Federal Court Cour fédérale

Date: 20160215

Docket: T-903-15

Citation: 2016 FC 199

Ottawa, Ontario, February 15, 2016

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

SUSAN AUCH

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. INTRODUCTION

[1] This is an application under s 18.1 of the *Federal Courts Act*, RSC 1985, c F-7 [Act] for judicial review of a decision of a member of the Appeal Division of the Social Security Tribunal [SST-AD] dated March 23, 2015 [Decision] refusing leave to appeal a decision of the General Division of the Social Security Tribunal [SST-GD].

II. BACKGROUND

[2] The Applicant received maternity/parental benefits pursuant to the *Employment Insurance Act*, SC 1996, c 23 [*EI Act*] from June 3, 2007 to May 17, 2008.

[3] On June 21, 2007, the Canada Employment Insurance Commission [Commission] telephoned the Applicant, advising her that any earnings made as a real estate agent should be communicated to the Commission so that they could be deducted from her benefits. On the same day, the Commission sent a letter explaining how self-employment affects a claim.

[4] In 2011, the Commission became aware that the Applicant declared self-employment earnings of $90,000 on her T-1 statement for 2008.

[5] On November 4, 2011, the Commission, unaware that the Applicant had moved, mailed a letter to her address on file requesting additional information regarding her earnings from 2008. On January 5, 2012, a follow-up letter was sent. These communications were left unanswered by the Applicant.

[6] On November 19, 2012, the Commission, believing the Applicant to have made a false or misleading statement because her earnings had not been reported while she was in receipt of benefits and no contradictory information had been submitted, issued a Record of Decision Violation. The earnings declared for 2008 were allocated at a rate of $1,746.00 for 19 weeks and $1,396.00 for 1 week, generating an overpayment of $8,707.32.

[7] In March, 2013, the Commission was notified by the Applicant that she had never received its letters and had moved to Manitoba. The Commission subsequently permitted the Applicant further time to supply the additional information regarding her 2008 earnings.

[8] On June 11, 2013, the Applicant wrote to the Commission, advising that she had not worked or received a salary while on maternity leave. She did not provide any accompanying documentation to corroborate her account and claimed that the business income she earned as a real estate agent was earned subsequent to her maternity leave so that there was no basis for a redetermination of income. The letter was resent by the Applicant twice and was received by the Commission on September 12, 2013 and again on October 18, 2013.

[9] On October 25, 2013, the Applicant filed a Request for Reconsideration of the overpayment. On November 26, 2013, by way of letter the Commission acknowledged receipt of the request and asked again for documentary proof that she did not generate earnings while in receipt of benefits.

[10] On December 5, 2013, the Commission, having received no response from the Applicant, attempted to telephone her with no success. On December 6, 2013, a letter was sent to the Applicant advising her that reconsideration was denied as no documentation had been provided to corroborate her position.

[11] On January 13, 2014, a Notice of Debt was issued for the $8,707.32 overpayment.

[12] On January 28, 2014, the SST-GD advised the Applicant by letter that it would be proceeding by written questions and answers. The deadline for receipt of the Applicant's written answers was February 21, 2014; the SST-GD received no written answers from the Applicant.

[13] On February 25, 2014, the SST-GD dismissed the Applicant's appeal. On June 26, 2014, the Applicant applied for leave to appeal to the SST-AD. On March 23, 2015 the Application for Leave to Appeal was dismissed by a member of the SST-AD.

III. DECISION UNDER REVIEW

A. *Appeal Division Decision*

[14] The SST-AD's Decision of March 23, 2015, denying the Applicant's leave to appeal, is the subject of this judicial review. The Decision found that the Applicant simply repeated the same submissions she had offered the SST-GD. The member concluded that the Applicant was essentially asking that the case be reheard and that a different conclusion be reached. The Applicant failed to explain how the SST-GD had made at least one reviewable error. The member said that, as such, the law would not permit the intervention of the SST-AD.

B. *General Division Decision*

[15] Following a question and answer hearing, the SST-GD decided on February 25, 2014 that monies received by the Applicant during the period in which she was also receiving benefits were properly allocated by the Commission as "earnings" as per s 35 of the *Employment*

Insurance Regulations, SOR/96-332 [*EI Regulations*], and that the Commission's imposition of a warning penalty pursuant to ss 38 and 41.1 of the *EI Act* was justified.

[16] Holding that the onus was on the Applicant to show that any money she had earned was received after the benefits period ceased, the SST-GD concluded that the Applicant had not met her burden of proof as she did not provide any supporting evidence indicative of the dates of the payment on which she had received the monies at issue.

