Federal Court  Cour fédérale

Date: 20200709

Docket: T-26-19

Citation: 2020 FC 743

Ottawa, Ontario, July 9, 2020

PRESENT: Madam Justice McDonald

BETWEEN:

MICHAEL HORTON

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

AMENDED JUDGMENT AND REASONS

Introduction

[1] This is an application for judicial review of a decision of the Social Security Tribunal (SST) Appeal Division (AD) who refused Mr. Horton's request for leave to appeal a decision of the SST General Division (GD). Mr. Horton, who represents himself in this matter, was found to be ineligible for Employment Insurance (EI) benefits under the *Employment Insurance Act*, SC 1996, c 23 (*EI Act*) when the Canada Employment Insurance Commission (Commission)

determined that he made false statements in his EI reports concerning his availability for work. This resulted in Mr. Horton being responsible for an overpayment of some $8,000.00.

[2] This judicial review was heard by Justice Boswell on February 11, 2020, in Saint John, New Brunswick, and Justice Boswell reserved his decision. I was appointed by the Chief Justice pursuant to Rule 39 of the *Federal Courts Rules*, SOR/98-106 (*Federal Courts Rules*) to rehear the application. The rehearing of this matter proceeded on June 18, 2020 at a special sitting of the Court held via videoconference.

[3] During the June 18, 2020 hearing, I advised Mr. Horton and counsel for the Respondent, Mr. Vens, that I had reviewed all materials filed on the judicial review and I had listened to the recording of the oral submissions made during the February 11, 2020 hearing before Justice Boswell. I advised the parties that if they were in agreement, I was prepared to render a decision based upon the materials filed and the oral submissions made for the February 11, 2020 hearing.

[4] In response, Mr. Horton made brief submissions on the merits of his application, which I would note were the same as the oral submissions made before Justice Boswell. Mr. Horton agreed to the Court rendering a decision based upon the materials filed with the Court and his oral submissions made on February 11, 2020 and again on June 18, 2020.

[5] Counsel for the Respondent, Mr. Vens, was in agreement with the Court rendering its decision on the basis of the record filed and the oral submissions made on February 11, 2020.

Preliminary Matter

[6] The Respondent requests that the style of cause be amended pursuant to Rule 303(2) of the *Federal Courts Rules* to name the Attorney General of Canada as the proper Respondent.

[7] I agree that the Attorney General of Canada is the proper Respondent and the amendment request is granted with immediate effect.

Background

[8] In September 2016, Mr. Horton applied for EI benefits and completed a questionnaire where he noted that he was enrolled as a full-time student in the science program at the University of New Brunswick (UNB) but he was not obligated to attend any scheduled classes and was available for work. He noted that he would adapt his course schedule as necessary to accept a new job.

[9] In January 2017, during his second semester at UNB, Mr. Horton completed another EI questionnaire with different answers on his availability for work. This prompted an investigation by the Commission. The Commission's investigator contacted the UNB Faculty of Science on March 7, 2017, and was advised that all courses in the faculty were classroom-based, on-campus with mandatory attendance.

[10] The investigator advised Mr. Horton of this information and asked for an explanation of the inconsistencies in the questionnaires. Mr. Horton confirmed that he was aware of the

attendance policy at UNB, but explained that not all professors took class attendance. Mr. Horton stated that he chose to answer "No" to the attendance obligation question because he determined that he could miss some classes if he needed to work.

[11] The investigator also asked why Mr. Horton indicated that he would change his course schedule to accept a full-time job, and why he changed his answer on the January 2017 questionnaire to say that he would not accept a full-time job and would instead continue his program of study. Mr. Horton answered that he "wasn't thinking about it in the right away [*sic*], I guess". The investigator explained that his file would be forwarded to an adjudicator for review and that Mr. Horton would receive a letter notifying him of the decision. The investigator explained the policy on false statements and penalties.

