Federal Court  Cour fédérale

Date: 20140930

Docket: T-2043-13

Citation: 2014 FC 927

Ottawa, Ontario, September 30, 2014

PRESENT: The Honourable Madam Justice Gagné

BETWEEN:

MATTHEW TURNER

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of a decision under section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7, dated November 5, 2013, rendered by the Canada Employment Insurance Commission [Commission] to refuse to write off a $17,659 overpayment made to the applicant. The Commission reasoned that it could not write off the applicant's debt because he had made false or misleading declarations in support of his Employment Insurance [EI] claim, whether he knew them to be false or misleading or not, pursuant to subsection 56(2) of the *Employment Insurance Regulations*, SOR/96-332 [Regulations].

[2] For the reasons discussed below, this application for judicial review will be dismissed.

Background

[3] The applicant, Matthew Turner, is a self-employed small business owner, specializing in environmentally friendly ski and snowboard waxes, operating as a sole proprietorship in Vancouver under the name BeaverWax. He began developing his company in 2004 outside of his normal work hours.

[4] In June 2010, he was laid off from his position with Sony Music, and so decided to focus on BeaverWax full time.

[5] On July 13, 2010 the applicant submitted an online application for EI benefits. He stated that he was self-employed, working 15 hours or more per week in his self-employment business, and so was not available for work.

[6] On or about August 4, 2010, the applicant confirmed to a Service Canada agent that he would be available and seeking full time work in the ski and snowboard industry.

[7] Based on this statement of availability and on the basis that involvement in his business would be minor in extent, the applicant's claim for benefits was allowed.

[8] On August 16, 2010, the respondent notified the applicant in writing to declare his net income and the number of hours he spent in self-employment for each week on his claimant report. The letter stated:

> We are writing to inform you that we have reviewed the information concerning your self-employment and have allowed your Employment Insurance claim at this time.
>
> You must tell us, however, if the number of hours that you spend in self-employment increases. These changes could result in you not being entitled to receive further benefits. If you do not tell us, you may be overpaid.
>
> **Important Reminder:**
>
> Declare your net income and the number of hours you spend in your self-employment for each of the weeks on your claimant's reports.

[9] The applicant did not declare any work or income on any of his weekly claimant's reports. Specifically, on each report, the applicant declared "No" in response to the question:

> Did you work or receive any earnings during the period of this report? This includes work for which you will be paid later, unpaid work or self-employment.

[10] The applicant was paid EI benefits between July 2010 and June 2011.

[11] Following an investigation in 2012, the Commission determined that the applicant's self-employment had not been minor during the period he received EI benefits. A retroactive disentitlement was imposed on the basis that the applicant had failed to prove he was unemployed in accordance with sections 9 and 11 of the *Employment Insurance Act*, SC 1996, c 23 [Act] and section 30 of the Regulations.

[12] The applicant appealed the question of disentitlement to the Board of Referees [Board]. The question before the Board was "whether or not the claimant is subject to the imposition of disentitlement pursuant to sections 9 and 11 of the [Act] and section 30 of the Regulations for failing to prove he was unemployed."

[13] The Board found that the applicant worked on a full time basis on his business. The applicant had $19,455 in self-employment in 2011. This was not "minor in extent or that he would not normally rely on this employment as a principal means of livelihood."

[14] The Board observed, at pages 7 and 8 of its decision, that the applicant was:

> [F]orthright and totally honest in declaring his intent to devote his full time and resources to developing self-employment. The claimant clearly indicated that he was not available for work and still received benefits.

[15] While the Board unanimously dismissed the appeal, it found that the Commission had erred in allowing the claim to begin with and that the claimant's self-employment activity was of a minor nature for part of the period he received benefits. As such, the Board requested that the Commission mitigate the overpayment:

> The Board wishes to draw to the attention of the Commission that they erred in allowing the claimant to receive benefits when the claimant clearly articulated at the time of making application for benefits in his initial reporting that he did not intend to look for work and was devoting his full time and energies to building up the business. The Commission did not question his availability when in fact he clearly was not available for work. The Board requests that the Commission mitigate the overpayment in light of the fact that the claimant clearly articulated to them at the time of making application for benefits that he was working full time in self-employment and should have not been allowed the claim for benefits as he did not demonstrate his availability for work. The

> claimant has clearly shown in his reporting and additional information on Exhibit 17 that for part of this period the claimants'(sic) self-employment activity was of a minor nature. [Emphasis added]

[16] As such, the Board found as fact that section 52 of the Act applied to the claimant, and so the Commission could reconsider his claim.