[17] As regards the warning issued by the Commission, the SST-GD examined whether a false or misleading statement had been made, whether it had been made knowingly and whether the Commission had properly exercised its discretionary authority in calculating the amount of the penalty. It was determined that, on a balance of probabilities, the Applicant did make a false or misleading statement by omitting to declare her earnings while in receipt of benefits, despite being advised that she must do so. The SST-GD found that the warning letter was a proper exercise of the Commission's discretion to impose penalties under s 38 of the *EI Act*.

IV. ISSUES

[18] This judicial review is principally concerned with determining whether the SST-AD's Decision refusing leave to appeal was reasonable. From her written submissions, the Applicant raises the following as points in issue:

1) Subsection 52(1) of the *EI Act* creates a 36 month limitation period. The Respondent did not commence an action against the Applicant within that limitation period.

2) Subsection 52(5) of the Act states that 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.

3) The Applicant submits that she did not provide any false or misleading statement or representation in connection with a claim and that the Respondent abused its discretion to claim that the Applicant made a false or misleading statement or representation in order to extend the limitation period.

4) The Decision decided that the Applicant "received money which was paid to her as business income from her employment as a real estate agent."

5) The Applicant submits that this is not true and that the Applicant did not earn real estate commission during the benefit period.

V. STANDARD OF REVIEW

[19] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to a particular question before the court is settled in a satisfactory manner by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless, or where the relevant precedents appear to be inconsistent with new developments in the common law principles of judicial review, must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis: *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 48.

[20] The points in issue raised by the Applicant have brought forward three principal concerns: points 1) and 2) address the SST's interpretation of a limitation period; point 3) speaks of an alleged abuse of discretion on the part of the SST, and points 4) and 5) ask the Court to

determine whether the SST was incorrect in its conclusion that the Applicant had earned income outside of the benefit period.

[21] The Respondent submits, and I concur, that the two-step analysis that previously guided this Court when reviewing decisions of the former Pensions Appeals Board (now replaced by the SST) on applications for leave to appeal, should be reconsidered. That analysis involved ascertaining: (1) whether the correct test was applied; and (2) whether an error had occurred in determining whether there was an arguable case. The *Department of Employment and Social Development Act*, 2005, c 34, s 1 [DESDA], the SST-AD's enabling statute, now establishes the test for leave to appeal at s 58.

[22] In *Atkinson v Canada (Attorney General)*, 2014 FCA 187, the Federal Court of Appeal reviewed the appropriate standard of review for decisions of the SST-AD in relation to the *Canada Pension Plan*. There, the Court concluded that because the SST-AD was interpreting and applying its home statute and the presumption of a standard of reasonableness had not been rebutted, it was the correct standard of review (at paras 24-32). This reasoning was recently applied in *Thibodeau v Canada (Attorney General)*, 2015 FCA 167 at para 35, where the Court found that the *EI Act* was closely connected to the SST's mandate and deference should be presumed. See also *Tracey v Canada (Attorney General)*, 2015 FC 1300. Similarly, the concerns raised by the Applicant each relate to the SST's interpretation of its home legislation, its capacities and its discretion and are questions of mixed fact and law. Consequently, the standard of reasonableness applies to each of the points in issue raised in the present application.

[23] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": see *Dunsmuir*, above, at para 47; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59. Put another way, the Court should intervene only if the Decision was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

VI. STATUTORY PROVISIONS

[24] The following provisions of the *EI Act* are applicable in this proceeding:

Undeclared Earnings	**Rémunération non déclarée**
…	…
19(3) If the claimant has failed to declare all or some of their earnings to the Commission for a period, determined under the regulations, for which benefits were claimed,	19(3) Lorsque le prestataire a omis de déclarer à la Commission tout ou partie de la rémunération qu'il a reçue à l'égard d'une période, déterminée conformément aux règlements, pour laquelle il a demandé des prestations :
(a) the following amount shall be deducted from the benefits paid to the claimant for that period:	(a) la Commission déduit des prestations versées à l'égard de cette période un montant correspondant :
(i) the amount of the undeclared earnings, if, in the opinion of the Commission, the claimant knowingly failed to declare the earnings, or	(i) à la rémunération non déclarée pour cette période, si elle estime que le prestataire a sciemment omis de déclarer tout ou partie de cette

rémunération,

(ii) in any other case, the amount of the undeclared earnings less the difference between

(A) all amounts determined under paragraph (2)(a) or (b) for the period,

and

(B) all amounts that were applied under those paragraphs in respect of the declared earnings for the period; and

(ii) dans tout autre cas, à celui obtenu par soustraction, du total de la rémunération non déclarée qu'il a reçue pour cette période, de la différence entre l'exemption à laquelle il a droit, pour cette période, au titre du paragraphe (2) et celle dont il a bénéficié;

(b) the deduction shall be made

(i) from the benefits paid for a number of weeks that begins with the first week for which the earnings were not declared in that period, and

(ii) in such a manner that the amount deducted in each consecutive week equals the claimant's benefits paid for that week.

