: 20230310

Docket: T-1425-22

Citation: 2023 FC 331

Calgary, Alberta, March 10, 2023

PRESENT: The Honourable Madam Justice Aylen

BETWEEN:

GIANNINA VELASCO

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant seeks judicial review of a decision of the Canada Employment Insurance Commission [Commission] dated June 13, 2022 [Decision], in which the Commission held that it did not have the authority to make a determination of the Applicant's request for reconsideration of a decision of the Commission. The Commission had issued a Notice of Debt to the Applicant regarding an asserted overpayment of Emergency Response Benefits [ERB].

[2] For the reasons that follow, I find that the decision of the Commission is unreasonable and accordingly, the application for judicial review shall be granted.

II. Background and Decision at Issue

[3] The Applicant filed a claim for Employment Insurance regular benefits following her last day of work on March 17, 2020 due to a shortage of work.

[4] The Commission established the claim as Employment Insurance (EI) ERB commencing as of March 15, 2020. The Applicant received an advance payment of \$2,000.00 in EI ERB on April 6, 2020, followed by an additional seven weeks of EI ERB covering the period March 15 to June 14, 2020, for a total of 11 weeks of compensation.

[5] The Commission ultimately determined that, based on the Applicant's earnings, the Applicant was, in fact, only entitled to seven weeks of EI ERB. As the Applicant did not collect EI ERB for a lengthy period of time, the Commission was unable to recover the advance payment from future weeks of benefits. Accordingly, on April 5, 2022, the Commission sent a Notice of Debt to the Applicant, advising of the overpayment and requesting repayment of the \$2,000.00 advance.

[6] On April 12, 2022, the Applicant contacted the Commission for information regarding the Notice of Debt and was advised of the right to request reconsideration.

[7] On April 28, 2022, the Applicant submitted a completed “Request for Reconsideration of an Employment Insurance (EI) Decision” form. The Employment Insurance decision at issue is described as “the \$2,000 that they’re asking to pay back”. The Applicant stated that the reason for the request for reconsideration was as follows:

In 2020 I was working as a cleaner \$16 hourly. The gym (YMCA) had to close because of the pandemic. I applied for EI when I got laid off, I was more than grateful to have received this to pay food, rent and other expenses. I worked very hard to find work and not depend on government and risk myself to find jobs cleaning during the worst times of the Pandemic, under the cleaning business I opened. If it wasn’t for the money I received from EI I wouldn’t have been able to support the basic expenses such as food, health, etc. I never asked the government to send me extra of what I needed, please reconsider my request in not having to give back the help that I received when I needed the most. I look forward to your decision.

[8] By letter dated June 13, 2022, the Commission advised the Applicant:

We received your request for reconsideration on May 5, 2022.

The Employment Insurance Commission cannot follow through with this request for reconsideration because we do not have authority to reconsider the issue. The authority to reconsider the payment of debt falls within the jurisdiction of the Canada Revenue Agency. In this instance, you were paid Emergency Response Benefits (ERB) between March 15, 2020 until June 14, 2020, totalling 7 weeks of benefits, your earnings reported put you over the earnings threshold for eligibility to benefits during some of those weeks. On April 6, 2020 you received a \$2000 advance payment of benefits, equivalent to 4 weeks. The total you were paid represents 11 weeks of benefits, 4 more than your entitlement. The advance payment was unable to be recovered from future weeks of benefits which is why there is an overpayment on your file.

[9] On July 11, 2022, the Applicant commenced this application for judicial review, naming the Canada Revenue Agency as the Respondent. The Applicant pleads that the application is in

respect of the \$2,000.00 ERB that she received on April 6, 2020 and that the Commission is now asking to be repaid. She identifies the decision at issue as the decision made by the Commission requiring repayment of the ERB.

[10] By way of relief, the Applicant seeks: (a) an order declaring that asking the Applicant to pay back the ERB is unreasonable and unlawful; (b) an order declaring that the Commission, the Canada Revenue Agency and Employment and Social Development Canada failed to notify the Applicant that the ERB was subject to be paid back for two years; and (c) an order declaring that the Applicant is not obligated to pay back the ERB.

III. Preliminary Issues

[11] In their memorandum of fact and law, the Respondent requests an order amending the style of cause to name the Attorney General of Canada as the respondent. Pursuant to Rule 303 of the *Federal Courts Rules*, the appropriate respondent in this application is the Attorney General of Canada. The style of cause shall be amended accordingly.

IV. Analysis

[12] The sole issue for determination is whether the decision of the Commission was reasonable.

[13] The Respondent submits, and I agree, that when a court reviews the merits of an administrative decision, the presumptive standard of review is reasonableness. No exceptions to

that presumption have been raised nor apply [see *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 23, 25].