[17] The applicant then requested that the overpayment be written off under subsection 56(2) of the Regulations on the basis that the error that resulted in the overpayment was the Commission's alone.

[18] The Commission determined that the overpayment did not meet the legislative requirements for a write off. By answering "No" on each of the 25 reports to the question of whether he worked or received earnings, the Commission determined that the applicant made false declarations, whether he knew them to be false or misleading or not.

Issues and Standard of Review

[19] The only issue raised by this application is whether or not the respondent committed a reviewable error in refusing to write off the overpayment made to the applicant.

[20] As for the standard of review, both parties agree that the issue is subject to the standard of reasonableness (*Bernatchez v Canada (Attorney General)*, 2013 FC 111 [*Bernatchez*]; *Dunsmuir v New Brunswick*, 2008 SCC 9 at para. 47). The "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 (*Bernatchez* at para 22).

Analysis

[21] The applicant submits that the respondent must defer to the findings of fact made by the Board. The Board found:

1. that the applicant was honest and forthright;
2. that he clearly indicated that he was not available for work and still received benefits;
3. that the respondent erred in allowing the applicant to receive benefits; and
4. that the respondent did not question the applicant's availability when he was clearly not available for work.

[22] The applicant relies on *Campbell v Canada (Attorney General)*, 2002 FCT 811 [*Campbell*], where the Commission refused to write off an overpayment despite the Board's finding that the claimant had made no false or misleading statements. There, the Commission had found that he did in fact make false or misleading statements. Justice Tremblay-Lamer held, at paras 19 and 20, that the "Commission could not disregard the findings of fact made by the Board of Referees on that point" and so "[b]y failing to take into account the findings of fact of the Board of Referees, the Commission fettered its discretion and it cannot be said that it exercised its discretion judicially".

[23] The applicant takes the Board's finding that he was "honest and forthright" to be synonymous with a finding that he did not make false or misleading statements.

[24] As for the respondent, he maintains that the Commission did in fact exercise its discretion judicially. The Commission's discretion to provide a write off only arises if a condition precedent set out in subsection 56(2) of the Regulations is satisfied. An overpayment may be written off only if it 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. This did not occur in the case at bar, and so the Commission could not proceed with the write off of the overpayment. I agree.

[25] The applicant's reliance on *Campbell* is misplaced. In that case, the Board expressly found that the claimant had not made any false or misleading statements. Instead, the factual situation in the case at bar mirrors that of *Mangat v Canada (Attorney General)*, 2012 FC 1409 [*Mangat*]. There, the Board had expressly found that the claimant did not knowingly make a false statement. Nonetheless, it was held that the reasons for making an error are not to be taken into consideration in reaching a write off decision.

[26] As Justice Campbell explained in *Mangat*, responding to the same reliance on *Campbell* made by the applicant in that case:

> [12] […] I dismiss this argument. The Commission did not make a finding of fact that is contradictory to a finding made by the Board, it made a finding of relevance; it is irrelevant that the Board found that the Applicant did not knowingly give inaccurate information in his application for benefits.

[27] In the case at bar, the fact that the Board found that the applicant was forthright and totally honest in declaring his intent to devote his full time and resources to develop self employment, and that he first clearly indicated he was not available for work, is irrelevant to whether the claimant knowingly or unknowingly made false declarations.

[28] The Board explicitly noted that the claimant had "declared no hours of work and no income on his declarations," that the "claimant was also instructed to report his self-employment hours on his claim report," and that the claimant "was involved on a daily basis from 9-5 and on some occasions additional hours of work." These statements support no conclusion other than that the applicant made false or misleading declarations, whether he knew them to be false or misleading or not.

Conclusion

[29] While I express sympathy for the applicant's position, the Commission was unable to exercise its discretion to write off the amounts claimed by the applicant. As Justice Campbell explained in *Mangat* at para 13: "the clear intention of Parliament was to place full responsibility on the Applicant for any errors or misrepresentations in the application for benefits." As such, section 56 of the Regulations prevents the Commission from abiding by the Board's request for mitigation.

[30] At the hearing the parties informed me that they agreed that should this application be dismissed, no costs be granted in favour of the respondent. I believe that to be a fairly decent recommendation.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed; and

2. No costs are granted.

"Jocelyne Gagné"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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