(b) ce montant est déduit des prestations versées à l'égard des semaines commençant par la première semaine à l'égard de laquelle la rémunération n'a pas été déclarée, de sorte que le montant de la déduction pour chaque semaine consécutive soit égal au montant des prestations versées

…

…

Penalty for claimants, etc.

Pénalité : prestataire

38 (1) The Commission may impose on a claimant, or any other person acting for a claimant, a penalty for each of the following acts or omissions if the Commission becomes aware of facts that in its opinion establish that the claimant or other person has

38 (1) Lorsqu'elle prend connaissance de faits qui, à son avis, démontrent que le prestataire ou une personne agissant pour son compte a perpétré l'un des actes délictueux suivants, la Commission peut lui infliger une pénalité pour chacun de ces actes :

(a) in relation to a claim for benefits, made a representation that the claimant or other person knew was false or misleading;

(a) à l'occasion d'une demande de prestations, faire sciemment une déclaration fausse ou trompeuse;

(b) being required under this Act or the regulations to provide information, provided information or made a representation that the claimant or other person knew was false or misleading;

(b) étant requis en vertu de la présente loi ou des règlements de fournir des renseignements, faire une déclaration ou fournir un renseignement qu'on sait être faux ou trompeurs;

(c) knowingly failed to declare to the Commission all or some of the claimant's earnings for a period determined under the regulations for which the claimant claimed benefits;

(c) omettre sciemment de déclarer à la Commission tout ou partie de la rémunération reçue à l'égard de la période déterminée conformément aux règlements pour laquelle il a demandé des prestations;

(d) made a claim or declaration that the claimant or other person knew was false or misleading because of the non-disclosure of facts;

(d) faire une demande ou une déclaration que, en raison de la dissimulation de certains faits, l'on sait être fausse ou trompeuse;

(e) being the payee of a special warrant, knowingly negotiated or attempted to negotiate it for benefits to which the claimant was not entitled;

(e) sciemment négocier ou tenter de négocier un mandat spécial établi à son nom pour des prestations au bénéfice desquelles on n'est pas admissible;

(f) knowingly failed to return a special warrant or the amount of the warrant or any excess amount, as required by section 44;

(f) omettre sciemment de renvoyer un mandat spécial ou d'en restituer le montant ou la partie excédentaire comme le requiert l'article 44;

(g) imported or exported a document issued by the Commission, or had it imported or exported, for the purpose of defrauding or

(g) dans l'intention de léser ou de tromper la Commission, importer ou exporter, ou faire importer ou exporter, un document délivré par elle;

deceiving the Commission; or

(h) participated in, assented to or acquiesced in an act or omission mentioned in paragraphs (a) to (g).

Limitation on imposition of penalties

40. A penalty shall not be imposed under section 38 or 39 if

(a) a prosecution for the act or omission has been initiated against the employee, employer or other person;

or

(b) 36 months have passed since the day on which the act or omission occurred.

Warning

41.1 (1) The Commission may issue a warning instead of setting the amount of a penalty for an act or omission under subsection 38(2) or 39(2).

Limitation period

(2) Notwithstanding paragraph 40(b), a warning may be issued within 72 months after the day on which the act or omission occurred.

(h) participer, consentir ou acquiescer à la perpétration d'un acte délictueux visé à l'un ou l'autre des alinéas a) à g).

Restrictions relatives à l'imposition des pénalités

40. Les pénalités prévues aux articles 38 et 39 ne peuvent être infligées plus de trente-six mois après la date de perpétration de l'acte délictueux ni si une poursuite a déjà été intentée pour celui-ci.

Avertissement

41.1 (1) La Commission peut, en guise de pénalité pouvant être infligée au titre de l'article 38 ou 39, donner un avertissement à la personne qui a perpétré un acte délictueux.