[14] In *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67, Justice Rowe explained what is required for a reasonable decision and what is required of a Court reviewing on the reasonableness standard. He stated:

[31] A reasonable decision is “one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker” (*Vavilov*, at para. 85). Accordingly, when conducting reasonableness review “[a] reviewing court must begin its inquiry into the reasonableness of a decision by examining the reasons provided with ‘respectful attention’ and seeking to understand the reasoning process followed by the decision maker to arrive at [the] conclusion” (*Vavilov*, at para. 84, quoting *Dunsmuir*, at para. 48). The reasons should be read holistically and contextually in order to understand “the basis on which a decision was made” (*Vavilov*, at para. 97, citing *Newfoundland Nurses*).

[32] A reviewing court should consider whether the decision as a whole is reasonable: “...what is reasonable in a given situation will always depend on the constraints imposed by the legal and factual context of the particular decision under review” (*Vavilov*, at para. 90). The reviewing court must ask “whether the decision bears the hallmarks of reasonableness – justification, transparency and intelligibility – and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision” (*Vavilov*, at para. 99, citing *Dunsmuir*, at paras. 47 and 74, and *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5, at para. 13).

[33] Under reasonableness review, “[t]he burden is on the party challenging the decision to show that it is unreasonable” (*Vavilov*, at para. 100). The challenging party must satisfy the court “that any shortcomings or flaws relied on ... are sufficiently central or significant to render the decision unreasonable” (*Vavilov*, at para. 100).

[15] Section 52 of the *Employment Insurance Act*, SC 1996, c 23 [Act], grants the Commission jurisdiction to reconsider claims for benefits for a prescribed period of time after the benefits have been paid. It provides:

Reconsideration of claim

52 (1) Despite section 111, but subject to subsection (5), the Commission may reconsider a claim for benefits within 36 months after the benefits have been paid or would have been payable.

Decision

(2) If the Commission decides that a person has received money by way of benefits for which the person was not qualified or to which the person was not entitled, or has not received money for which the person was qualified and to which the person was entitled, the Commission must calculate the amount of the money and notify the claimant of its decision.

Amount repayable

(3) If the Commission decides that a person has received money by way of benefits for which the person was not qualified or to which the person was not entitled,

(a) the amount calculated is repayable under section 43; and

(b) the day that the Commission notifies the person of the amount is, for the purposes of subsection 47(3), the day on which the liability arises.

Amount payable

Nouvel examen de la demande

52 (1) Malgré l'article 111 mais sous réserve du paragraphe (5), la Commission peut, dans les trente-six mois qui suivent le moment où des prestations ont été payées ou sont devenues payables, examiner de nouveau toute demande au sujet de ces prestations.

Décision

(2) Si elle décide qu'une personne a reçu une somme au titre de prestations pour lesquelles elle ne remplissait pas les conditions requises ou au bénéfice desquelles elle n'était pas admissible, ou n'a pas reçu la somme pour laquelle elle remplissait les conditions requises et au bénéfice de laquelle elle était admissible, la Commission calcule la somme payée ou à payer, selon le cas, et notifie sa décision au prestataire.

Somme remboursable

(3) Si la Commission décide qu'une personne a reçu une somme au titre de prestations auxquelles elle n'avait pas droit ou au bénéfice desquelles elle n'était pas admissible :

a) la somme calculée au titre du paragraphe (2) est celle qui est remboursable conformément à l'article 43;

b) la date à laquelle la Commission notifie la personne de la somme en

(4) If the Commission decides that a person was qualified and entitled to receive money by way of benefits, and the money was not paid, the amount calculated is payable to the claimant.

Extended time to reconsider claim

(5) If, in the opinion of the Commission, a false or misleading statement or representation has been made in connection with a claim, the Commission has 72 months within which to reconsider the claim.

cause est, pour l'application du paragraphe 47(3), la date où la créance a pris naissance.

Somme payable

(4) Si la Commission décide qu'une personne n'a pas reçu la somme au titre de prestations pour lesquelles elle remplissait les conditions requises et au bénéfice desquelles elle était admissible, la somme calculée au titre du paragraphe (2) est celle qui est payable au prestataire.

Prolongation du délai de réexamen de la demande

(5) Lorsque la Commission estime qu'une déclaration ou affirmation fautive ou trompeuse a été faite relativement à une demande de prestations, elle dispose d'un délai de soixante-douze mois pour réexaminer la demande.

[16] In this case, the Commission's reconsideration (which occurred within the period of time prescribed by subsection 52(1) resulted in: (a) a determination that the Applicant had received money by way of benefits for which she was not entitled; and (b) the issuance of a Notice of Debt in the amount of \$2,000.00.

[17] The Federal Court of Appeal has confirmed that Notices of Debt are decisions of the Commission that fall within subsection 52(2) of the *Act* [see *Braga v Canada (Attorney General)*, 2009 FCA 167 at para 41]. Subsection 52(3) of the *Act* provides that the amount of an overpayment specified in a Notice of Debt becomes repayable, under section 43 of the *Act*, on the date of the notification of the amount of the overpayment. Under section 44 of the *Act*, a person who receives

an overpayment of benefits is required to return the amount of the overpayment without delay. These provisions have the effect of creating an enforceable debt obligation in the amount specified in the Notice of Debt. That amount is a debt due to His Majesty and is recoverable in accordance with the provisions of section 47, subject to the prescription period in subsection 47(3) of the *Act*.

