Federal Court  Cour fédérale

Date: 20130131

Docket: T-735-12

Citation: 2013 FC 111

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, January 31, 2013

PRESENT: The Honourable Mr. Justice de Montigny

BETWEEN:

JEAN-CLAUDE BERNATCHEZ

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Court has before it an application under section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7, for judicial review of a decision by the Employment Insurance Commission (the Commission) dated March 12, 2012, refusing the applicant's request to write off an overpayment of Employment Insurance benefits pursuant to section 56 of the *Employment Insurance Regulations*, SOR/96-332 [the Regulations].

I. Facts

[2] On July 9, 2010, Jean-Claude Bernatchez (the applicant), who was self-represented in this Court, applied for Employment Insurance benefits from the Commission after losing his employment with Sani-Sable L.B. Inc., in Maria, Quebec.

[3] Beginning on August 3, 2010, the applicant received benefits for a period of eligibility that commenced on July 4, 2010.

[4] On October 20, 2010, the Commission advised the applicant that it had made an error in calculating his benefits and revised the amount of his benefits downward from $457 to $289. The Commission explained that $67,080 was erroneously recorded for one week's pay instead of $670.80, which inflated the amount of benefits the applicant was entitled to. The Commission stated that if the applicant had already received benefits, he had received an overpayment.

[5] On October 23, 2010, the Commission sent a notice of debt in the amount of $2,016 to the applicant with the following explanation: [TRANSLATION] "A change in the limits of insurable employment caused an overpayment."

[6] On November 15, 2010, the applicant advised the Commission that he intended to appeal the decision [TRANSLATION] "concerning the error in calculation by [the Commission] relating to [his] application for benefits, which caused an overpayment of $2,016. "

[7] On November 22, the applicant notified the Commission that he was not disputing the new rate of benefits, only the request to reimburse the overpayment.

[8] On November 23, without informing the applicant, a Commission officer reviewed the possibility of writing off the overpayment. The officer decided that it was not possible to write it off because the benefits had been paid for less than 12 months before the notice of error and noted that the file had been transferred to the Board of Referees. The same day, the Commission received the applicant's notice of appeal.

[9] On December 14, 2010, the Board of Referees denied the applicant's appeal. The Board of Referees wrote that it could not rule on overpayments and could not make a recommendation to the Commission since the overpayments were made less than 12 months before the claimant was notified.

[10] On February 10, 2011, the applicant filed a notice of appeal of the Board of Referees' decision to the Umpire.

[11] On December 23, 2011, the Umpire upheld the Board of Referees' decision. Umpire Blanchard stated that neither the Board of Referees nor the Umpire has the power to order the Commission to exercise its discretion to write off an overpayment.

[12] On February 22, 2012, the applicant filed an application for judicial review of the Umpire's decision to the Federal Court of Appeal.

[13] On March 12, 2012, the Commission sent the applicant a notice stating that it could not write off the $2,016 overpayment because the amounts had been paid less than twelve months before the notice of error. The Commission indicated that the applicant could seek judicial review of that decision at the Federal Court.

[14] On March 21, 2012, the applicant withdrew the application for judicial review at the Court of Appeal.

[15] On April 10, 2012, the applicant filed an application with the Federal Court for judicial review of the Commission's decision dated March 12, 2012.

II. Impugned decision

[16] Officer Lucie Camirand explained in her decision that the section 56 criteria must be met in order for the Commission to write off an overpayment and that those criteria were not met in this case.

[17] The officer indicated two situations where a write-off is possible:

> [TRANSLATION]
>
> (a) the overpayment does not arise from an error or a false or misleading declaration by the claimant, and the overpayment is the result of a retrospective decision concerning insurable earnings or a decision regarding benefits paid as part of a training or employment program (Regulations, paragraph 56(1)(*e*));
>
> (b) the Commission notifies the claimant of the overpayment more than twelve months after the overpayment was paid, the overpayment

> does not arise from an error or a false or misleading declaration by the claimant and the overpayment arises as a result of, as the case may be,
>
> - a delay or error made by the Commission;
> - retrospective control procedures or a review initiated by the Commission;
> - an error made by the employer on the record of employment;
> - an incorrect calculation by the employer of insurable earnings or hours of employment;
> - an error in insuring the employment (Regulations, subsection 56(2)).

[18] Ms. Camirand stated that a write-off is not possible in this situation because the benefits were received within the 12-month period preceding the notice of error. Ms. Camirand added that if the applicant was dissatisfied with the decision, he could apply to the Federal Court for judicial review.