Prescription

(2) Malgré l'article 40, l'avertissement peut être donné dans les soixante-douze mois suivant la perpétration de l'acte délictueux.

Reconsideration of claim

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

Decision

52 (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.

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.

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.

Prolongation du délai de réexamen de la demande

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

Definition of insured participant

58 In this Part, insured participant means an insured person who requests assistance under employment benefits and, when requesting the assistance, is an unemployed person

(a) for whom a benefit period is established or whose benefit period has ended within the previous 60 months; or

(b) who would have had a benefit period established for them within the previous 60 months if it were not for the fact that they have had fewer than the hours referred to in subsection 7(4) in the last 52 weeks before what would have been their qualifying period and who, during what would have been that qualifying period, has had at least the number of hours of insurable employment indicated in the table set out in subsection 7(2) or 7.1(1) in relation to their applicable regional rate of unemployment.

Définition de participant

58 Dans la présente partie, participant désigne l'assuré qui demande de l'aide dans le cadre d'une prestation d'emploi et qui, à la date de la demande, est un chômeur, selon le cas :

(a) à l'égard de qui une période de prestations a été établie ou a pris fin au cours des soixante derniers mois;

(b) à l'égard de qui une période de prestations aurait été établie au cours des soixante derniers mois n'était le fait que le nombre d'heures qu'il a cumulées au cours de la période de cinquante-deux semaines qui précède le début de ce qui aurait été sa période de référence est inférieur à celui visé au paragraphe 7(4) et qui, au cours de ce qui aurait été sa période de référence, a exercé un emploi assurable pendant au moins le nombre d'heures indiqué au tableau figurant au paragraphe 7(2) ou 7.1(1) en fonction du taux régional de chômage qui lui est applicable.

[25] The following provisions of the *EI Regulations* are applicable in this proceeding:

Determination of Earnings for Benefit Purposes	**Détermination de la rémunération aux fins du bénéfice des prestations**
35 (2) Subject to the other provisions of this section, the earnings to be taken into account for the purpose of determining whether an interruption of earnings under section 14 has occurred and the amount to be deducted from benefits payable under section 19, subsection 21(3), 22(5), 152.03(3) or 152.04(4) or section 152.18 of the Act, and to be taken into account for the purposes of sections 45 and 46 of the Act, are the entire income of a claimant arising out of any employment, including:	35 (2) Sous réserve des autres dispositions du présent article, la rémunération qu'il faut prendre en compte pour vérifier s'il y a eu l'arrêt de rémunération visé à l'article 14 et fixer le montant à déduire des prestations à payer en vertu de l'article 19, des paragraphes 21(3), 22(5), 152.03(3) ou 152.04(4), ou de l'article 152.18 de la Loi, ainsi que pour l'application des articles 45 et 46 de la Loi, est le revenu intégral du prestataire provenant de tout emploi, notamment :
(a) amounts payable to a claimant in respect of wages, benefits or other remuneration from the proceeds realized from the property of a bankrupt employer;	(a) les montants payables au prestataire, à titre de salaire, d'avantages ou autre rétribution, sur les montants réalisés provenant des biens de son employeur failli;
(b) workers' compensation payments received or to be received by a claimant, other than a lump sum or pension paid in full and final settlement of a claim made for workers' compensation payments;	(b) les indemnités que le prestataire a reçues ou recevra pour un accident du travail ou une maladie professionnelle, autres qu'une somme forfaitaire ou une pension versées par suite du règlement définitif d'une réclamation;
(c) payments a claimant has received or, on application, is entitled to receive under	(c) les indemnités que le prestataire a reçues ou a le droit de recevoir, sur demande, aux termes :

(i) a group wage-loss indemnity plan,

(i) soit d'un régime collectif d'assurance-salaire,

(ii) a paid sick, maternity or adoption leave plan,

(ii) soit d'un régime de congés payés de maladie, de maternité ou d'adoption,

(iii) a leave plan providing payment in respect of the care of a child or children referred to in subsection 23(1) or 152.05(1) of the Act,

(iii) soit d'un régime de congés payés pour soins à donner à un ou plusieurs enfants visés aux paragraphes 23(1) ou 152.05(1) de la Loi,

(iv) a leave plan providing payment in respect of the care or support of a family member referred to in subsection 23.1(2) or 152.06(1) of the Act, or

(iv) soit d'un régime de congés payés pour soins ou soutien à donner à un membre de la famille visé aux paragraphes 23.1(2) ou 152.06(1) de la Loi,

(v) a leave plan providing payment in respect of the care or support of a critically ill child;