[12] Following the investigation, on June 2, 2017, the Commission sent a letter to Mr. Horton advising that he had made a false representation and that it had found him not available for work. Mr. Horton was also advised that as this was his first incident of improper reporting, the Commission was imposing a warning instead of a monetary penalty. The Commission issued a notice of debt for repayment of benefits in the amount of $8,055.00.

[13] On August 15, 2017, the Commission denied Mr. Horton's request for reconsideration.

General Division

[14] Mr. Horton appealed the Commission decision to the GD. The two issues before the GD were whether Mr. Horton could prove he was available for work while attending a course of

instruction pursuant to paragraph 18(1)(a) of the *EI Act*; and, whether a penalty should be imposed pursuant to section 38 of the *EI Act* for making a misrepresentation by knowingly providing false or misleading information to the Commission.

[15] The GD noted that Mr. Horton believed that his answers were honest and he believed that he provided accurate information. He stated that he was willing to work as he was hoping to support himself through his studies. He stated that many people do this and that he did not think that he was doing anything wrong.

[16] While the GD commended his efforts to complete his education and find suitable employment, the GD found that he failed to present evidence of "exceptional circumstances" to rebut the presumption of non-availability while attending a full-time course. The GD concluded that he was not eligible to receive EI benefits.

[17] On the second issue, the GD noted that section 38 of the *EI Act* allows the Commission to impose a penalty for any misrepresentation knowingly made. The GD found that the Commission had shown that Mr. Horton was aware of the UNB course attendance policies and that he submitted contradictory information on two occasions. As a result, the GD determined that the Commission acted properly within its discretion when it imposed a warning letter as a penalty. The GD dismissed Mr. Horton's appeal on both issues.

Appeal Division – Decision Under Review

[18] In his application to the AD, Mr. Horton argued that the GD erred by failing to consider his personal circumstances. He explained that his answers were truthful and he was available to work around his school hours.

[19] Mr. Horton was late submitting his appeal application; therefore, the AD had two issues to determine. First, whether an extension of time to apply for leave to appeal should be granted, and, second, whether there was an arguable case that the GD made an error in concluding that Mr. Horton was not available for work.

[20] With respect to the late application, Mr. Horton failed to provide any explanation for the delay in filing. The deadline to file his appeal was May 16, 2018. He did not file his appeal until October 9, 2018. No reason or explanation was provided for this almost five-month delay.

[21] The AD relied upon the decision in *Canada (Attorney General) v Larkman*, 2012 FCA 204 (*Larkman)* for the proposition that the overriding consideration when determining whether to allow an extension of time is that the interests of justice be served. The AD noted that the "interests of justice" question would be determined based upon whether the appeal had a reasonable chance of success. The AD therefore considered whether there was an arguable case that the GD made a serious error in concluding that Mr. Horton was not available for work.

[22] The AD considered the evidence before the GD including the documentary record and the oral evidence of Mr. Horton and his witness. The AD noted that the GD considered Mr.

Horton's explanation for the discrepancies in his answers, and his willingness to work around his course schedule. However, the AD determined that the GD applied the proper legal presumption of non-availability for work while attending a full-time course and that Mr. Horton failed to present evidence of exceptional circumstances to rebut this presumption.

[23] The AD considered Mr. Horton's arguments that he answered the questions truthfully and that he was willing to work around his class schedule. The AD also noted that he tried, unsuccessfully to obtain employment, and that his intention in returning to school was to improve his employability. His argument that the EI application questions were difficult to understand and this led to his misunderstanding, was also considered by the AD.

[24] However, the AD noted that Mr. Horton was relying upon the same submissions as those made to the GD, and that rearguing the same points, does not amount to a ground of appeal for a reviewable error. The AD concluded that the appeal had no reasonable chance of success, therefore the extension of time request was refused on December 11, 2018.

Issues

[25] The only issue that arises on this judicial review is whether it was reasonable for the AD to refuse an extension of time because Mr. Horton's appeal had no reasonable chance of success.