III. Issues

[19] This matter raises a preliminary issue and a substantive issue.

[20] As a preliminary point, the first question that must be answered is whether the Federal Court has jurisdiction to hear this application for judicial review.

[21] In the affirmative, was the Commission's decision reasonable under section 56 of the Regulations?

IV. Standard of review

[22] This Court has determined on numerous occasions that the Commission's decisions concerning the write-off of overpayments are subject to the reasonableness standard: see, *inter alia*, *Claveau v Canada (Attorney General)*, 2008 FC 672 at para 32-35, 173 ACWS (3d) 498. Moreover, the Supreme Court pointed out recently that this standard must be applied where a tribunal or other body interprets and applies its own statute and the issue is within its expertise and does not raise issues of general legal importance: *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2011 SCC 53 at para 24, [2011] 3 SCR 471. This means that this Court must show deference to decisions made by the Commission and will intervene only where it can be shown that the impugned decision does not fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and law: *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190.

V. Analysis

A *Did the applicant choose the correct procedure for disputing the Commission's decision about writing off the overpayment?*

[23] Before examining the merits of the applicant's application for judicial review, consideration must be given to the appropriate forum for hearing this dispute. At the hearing, I raised this issue on my own initiative, and I invited the parties to make representations on this point in light of the concurring reasons of Justice Stratas of the Federal Court of Appeal in *Steel v Canada (Attorney General)*, 2011 FCA 153, 418 NR 327. In that case, Justice Stratas was of the view that since the *Employment Insurance Act* came into force, SC 1996, c 23 [EIA], "a claimant or other person" and not simply a "claimant", as was the case previously, may appeal a decision of the Commission to

the Board of Referees then to the Umpire (see subsection 114(1) and section 115 of the EIA). It follows that, even in write-off cases, a decision by the Commission may be appealed to the Board of Referees, the Umpire and then the Federal Court of Appeal, in accordance with section 118 of the EIA.

[24] The applicant made no further representations on this point. On the other hand, the Attorney General submitted that the Federal Court is always the appropriate forum to hear an application for judicial review regarding a write-off decision by the Commission, insofar as Justice Stratas' reasons did not bind this Court.

[25] It is true that Justice Stratas' reasons are *obiter dictum*, which the majority did not agree with. It is also accurate to maintain that a write-off is not part of the Board of Referees' expertise because a person makes such a request as a debtor not as a claimant. That being said, Justice Stratas' reasoning appears unassailable to me. The previous jurisprudence was based on the fact that section 79 of the *Unemployment Insurance Act*, RSC 1985, c U-1, conferred a right of appeal on a claimant only, which excluded a person who was asking for debt forgiveness because that person was not acting as a claimant but a debtor. Parliament amended that provision in 1996 by introducing subsection 114(1) of the EIA, which provides that "a claimant or other person who is the subject of a decision of the Commission" may appeal that decision to the Board of Referees and the Umpire. I would accordingly be inclined to agree with this argument and to dismiss the applicant's application for judicial review on this ground alone. However, two reasons lead me to examine his application on the merits.

[26] First, the respondent correctly submits that Justice Stratas' comments in *Steel* do not formally bind this Court until such time as the Court of Appeal adopts Justice Stratas' opinion and explicitly disregards the numerous decisions it has issued (before and after the statutory amendment enacted in 1996) to the effect that a decision by the Commission refusing to write off an overpayment cannot be appealed to the Board of Referees: see, *inter alia*, *Cornish-Hardy v Canada (Board of Referees)* (1979), [1979] 2 FC 437 (available on QL) (CA), aff'd by [1980] 1 SCR 1218; *Canada (Attorney General) v Idemudia*, 236 NR 359 at para 1, 86 ACWS (3d) 253; *Buffone v Canada (Minister of Human Resources Development)*, [2001] FCJ No. 38 at para 3 (QL); *Canada (Attorney General) v Mosher*, 2002 FCA 355 at para 2, 117 ACWS (3d) 650; *Canada (Attorney General) v Villeneuve*, 2005 FCA 440 at para 16, 352 NR 60.