(v) soit d'un régime de congés payés pour soins ou soutien à donner à un enfant gravement malade;

(d) notwithstanding paragraph (7)(b) but subject to subsections (3) and (3.1), the payments a claimant has received or, on application, is entitled to receive from a motor vehicle accident insurance plan provided under a provincial law in respect of the actual or presumed loss of income from employment due to injury, if the benefits paid or payable under the Act are not taken into account in determining the amount that the claimant receives or is entitled to receive from the plan;

(d) malgré l'alinéa (7)b) et sous réserve des paragraphes (3) et (3.1), les indemnités que le prestataire a reçues ou a le droit de recevoir, sur demande, dans le cadre d'un régime d'assurance-automobile prévu par une loi provinciale pour la perte réelle ou présumée du revenu d'un emploi par suite de blessures corporelles, si les prestations payées ou payables en vertu de la Loi ne sont pas prises en compte dans l'établissement du montant que le prestataire a reçu ou a le droit de recevoir dans le cadre de ce régime;

(e) the moneys paid or payable to a claimant on a periodic basis or in a lump sum on account of or in lieu of a pension; and	(e) les sommes payées ou payables au prestataire, par versements périodiques ou sous forme de montant forfaitaire, au titre ou au lieu d'une pension;
(f) where the benefits paid or payable under the Act are not taken into account in determining the amount that a claimant receives or is entitled to receive pursuant to a provincial law in respect of an actual or presumed loss of income from employment, the indemnity payments the claimant has received or, on application, is entitled to receive pursuant to that provincial law by reason of the fact that the claimant has ceased to work for the reason that continuation of work entailed physical dangers for	(f) dans les cas où les prestations payées ou payables en vertu de la Loi ne sont pas prises en compte dans l'établissement du montant que le prestataire a reçu ou a le droit de recevoir en vertu d'une loi provinciale pour la perte réelle ou présumée du revenu d'un emploi, les indemnités que le prestataire a reçues ou a le droit de recevoir, sur demande, en vertu de cette loi provinciale du fait qu'il a cessé de travailler parce que la continuation de son travail mettait en danger l'une des personnes suivantes :
(i) the claimant,	(i) le prestataire,
(ii) the claimant's unborn child, or	(ii) l'enfant à naître de la prestataire,
(iii) the child the claimant is breast-feeding.	(iii) l'enfant qu'allaite la prestataire.

[26] The following provisions of the DESDA are applicable in this proceeding:

Grounds of Appeal	**Moyens d'appel**
58 (1) The only grounds of appeal are that	58 (1) Les seuls moyens d'appel sont les suivants :
(a) the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to	(a) la division générale n'a pas observé un principe de justice naturelle ou a autrement excédé ou refusé d'exercer sa

exercise its jurisdiction;	compétence;
(b) the General Division erred in law in making its decision, whether or not the error appears on the face of the record; or	(b) elle a rendu une décision entachée d'une erreur de droit, que l'erreur ressorte ou non à la lecture du dossier;
(c) the General Division based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.	(c) elle a fondé sa décision sur une conclusion de fait erronée, tirée de façon abusive ou arbitraire ou sans tenir compte des éléments portés à sa connaissance.

VII. ARGUMENTS

A. *Applicant*

[27] The Applicant submits that she had regular communication with Canada Revenue Agency [CRA], who had all of her current contact information, and the Commission would have had access to this information through its communications with CRA. The Commission should have been able to contact her on all of the dates that it claims it attempted to reach her by phone or letter.

[28] The Applicant says that according to s 52(1) of the *EI Act*, the legislated limitation period for reclaiming overpayment on benefits expired on May 17, 2011; the Respondent did not attempt to contact the Applicant prior to this date. The first time that the Respondent did communicate with the Applicant was in a letter dated November 4, 2011 – 41 months after the expiry of the limitation period. Because the Commission found that the Applicant had made false or misleading statements, it extended the limitation period to 72 months as per s 52(5) of the *EI*

Act. The Applicant denies that she made any false or misleading statements and says that the limitation period should not have been extended, as this was an abuse of the Commission's power.

[29] The Applicant submits that she did not earn any income attributed to her during the time she was in receipt of maternity benefits (calculated at $1,746.00 for 19 weeks and $1,396.00 for 1 week) and claims she provided evidence supporting this assertion. She says she did not misrepresent her earnings and did provide enough evidence to demonstrate that she did not earn income during this period. The Respondent's submissions asserting the opposite are consequently unfair and the Applicant says she should not be faced with a penalty. Furthermore, the Respondent made an error of fact by allocating income annually when the Applicant received income periodically, and never at a point that fell within the maternity benefit period.

