

Federal Court



Cour fédérale

Date: 20150413

Docket: T-866-14

Citation: 2015 FC 448

Ottawa, Ontario, April 13, 2015

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

KAREN FINANDERS

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Ms. Finanders (the applicant) asked the Canada Revenue Agency (the CRA or the respondent) to cancel the penalty and interest charged on her 2009 tax year, which the Minister can do by virtue of subsection 220(3.1) of the *Income Tax Act*, RSC 1985, c 1 (5th Supp) [ITA]. However, the applicant's request was refused at the first level review and partly allowed at the second level review. She now applies to this Court for judicial review of the second level decision pursuant to subsection 18.1(1) of the *Federal Courts Act*, RSC 1985, c F-7.

[2] In the applicant's record, she asks the Court to grant the relief for her tax penalties "\$2,478.00 for Federal and Provincial in the total amount of \$4,957.40."

I. Background

[3] The applicant started working for NYK Canada Inc. in January 2001. She went on short term disability in June 2008 due to surgeries for carpal tunnel syndrome.

[4] In July 2008, the applicant moved from 748 Herring Cove Road to 940 Herring Cove Road, Halifax, Nova Scotia. Later, as a result of surgical complications, she left work in March 2009 and went on long term disability.

[5] In 2009, the applicant filed her 2008 income tax return based on the T4 slip and short term disability slip issued by her employer NYK Canada Inc. The applicant was informed by her case manager at the Great-West Life Assurance Company that her long term disability was non-taxable. Also, she did not receive the T4 slip for her 2009 long term disability payments because it was sent to her former address. Further, in 2009, the applicant received a severance package from her company. It affected her disability benefits and resulted in a \$200 overpayment per month that the applicant had to pay back.

[6] In 2010, the applicant did not claim the long term disability payments on her 2009 tax return. After the applicant received a call from the CRA regarding the unclaimed long term disability on her 2009 tax return, she found out the T4 slip for the long term disability was issued but sent to her former address.

[7] Subsequently, the applicant withdrew from her registered retirement savings plan funds to pay off some of the balance, causing her hardship due to increased income and loss of eligibility for tax credits.

[8] In addition, the applicant states that she is a single mom who no longer receives childcare benefits. She states that she recently went through difficult family changes as well.

II. First Level Review

[9] By a letter dated March 23, 2011, the applicant made a request for taxpayer relief to waive the penalty and interest for the 2009 taxation year on the basis of inability to pay due to financial hardship and other extraordinary circumstances. The applicant provided the CRA with an income and expense/assets and liabilities statement as well as supporting documents.

[10] The first level decision maker made the following finding. The applicant failed to report T4RSP income on her 2006 return which resulted in her owing \$276.08, but no penalty was implemented because it was the applicant's first income omission. The applicant's total outstanding amount for her 2009 income tax return was \$14,335.80. She made a payment of \$4,500.00 on March 25, 2011. After the reassessment completed on August 5, 2011, the outstanding amount was reduced to \$8,838.70. Further, the decision maker found the applicant had assets and did not demonstrate an inability to pay.

[11] The decision maker stated although the applicant states she was misinformed by her long term disability manager, records indicate that the applicant "received long term disability from

Great West Life in 2008 and it was properly reported on [her] 2008 income tax return.” The decision maker concluded that the applicant failed to show that she was prevented from complying with the CRA’s filing and remitting requirements due to factors beyond her control and that payment of the liability in its entirety would cause undue hardship.

[12] The applicant’s request for relief was denied by the first level decision maker. The decision was rendered by a letter dated February 9, 2012.

III. Second Level Review

[13] The CRA received a letter from the applicant on May 11, 2012 wherein the applicant requested a second review of her request for relief. The applicant provided the following information requested by the CRA to complete the review: mutual fund account statements, a property assessment, mortgage statements, bank account statements, credit card statements, a benefits statement and an agreement between the applicant and her benefits provider.

[14] At the second level review, the decision maker noted the applicant failed to report T4RSP income on her 2006 return in the amount of \$1,228.00 and filed late returns for the 2008, 2010, 2011 and 2012 taxation years, where the 2008 and 2012 taxation years were in a refund status and the 2010 and 2011 tax years have a total balance of \$6,823.27 owing. The current balance owing for the 2009 tax year is \$5,437.63.

[15] The applicant has demonstrated an inability to pay as shown by a monthly deficit and an inability to borrow; therefore, the decision maker allowed the cancellation of the interest

assessed on the 2009 tax year based on financial hardship. Cancellation of penalties was not allowed because consideration would generally not be given based on financial hardship unless an extraordinary circumstance has prevented compliance.

[16] It was further noted that “Canada’s tax system is based on self-assessment that places the initial responsibility on taxpayers or their representatives for filing complete and accurate returns and remitting any amounts owing on time. Taxpayers are expected to have a general knowledge of their obligations and to comply with any obligations they may have without notice or demand by the CRA.” The decision maker concluded that the applicant’s submission failed to demonstrate any extraordinary circumstance.

[17] The decision was delivered to the applicant by a letter dated February 28, 2014. The applicant’s request was allowed in part to waive the interest charges.