Standard of Review

[26] The presumptive standard of review of the AD decision is reasonableness. Although this presumption is rebuttable, none of the exceptions identified by the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paragraphs 16 to 17, 23 [*Vavilov*] apply to this application.

[27] The reasonableness standard of review is concerned with both the decision-making process and its outcomes. It tasks the Court with reviewing an administrative decision for the existence of justification, transparency, and intelligibility within the decision-making process; and determining whether the decision is justified in relation to the relevant factual and legal constraints that bear on the decision (*Vavilov* at paras 12, 99; *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

Analysis

[28] On this judicial review, Mr. Horton makes the same arguments as made before the GD and the AD. Namely, that he was being honest in his answers on the EI questionnaire, that he was available for work as his class schedule was flexible, and that he misunderstood the questions. In his view, the questions should have been more explicit to avoid misunderstandings. He argues that the GD and the AD failed to properly consider his particular circumstances or his explanations.

[29] In considering his request for an appeal, the AD was correct to consider the request for an extension of time to appeal and the application for leave to appeal simultaneously (*Bossé v Canada (Attorney General)*, 2015 FC 1142 at para 12 [*Bossé*]).

[30] There were time limits within which Mr. Horton had to file his appeal with the AD. As noted above, he was almost five months late when he filed his appeal application; therefore, he had to seek an extension of time to file his appeal. In considering the extension of time request, the most important factor is whether it is in "the interests of justice" that the extension of time be granted. In assessing the "interests of justice", the following factors are considered: (a) was there a continuing intention to appeal; (b) does the appeal disclose an arguable case; (c) is there a reasonable explanation for the delay; and, (d) is there prejudice to the other party (*Bossé* at para 12).

[31] Although Mr. Horton did not provide an explanation for the delay in filing the appeal application which would have demonstrated a continuing intention to appeal, the AD nonetheless considered the most important factor - having an arguable case (*Liclican v Canada (Attorney General)*, 2020 FC 24 at para 23).

[32] The grounds of appeal available to Mr. Horton are prescribed in subsection 58(1) of the *Department of Employment and Social Development Act*, SC, 2005, c 34 (*DESDA)* as the following: a breach of natural justice, an error of law, or an erroneous finding of fact made in a perverse and capricious manner or without regard for the material before it (*Cameron v Canada (Attorney General)*, 2018 FCA 100 at para 2).

[33] Subsection 58(2) of the *DESDA* stipulates that the AD will grant leave to appeal if it is satisfied that the appeal has a reasonable chance of success. To have a reasonable chance of success, Mr. Horton had to demonstrate that he had some arguable ground under subsection 58(1) of the *DESDA* upon which the proposed appeal might succeed (*Osaj v Canada (Attorney General)*, 2016 FC 115 at para 12).

Availability to Work

[34] The core issue before the GD was with respect to Mr. Horton's availability to work. Paragraph 18(1)(a) of the *EI Act* provides that a claimant is not entitled to be paid benefits for any working day in a benefit period for which the claimant fails to prove that on that day he or she was capable of and available for work and unable to obtain suitable employment.

[35] A person enrolled in full-time study, like Mr. Horton, is presumed to be unavailable for work. This presumption is refutable only in exceptional circumstances. A claimant who is only available for employment outside of his course schedule is restricting his availability and therefore is not available for work within the meaning of the *EI Act* (*Canada (Attorney General) v Gagnon*, 2005 FCA 321 at para 6; *Duquet v Canada (Employment and Immigration Commission)*, 2008 FCA 313 at para 2).

[36] Although Mr. Horton may have believed he could make himself available for work while attending university full-time, that was contrary to the UNB's policy, and that is not "availability" within the meaning of the *EI Act* and the *Employment Insurance Regulations*, SOR/96-332. The legislation and jurisprudence interpreting the legislation require Mr. Horton to

prove that he is available for work. Adapting a work schedule to a full-time program of study, at the risk of breaching his university's policies, does not constitute "availability" under the legislation.