B. *Respondent*

[30] The Respondent submits that the SST-AD did not err in denying the Applicant leave to appeal the SST- GD decision and that the Decision reasonably addressed the issue of whether the Applicant had raised grounds of appeal that bore a practical chance of success. The Respondent says that the Applicant simply argued that the SST-GD had made an erroneous finding of fact; this amounts to the Applicant asking the SST-AD to rehear her case and to come to a different conclusion. The SST-AD concluded that the Applicant had not presented a ground of appeal that had a reasonable chance of success, as required by s 58 of the *EI Act*.

[31] The Respondent argues that the Commission properly allocated the Applicant's earnings. As per s 35(2) of the *EI Regulations*, earnings are "any pecuniary or non-pecuniary income that is or will be received by a claimant from an employer or any other person, including a trustee in bankruptcy."

[32] The Respondent says that the SST-GD's decision was also reasonable in confirming that the Commission had applied the law governing reconsideration of claims, allocation of earnings, and warnings in accordance with the *EI Act* and its regulations.

[33] With regard to the statutory scheme governing reconsideration, the Respondent submits that once the Commission is aware of an issue that pertains to the qualification or entitlement to benefits of a claimant – which includes undeclared earnings – it may, by virtue of s 52(5) of the *EI Act*, initiate a reconsideration of the benefits received up to 72 months after a claim for benefits is made. This time period allows the Commission to retrace its steps and retroactively impose penalties: *Canada (Attorney General) v Landry*, [1999] FCJ No 1872 at para 22.

[34] The Respondent notes that in her application for judicial review, the Applicant alleges for the first time that the Commission was "statute barred" by s 52 to reconsider her claim after 36 months. This argument was not raised before either of the SST divisions and is not relevant in determining this judicial review.

[35] Furthermore, the Applicant's Record for this judicial review contains new evidence that was not part of the material in possession of the SST-AD when it rendered its Decision and is

therefore inadmissible. The only material that can be considered on judicial review is that which was available to the decision-maker: *Lemiecha (Litigation guardian of) v Canada (Employment and Immigration)*, [1993] FCJ No 1333 (FCTD) at para 4; *Canada (Attorney General) v Merrigan*, 2004 FCA 253. The new evidence includes a copy of an email from the Calgary Real Estate Board confirming commissions and copies of listing sheets from transactions with commissions earned.

[36] In submissions on the statutory scheme governing the issuance of warnings and penalties (including ss 38, 40 and 41.1 of the *EI Act*), the Respondent submits that the Court has established that the onus is initially on the Commission to prove, on a balance of probabilities, that a claimant knowingly made a false or misleading statement. Once this is established from the evidence, the onus shifts to the claimant to provide an explanation that rebuts the inference that the false statements were knowingly made: *Canada (Attorney General) v Gates*, [1995] FCJ No 736 at paras 6, 9; *Nangle v Canada (Attorney General)*, 2003 FCA 210. The Respondent submits that it was probable that the Applicant had generated or received some of the $90,800 declared within the first five months of 2008 during which she was receiving benefits. When the Applicant refused to provide additional information that could have allowed the Commission to determine otherwise, this probability increased. The Commission therefore acted judicially in imposing the warning that it did and it was reasonable for the SST-GD to uphold this conclusion.

VIII. ANALYSIS

[37] Having reviewed the record before me in this application, and having heard the parties in open Court, I am convinced that Ms. Auch did not receive monies during the benefits period and

that she did not, in fact, misrepresent the situation to the SST. This does not, of course, render the decisions that found otherwise either unreasonable or procedurally unfair. The Commission, the SST-GD and the SST-AD could only act upon the information and submissions that Ms. Auch provided to them at the material times, and on judicial review, those decisions have to be assessed on the basis of the record that was before each tribunal. Strictly speaking, of course, I am only reviewing the March 23, 2015 Decision of the SST-AD, but a fuller context is required in order to understand what has happened here and how that Decision came to be made.

[38] In this motion, Ms. Auch focusses upon the applicable limitation period. She points out that the 36 month limitation period in s 52(1) of the *EI Act* had expired before the Respondent commenced any action against her to reclaim benefits she had received. She argues that, in order to overcome this hurdle, the Commission invented "a false and misleading statement or representation" that she never made so that the Commission could use the 72 month limitation period set out in s 52(5) of the Act. So this dispute centres upon whether Ms. Auch could be said to have made a false and misleading statement. If she didn't, then the 36 month limitation period had expired and the SST had no right to try and reclaim benefits paid. If she did make a false and misleading statement, then the SST could reclaim those benefits.