IV. Issues

[18] The applicant does not explicitly submit an issue, but implicitly, through her submissions, requests a determination whether the second level review decision was reasonable.

[19] The respondent submits the issue is whether the decision in question ought to be set aside on any of the grounds set out in subsection 18.1(4) of the *Federal Courts Act*.

[20] In my view, there are two issues:

A. What is the standard of review?

B. Was the decision reasonable?

V. Applicant's Written Submissions

[21] The applicant submits that the CRA did not realize she was on short term disability in the year 2008.

[22] The applicant submits her situation surrounding the 2009 tax return was beyond her control. She argues that she has done everything to ensure her 2009 tax was filed properly. Firstly, she was misled by her case manager at Great-West Life Assurance Company and secondly, because she moved in 2009, the T4 slip for her long term disability went to her former address so she never received it. She argues that had she received the T4 slip, she would have claimed it on her tax return. The applicant pleads to this Court to consider her situation and grant the relief for the penalties so that she can get out of her financial hardship.

VI. Respondent's Written Submissions

[23] The respondent first reviews the jurisdiction of this Court in granting relief by citing subsections 18.1(3) and 18.1(4) of the *Federal Courts Act*.

[24] The respondent submits reasonableness is the standard of review applicable to a decision made under subsection 220(3.1) of the ITA (see *Telfer v Canada (Revenue Agency)*, 2009 FCA 23 at paragraph 24, [2009] FCJ No 71 [*Telfer*]).

[25] The respondent argues the decision was reasonable. The applicant has not specified the reviewable error made by the decision maker in denying the waiving of penalty and interest. The decision maker stated the interest would be waived due to financial hardship. It concluded that penalties would not be waived on the basis that: a) the applicant had a history of non-compliance; b) the applicant had correctly reported disability benefits in previous years; c) the applicant did not ensure that the tax advice she received was correct which was her responsibility, and d) there were no circumstances beyond the applicant's control which prevented her from correctly reporting her income.

[26] The respondent further submits the applicant has not demonstrated any grounds for relief under subsection 18.1(4) of the *Federal Courts Act*.

VII. Analysis and Decision

A. *Issue 1 - What is the standard of review?*

[27] Where previous jurisprudence has determined the standard of review applicable to a particular issue before the court, the reviewing court may adopt that standard (see *Dunsmuir v New Brunswick*, 2008 SCC 9 at paragraph 57, [2008] 1 SCR 190 [*Dunsmuir*]). The Federal Court of Appeal held that the standard of review for a decision under subsection 220(3.1) of the ITA is reasonableness (*Telfer* at paragraph 24). This means I will apply the standard of reasonableness and not intervene if the decision is transparent, justifiable, intelligible and within the range of acceptable outcomes based on the evidence before the decision maker (*Dunsmuir* at paragraph 47; and *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paragraph 59, [2009] 1

SCR 339 [*Khosa*]). As the Supreme Court held in *Khosa* at paragraphs 59 and 61, a reviewing court cannot substitute its own view of a preferable outcome, nor can it reweigh the evidence.

B. *Issue 2 - Was the decision reasonable?*

[28] Under subsection 220(3.1) of the ITA, the Minister may waive or cancel interest and penalties. Here, the applicant challenges the decision pertaining to the denial of penalty waiver made by the second level review. The decision maker concluded that penalties would not be waived on the basis: a) the applicant had a history of non-compliance; b) the applicant had correctly reported disability benefits in previous years; c) the applicant did not ensure that the tax advice she received was correct which was her responsibility, and d) there were no circumstances beyond the applicant's control which prevented her from correctly reporting her income. The applicant does not dispute the first and third factors. She argues that short term disability is different from long term disability and it was the short term disability benefit in 2008 which she reported correctly, unlike the long term disability in 2009. Also, the incorrect advice on the 2009 long term disability she received should be considered as circumstance beyond her control.

[29] A review of section 18.1(4) of the *Federal Courts Act* shows subsection (d) could be relevant. It states that relief may be granted if the decision maker "based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it." The applicant alleges the CRA based its finding on a mistake of fact that the 2008 disability was short term, not long term.

[30] A review of the record shows that CRA has, since at least February 9, 2012, believed that the applicant received long term disability payments from Great West Life and claimed them in her 2008 income tax return. At page 32 of the certified tribunal record, the first level decision stated:

...However our records indicate that you received long term disability from Great West Life in 2008 and it was properly reported on your 2008 income tax return. ...

[31] In the taxpayer relief fact sheet for the second level request, the following is stated at page 77 of the certified tribunal record:

... I have noted the TP correctly reported T4A income on her 2008 return.

And at page 80 of the certified tribunal record:

A review of our system shows that you received disability payments from Great-West Life in 2008 and correctly reported these amounts on your 2008 tax return.

[32] There is no dispute that one of the reasons for refusing the applicant relief was that she had received long term disability benefits in 2008 and she had included the amounts in her 2008 tax return. As a result, she should have known to include the long term benefit amount in her 2009 income tax return.