[37] The AD reasonably found that the GD did not make an erroneous finding of fact in a perverse and capricious manner or without regard for the material before it. The GD considered Mr. Horton's documentary and oral evidence and reasonably determined that his availability was restricted under the *EI Act* and that he failed to provide evidence of exceptional circumstances.

Warning Letter Penalty

[38] With respect to the warning letter as a penalty, subsection 38(1) of the *EI Act* gives the Commission wide discretion to impose a penalty for representations that the claimant knew were false or misleading in relation to a claim for benefits. The test for "knowledge" is subjective. According to the Federal Court of Appeal in *Canada (Attorney General) v Bellil*, 2017 FCA 104 at paragraph 11 [*Bellil*]:

> [11] When it comes to the interpretation of the word "knew", this Court has specified that a subjective test should be used to determine whether the required knowledge exists. The issue is therefore not whether the claimant ought to have known that his representation was false or misleading; a false but innocent representation does not give rise to penalties. That being said, it is not sufficient to proclaim one's ignorance to avoid sanctions; it is permissible to consider common sense and objective factors to decide whether a claimant had subjective knowledge of the falsity of his or her representations. Justice Linden stated the following in *Gates* (at para. 5);
>
> > In deciding whether there was subjective knowledge by a claimant, however, the Commission or Board may take into account common sense and objective

> factors. In other words, if a claimant claims to be ignorant of something that the whole world knows, the fact finder could rightly disbelieve that claimant and find that there was, in fact, subjective knowledge, despite the denial. Not to know the obvious, therefore, might properly lead to an inference that the claimant is lying. This does not make the test objective; it does, however, take into account objective matters in coming to a decision on subjective knowledge.

[39] The GD appropriately noted that in a finding of misrepresentation, the onus of proof first rests with the Commission (*Bellil* at para 10). Once the Commission can reasonably conclude benefits were paid as a result of misrepresentation, the burden shifts to the claimant to prove that the events are open to innocent interpretation. The GD remarked that the standard of proof is the balance of probabilities and that it is insufficient to simply disbelieve a claimant's statement of innocence.

[40] The GD remarked that to establish a false statement was knowingly made, the evidence must show: (1) an objectively false statement, (2) that misleads the Commission, (3) resulting in the real or possible payment of benefits to which the claimant was not entitled, and (4) at the time of the statement, the claimant knew it did not accurately reflect the facts.

[41] The AD found that the GD considered that the evidence established that Mr. Horton was aware of the UNB attendance policies and that he submitted contrary information on two occasions. As a result, the AD and the GD reasonably determined that the Commission acted properly within its discretion when it imposed a warning letter as a penalty.

Conclusion

[42] In my view, the AD's decision is reasonable and justifiable and there is no basis for this Court to intervene in the decision. This judicial review is therefore dismissed.

[43] The Respondent is not seeking costs and none are awarded.

JUDGMENT IN T-26-19

THIS COURT'S JUDGMENT is that:

1. The style of cause is hereby amended to name the Attorney General of Canada as the sole Respondent;

2. The application for judicial review is dismissed; and

3. No costs are awarded.

"Ann Marie McDonald"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-26-19
STYLE OF CAUSE:	MICHAEL HORTON v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE BETWEEN QUISPAMSIS, NEW BRUNSWICK AND OTTAWA, ONTARIO
DATE OF HEARING:	JUNE 18, 2020
AMENDED JUDGMENT AND REASONS:	MCDONALD J.
DATED:	JULY 9, 2020

APPEARANCES:

Michael Horton	APPLICANT ON HIS OWN BEHALF
Matthew Vens	FOR THE RESPONDENT

SOLICITORS OF RECORD:

- NIL -	SELF-REPRESENTED APPLICANT
ATTORNEY GENERAL OF CANADA Department of Justice Gatineau, QC	FOR THE RESPONDENT