[39] In her correspondence with the SST, Ms. Auch has been entirely consistent. She has repeatedly told them that she neither worked, nor received monies from employment during the benefit period. The work and monies at issue relate to Ms. Auch's work as a real estate agent. Given this consistency of Ms. Auch, how did the Commission conclude that a misrepresentation occurred and that she did receive monies from the real estate work during the benefits period?

[40] In 2011, on the basis of information from CRA, the Commission became aware that Ms. Auch had declared self-employment earnings of $90,800 in her T-1 statement for the year 2008. Because the benefits period ended on May 17, 2008, these monies could have been earned either inside or outside the benefits period. The Commission did not know which it was. So in November 2011 (approximately 41 months after Mr. Auch had received her last benefit payment, and so outside the 36 month limitation period) the Commission sent a letter to Ms. Auch at the address on her file and requested additional information about her 2008 earnings. After receiving no response from Ms. Auch, the Commission sent a follow-up letter in January 2012. This letter was not answered.

[41] The letters were not answered because Ms. Auch had moved to a new address in Manitoba. There was no reason why Ms. Auch needed to inform the Commission of this change of address. The time for receiving benefits had past and there was no reason for her to expect that the Commission would need to contact her.

[42] Having heard nothing from Ms. Auch however, the Commission issued a Record of Decision Violation and decided, on the basis of the CRA information, that Ms. Auch had made a false and misleading statement because she had not reported her 2008 earnings while she was in receipt of EI benefits and because no documentation had been tendered to contradict the Commission's conclusions. As a result, and in accordance with the *EI Regulations*, the earnings declared for 2008 were allocated (19 weeks at $1,746.00 and 1 week at $ 1,396.00) which created and overpayment of $8,707.32.

[43] The reason Ms. Auch had not reported these earnings is that they were all made from real estate commissions in 2008 that she had earned, and for work she had done, outside of the benefits period. The reason she had not been able to explain this was that she had moved houses and, as a result, never received the Commission's letters. At this point in the process, the Commission's decision was procedurally unfair. It never communicated its concerns to Mr. Auch or tried to find out why she didn't answer the letters. After 41 months, it should have been obvious that she could have moved houses and the Commission could easily have found her present address through CRA. Furthermore, the decision was also unreasonable and beyond the limitation period. Ms. Auch had not, in fact, misrepresented anything.

[44] It was not until March 2013 that Ms. Auch found out what had happened and notified the Commission that she had never received the letters. Quite properly, the Commission accepted this and allowed Ms. Auch further time to provide additional information regarding her 2008 declared earnings.

[45] By letter dated June 11, 2013, Ms. Auch confirmed to the Commission that she had moved to Manitoba and had not received the Commission's letters. She also told the Commission that she had not worked or received a salary while she was on maternity leave. She explained that the business income she had earned as a real estate agent in 2008 was earned after the expiry of her maternity leave. All of this was true, but Ms. Auch did not provide any documentation to corroborate her account. In fact, Ms. Auch sent the same letter a second time in September 2013, and a third time on October 2013, but each time without any documentation to support that she had not generated or earned any income while in receipt of maternity benefits.

This, in essence, is why the parties are before the Court: Ms. Auch's failure to corroborate with appropriate documentation what was, we now know, the truth.

[46] On October 10, 2013, Ms. Auch filed a request for reconsideration of the overpayment. By letter dated November 26, 2013 the Commission acknowledged the request for reconsideration and requested proof that she did not generate earnings while in receipt of EI benefits. That letter read:

> We are writing to let you know that we have received on October 25, 2013 your Request for Reconsideration of the decisions(s) made regarding your claim for Employment Insurance benefits.
>
> We are now reviewing your claim and every effort will be made to render a decision in writing within 30 days. We tried to contact you to obtain additional information, unfortunately without success. It is important that you contact the undersigned at Service Canada by fax with the following information.
>
> You stated that you were not self employed or in receipt of self employment income during your employment insurance benefit period June 7, 2007 to May 17, 2008. Please provide documentary proof to show you were not self employed during this time in order to support your statement. Please fax your response to us to 604-666-9350 before December 7[,] 2013, or within 10 days of the date of this letter. If we do not hear from you, we will proceed with our review and a decision will be made with the information on file.