[27] Even assuming that the Commission's decision to not write off the overpayment can be appealed to the Board of Referees and then to the Umpire, this Court would nonetheless retain the discretion to hear an application for judicial review. The mere fact that a decision made by a federal board, commission or other tribunal may be appealed does not restrict this Court's power to hear an application for judicial review, other than in the cases set out in section 18.5 of the *Federal Courts Act*. On the other hand, the EIA also does not remove this Court's power to grant relief with respect to a decision by the Commission in accordance with section 18.1 of the *Federal Courts Act*. Indeed, the Commission's decisions are not protected by a privative clause or by a provision that has the effect of making its decisions final. Accordingly, the Court retains the discretion to hear an application for judicial review relating to a decision by the Commission.

[28] It is true that an applicant must generally exhaust all available remedies before appealing an unfavourable decision by way of judicial review. The fact that there are alternative remedies is one

of the factors the Court may consider in refusing to grant the relief sought on a judicial review. In this case, I find that the Court must rule on the application for judicial review in light of all the circumstances.

[29] It appears from the record that the applicant filed an application for judicial review of the Umpire's decision to the Federal Court of Appeal on February 22, 2012. It seems, however, that he withdrew the application after receiving a notice from the Attorney General's legal services pointing out that an important piece of correspondence regarding the write-off was missing from his record. Although this letter is not in the record, it appears that it indicated to the applicant, at the same time, that his application for judicial review should have been filed with the Federal Court, not the Federal Court of Appeal, in accordance with the jurisprudence mentioned above and the position taken by the respondent in this case. Accordingly, it would be, at the very least, incongruous and contrary to the interests of justice to send the applicant to the Federal Court of Appeal now especially since his application appears to me to be unfounded, as I will now explain. In fact, the applicant has indeed exhausted the available remedies insofar as the Federal Court of Appeal decisions prior to Justice Stratas' opinion in *Steel* are still authoritative.

B. *Did the Commission make an unreasonable decision under section 56 of the Regulations?*

[30] Generally, benefits paid to an applicant who is not entitled to them are debts due to Her Majesty under subsection 47(1) of the EIA, and the Commission is required to recover them. However, section 56 of the Regulations provides for exceptions to this principle. Indeed, the Commission has the discretion to write off a debt resulting from an overpayment where certain conditions listed in that section are met. As Justice Lemieux stated in *Allard v Canada (Attorney General)*, 2001 FCT 789 at para 30 and 46, 208 FTR 161, 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.

[31] In this case, the respondent recognized that the overpayment did not arise from an error made by the applicant but by the Commission. This would seem to give rise to the requirements under subsection 56(2) of the Regulations. However, it provides that the overpayment must have been received more than 12 months before the Commission notifies the applicant of the overpayment. The applicant was notified on October 23, 2010, that he had received an overpayment from August 3 to October 8, 2010. Accordingly, less than 12 months elapsed between when he received the payments he was not entitled to and when he was notified, with the result that the condition in subsection 56(2) was not met.

[32] The applicant also does not meet the conditions in subsection 56(1) of the Regulations. The applicant briefly mentioned paragraph 56(1)(*e*) in his memorandum, but the evidence does not show that the payment arose from a retrospective decision or ruling on the non-insurability of employment or earnings (Part IV of the EIA) or from a retrospective decision in relation to benefits received as a participant in a job creation program (section 25 of the EIA).

[33] In short, the conditions giving rise to the exercise of the Commission's discretion in this case under section 56 of the Regulations were not met, and the Commission's decision was therefore perfectly reasonable. On the other hand, this Court cannot transform this application for

judicial review into a dispute over the Commission's civil liability, and it is therefore not pertinent to determine whether the Commission's conduct is akin to gross negligence.

[34] For all the foregoing reasons, the application for judicial review must therefore be dismissed. There is no doubt that the applicant acted in good faith and was in no way responsible for the Commission's error, as the Attorney General has, moreover, admitted. Unfortunately, the EIA and the Regulations are clear and did not permit the Commission to write off the overpayment that the applicant received.

THE COURT ORDERS that the application for judicial review is dismissed without costs.

"Yves de Montigny"

Judge

Certified true translation
Mary Jo Egan, LLB

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-735-12
STYLE OF CAUSE:	JEAN-CLAUDE BERNATCHEZ v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	Québec, Quebec
DATE OF HEARING:	October 11, 2012
REASONS FOR JUDGMENT:	de MONTIGNY J.
DATED:	January 31, 2013

APPEARANCES:

Jean-Claude Bernatchez	FOR THE APPLICANT (SELF-REPRESENTED)
Chantal Labonté	FOR THE RESPONDENT

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