[18] Section 112 of the *Act* provides the Applicant with an ability to seek reconsideration of a decision of the Commission. It provides:

Reconsideration — Commission

112 (1) A claimant or other person who is the subject of a decision of the Commission, or the employer of the claimant, may make a request to the Commission in the prescribed form and manner for a reconsideration of that decision at any time within

- (a) 30 days after the day on which a decision is communicated to them; or
- (b) any further time that the Commission may allow.

Reconsideration

(2) The Commission must reconsider its decision if a request is made under subsection (1).

Regulations

(3) The Governor in Council may make regulations setting out the circumstances in which the Commission may allow a longer period to make a request under subsection (1).

Révision — Commission

112 (1) Quiconque fait l'objet d'une décision de la Commission, de même que tout employeur d'un prestataire faisant l'objet d'une telle décision, peut, dans les trente jours suivant la date où il en reçoit communication, ou dans le délai supplémentaire que la Commission peut accorder, et selon les modalités prévues par règlement, demander à la Commission de réviser sa décision.

Nouvel examen

(2) La Commission est tenue d'examiner de nouveau sa décision si une telle demande lui est présentée.

Règlement

(3) Le gouverneur en conseil peut, par règlement, préciser les cas où la Commission peut accorder un délai plus long pour présenter la demande visée au paragraphe (1).

[19] The Applicant has not made any submissions regarding the reasonableness of the Commission's decision that it lacked jurisdiction to reconsider under section 112 of the *Act*. Rather, the Applicant's submissions focus on why she should not be required to repay the \$2,000.00. She asserts that: (a) she did not apply for EI ERB, but rather regular employment insurance benefits and thus the payment of EI ERB was made without her consent; (b) the Commission never identified the \$2,000.00 advance payment as EI ERB; and (c) the Applicant used the money for her expenses on the understanding that it was regular EI benefits and was never told that there was a possibility that it would have to be repaid. The Applicant asserts that, in the circumstances, she should not be required to pay back the advance payment.

[20] The Respondent asserts that the Decision was reasonable, as the Applicant's responsibility to pay back an overpayment under section 52(3)(a) and (b) is not subject to the reconsideration process under section 112 of the *Act* because the responsibility to pay back the debt is not a decision of the Commission. The Respondent asserts that the reconsideration process under section 112 of the *Act* is only available where a claimant challenges the accuracy of the quantum of the debt (which the Respondent asserts the Applicant has not done in this case) or any decision of the Commission.

[21] I find that the Commission's Decision lacks intelligibility. The Commission made a decision under section 52 that there was an overpayment and that the quantum of the overpayment was \$2,000. Those determinations resulted in a Notice of Debt, which the Federal Court of Appeal in *Braga* has confirmed is a "decision of the Commission".

[22] The Commission's determination that it lacked jurisdiction to perform a reconsideration under section 112 of the *Act* appears to be based on the Commission's characterization of the grounds of reconsideration advanced by the Applicant (namely, debt relief). However, section 112 does not take into consideration the grounds of reconsideration. Rather, the only requirement for reconsideration is that there be a decision of the Commission, which there clearly was in this case. Moreover, section 112 of the *Act* does not vest the Commission with jurisdiction to refuse to reconsider one of its decisions depending upon the arguments advanced by a claimant. To the contrary, subsection 112(2) expressly provides that the Commission must reconsider its decision if a request is made under subsection (1), which is what occurred in this case.

[23] In the circumstances, I find that the Decision is unreasonable and accordingly, it shall be set aside and the request for reconsideration remitting to a different officer of the Commission to be determined. While the Applicant sought relief from the Court dispensing her from the requirement to repay the calculated overpayment, as I explained to the Applicant at the hearing of this application, such relief is not available from the Court on an application for judicial review.

[24] As the Applicant has not sought her costs of this application, none shall be awarded.

JUDGMENT in T-1425-22

THIS COURT'S JUDGMENT is that:

1. The style of cause is hereby amended to name the Attorney General of Canada as respondent.
2. The application for judicial review is granted.
3. The decision of the Canada Employment Insurance Commission dated June 13, 2022 related to the Applicant's request for reconsideration is set aside and the matter is remitted for determination by a different officer of the Canada Employment Insurance Commission.
4. There shall be no costs of this application.

"Mandy Ayles"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1425-22

STYLE OF CAUSE: GIANNINA VELASCO v THE ATTORNEY
GENERAL OF CANADA

PLACE OF HEARING: CALGARY, ALBERTA

DATE OF HEARING: MARCH 9, 2023

**REASONS FOR JUDGMENT
AND JUDGMENT:** AYLEN J.

DATED: MARCH 10, 2023

APPEARANCES:

Giannino Velasco

FOR THE APPLICANT
(ON HER OWN BEHALF)

Andrew Kirk

FOR THE RESPONDENT

SOLICITORS OF RECORD:

The Attorney General of Canada
Charlottetown, Prince Edward
Island

FOR THE RESPONDENT
THE ATTORNEY GENERAL OF CANADA