[47] Ms. Auch provided no response to this letter. The Commission attempted to contact her by telephone on December 5, 2013 but was unable to do so. Consequently, a letter was sent to Ms. Auch on December 6, 2013 advising her that her reconsideration request had been denied because she had failed to provide any documentation to support her position that she did not have self-employment income during the benefit period. Subsequently, in January 13, 2014, the Notice of Debt was issued.

[48] So the record is clear that Ms. Auch was fully informed that she needed to provide supporting, corroborating documentation, but she failed to do it. She says now that 2013 was a long time after 2008 and she couldn't easily access corroborating documentation. But the affidavit she has filed with this application does not explain why not. It also does not explain why, if she was having difficulties and wanted more time, she did not contact the Commission and request it. After the change of address issue was clarified, the Commission was quite prepared to allot Ms. Auch full scope to demonstrate that she had not received earnings during the benefits period but, apart from the assertions in her letter, she failed to provide any such evidence. She has provided some evidence in her record for this application, so it is difficult for the Court to understand why she could not have gone to the trouble earlier of finding some documentation that would support her case before the Commission. She said at the hearing before me that she thought her word should be enough. But that is naïve and unconvincing.

[49] Ms. Auch is an intelligent, professional woman and highly articulate. She works in real estate. She knows that formalities have to be observed and she was specifically told by the Commission that she needed to provide corroborative documentation, and yet she failed to do so. That is the nub of this application. Ms. Auch has produced no evidence, nor any convincing explanation before the Court as to why she couldn't provide the corroborating documentation requested or why, if she was having difficulties finding it, she didn't contact the Commission and seek more time and advice on what she could do to satisfy them on the issue of earnings.

[50] Because there was no information before the Commission to dispute the information from CRA, the Commission followed the *EI Regulations* and made the allocations set out above. The

burden of proof was upon Ms. Auch to show that she had not received earnings during the benefits period and, after being advised in writing of what was required, she failed to provide information necessary to support her assertions. The Commission also determined that a misrepresentation had occurred. This is because the CRA information showed reported earnings for 2008 and Ms. Auch declined to provide the information needed to show that she had not worked or received income during the benefits period. Nor did she provide a reason why she couldn't do this. As a consequence, on a balance of probabilities, the Commission concluded that her failure to provide the information requested meant that she had earned and received income during the benefits period. Why else would she not respond when asked to provide corroborating documentation?

[51] Ms. Auch then appealed to the SST-GD who confirmed the Commission's approach and provided legal authorities for doing so. In her appeal to the SST-AD, Ms. Auch failed to put forward any grounds of appeal stipulated in s 58(1) of the *Department of Employment and Social Development Act*. Consequently, that appeal had to be refused.

[52] Ms. Auch now comes before the Court on a judicial review basis. She swears that she did not receive earnings during the benefit period and that she did not misrepresent this to the Commission. I believe her, but unfortunately that does not assist her. She has failed to demonstrate that the SST-AD (or indeed the Commission decision or the SST-GD decision) lacked procedural fairness or was unreasonable. The simple fact is that she did not discharge the onus upon her to provide the requested corroborating documentation when it was needed by the Commission to determine whether she had received earnings during the benefit period, and she

has provided no convincing explanation as to why she did not or could not have done this, or could not have approached the Commission with any problems and seek more time to do so.

[53] As a result, I can find no reviewable error in the Decision before me and I have to dismiss this application. I do this reluctantly because I believe Ms. Auch is being honest with the Court and that she did not receive earnings during the benefit period. But she failed to demonstrate this in the right way when she was asked to do so, so that she cannot claim she has been dealt with unfairly. If she now has the corroborative evidence to back up what she said to the Commission, she should at least provide this to the Commission and ask if there is some way that her case can be reconsidered on the basis of this evidence. Whether that can be done, or should be done, is not a matter before me in this application so I can do no more than suggest she approach the Commission to see what, if anything, can be done at this point to rectify the situation.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application is dismissed without costs.
2. The style of cause is amended to delete the "Department of Employment and Social Development" as a Respondent. The "Attorney General of Canada" shall be the only Respondent named in this application.

"James Russell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-903-15
STYLE OF CAUSE:	SUSAN AUCH v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	WINNIPEG, MANITOBA
DATE OF HEARING:	JANUARY 13, 2016
JUDGMENT AND REASONS:	RUSSELL J.
DATED:	FEBRUARY 15, 2016

APPEARANCES:

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