[33] The evidence in the record before me shows that the applicant received short term disability payments in 2008, not long term benefits. The applicant was further told by her case manager at Great-West Life Assurance Company that long term disability payments were not

taxable. Based on these facts, it would not appear to be unreasonable for the applicant to believe that the long term payments were not taxable, especially in light of the fact that she did not receive a T4 slip from her employer.

[34] The decision letter dated February 28, 2014 shows that the decision maker relied on the fact that she had claimed long term disability amounts in 2008 to support the decision to deny relief. I cannot tell how much this influenced the decision maker to deny the relief or whether the result would have been different had the decision maker considered the actual facts.

[35] As a result, the decision is unreasonable and must be set aside and the matter remitted to another decision maker for redetermination.

[36] There shall be no order as to costs.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application is allowed, the decision is set aside and the matter is remitted to a different decision maker for redetermination.
2. There shall be no order as to costs.

"John A. O'Keefe"

Judge

ANNEXRelevant Statutory Provisions*Federal Courts Act, RSC, 1985, c F-7*

18.1 (1) An application for judicial review may be made by the Attorney General of Canada or by anyone directly affected by the matter in respect of which relief is sought.

(3) On an application for judicial review, the Federal Court may

(a) order a federal board, commission or other tribunal to do any act or thing it has unlawfully failed or refused to do or has unreasonably delayed in doing; or

(b) declare invalid or unlawful, or quash, set aside or set aside and refer back for determination in accordance with such directions as it considers to be appropriate, prohibit or restrain, a decision, order, act or proceeding of a federal board, commission or other tribunal.

(4) The Federal Court may grant relief under subsection (3) if it is satisfied that the federal board, commission or other tribunal

(a) acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction;

(b) failed to observe a principle

18.1 (1) Une demande de contrôle judiciaire peut être présentée par le procureur général du Canada ou par quiconque est directement touché par l'objet de la demande.

(3) Sur présentation d'une demande de contrôle judiciaire, la Cour fédérale peut :

a) ordonner à l'office fédéral en cause d'accomplir tout acte qu'il a illégalement omis ou refusé d'accomplir ou dont il a retardé l'exécution de manière déraisonnable;

b) déclarer nul ou illégal, ou annuler, ou infirmer et renvoyer pour jugement conformément aux instructions qu'elle estime appropriées, ou prohiber ou encore restreindre toute décision, ordonnance, procédure ou tout autre acte de l'office fédéral.

(4) Les mesures prévues au paragraphe (3) sont prises si la Cour fédérale est convaincue que l'office fédéral, selon le cas :

a) a agi sans compétence, outrepassé celle-ci ou refusé de l'exercer;

b) n'a pas observé un principe

of natural justice, procedural fairness or other procedure that it was required by law to observe;	de justice naturelle ou d'équité procédurale ou toute autre procédure qu'il était légalement tenu de respecter;
(c) erred in law in making a decision or an order, whether or not the error appears on the face of the record;	c) a rendu une décision ou une ordonnance entachée d'une erreur de droit, que celle-ci soit manifeste ou non au vu du dossier;
(d) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;	d) a rendu une décision ou une ordonnance fondée sur une conclusion de fait erronée, tirée de façon abusive ou arbitraire ou sans tenir compte des éléments dont il dispose;
(e) acted, or failed to act, by reason of fraud or perjured evidence; or	e) a agi ou omis d'agir en raison d'une fraude ou de faux témoignages;
(f) acted in any other way that was contrary to law.	f) a agi de toute autre façon contraire à la loi.

Income Tax Act, RSC, 1985, c 1 (5th Supp)

220. (3.1) The Minister may, on or before the day that is ten calendar years after the end of a taxation year of a taxpayer (or in the case of a partnership, a fiscal period of the partnership) or on application by the taxpayer or partnership on or before that day, waive or cancel all or any portion of any penalty or interest otherwise payable under this Act by the taxpayer or partnership in respect of that taxation year or fiscal period, and notwithstanding subsections 152(4) to (5), any assessment of the interest and penalties payable by the taxpayer or partnership shall be made that	220. (3.1) Le ministre peut, au plus tard le jour qui suit de dix années civiles la fin de l'année d'imposition d'un contribuable ou de l'exercice d'une société de personnes ou sur demande du contribuable ou de la société de personnes faite au plus tard ce jour-là, renoncer à tout ou partie d'un montant de pénalité ou d'intérêts payable par ailleurs par le contribuable ou la société de personnes en application de la présente loi pour cette année d'imposition ou cet exercice, ou l'annuler en tout ou en partie. Malgré les paragraphes 152(4) à (5), le ministre établit les cotisations voulues concernant les intérêts
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is necessary to take into
account the cancellation of the
penalty or interest.

et pénalités payables par le
contribuable ou la société de
personnes pour tenir compte de
pareille annulation.

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-866-14

STYLE OF CAUSE: KAREN FINANDERS v
ATTORNEY GENERAL OF CANADA

PLACE OF HEARING: HALIFAX, NOVA SCOTIA

DATE OF HEARING: OCTOBER 15, 2014

**REASONS FOR JUDGMENT
AND JUDGMENT:** O'KEEFE J.

DATED: APRIL 13, 2015

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