Federal Court of Appeal | Cour d'appel fédérale

Date: 20170517

Docket: A-420-16

Citation: 2017 FCA 104

[ENGLISH TRANSLATION]

CORAM: **SCOTT J.A.**
BOIVIN J.A.
DE MONTIGNY J.A.

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

ABBES BELLIL

Respondent

Heard at Montreal, Quebec, on May 16, 2017.

Judgment delivered at Montreal, Quebec, on May 17, 2017.

REASONS FOR JUDGMENT OF THE COURT BY: DE MONTIGNY J.A.

CONCURRED IN BY: SCOTT J.A.
BOIVIN J.A.

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REASONS FOR JUDGMENT

DE MONTIGNY J.A.

[1] The Attorney General of Canada is seeking judicial review of a decision dated September 9, 2016, by the Appeal Division of the Social Security Tribunal (SST-AD), affirming the decision of the General Division of the Social Security Tribunal (SST-GD), which established that the respondent did not knowingly make false or misleading representations in his claims for employment insurance benefits. In doing so, the SST-AD found that the imposition of

a penalty was not justified under section 38 of the *Employment Insurance Act*, S.C. 1996, c. 23 (the Act), and that the issuance of a notice of violation was also not justified under section 7 of the same Act.

[2] Mr. Bellil holds a doctorate in nuclear engineering. He lost his job on October 12, 2012, when the Gentilly 2 Nuclear Power Station closed down, and established an employment insurance benefit period, effective April 14, 2013.

[3] The employment insurance program is based on the principle of self-reporting. In accordance with sections 48 to 50 of the Act, claimants must first make an initial claim, then complete report cards for each week of unemployment.

[4] According to the information taken from the declaration cards of the Canada Border Services Agency, Mr. Bellil was outside Canada from June 24 to August 10, 2013, and from September 3 to October 4, 2013, for a total of 11 weeks. Mr. Bellil visited Tunisia, where he is also a citizen, to take part in interviews and to do a work term as part of his job search. Yet, when he electronically filled out his employment insurance reports for the periods at issue, Mr. Bellil replied “no” to the following question: Were you outside Canada between Monday and Friday during the period of this report?

[5] Paragraph 37(b) of the Act provides that a claimant is disentitled from receiving benefits for any period during which the claimant is not in Canada. Paragraph 55(1)(f) of the *Employment Insurance Regulations*, SOR/96-332 (the Regulations), however, establishes that a claimant is

not disentitled from receiving benefits for being outside Canada in order to conduct a bona fide job search, but limits to 14 days the period during which the claimant can be outside Canada. In accordance with these provisions, the Canada Employment Insurance Commission (the Commission) informed Mr. Bellil in February 2015 that he was disentitled from receiving employment insurance benefits from July 10 to August 10, 2013, and from September 3 to October 4, 2013. The overpayment amount resulting from the disentitlement was assessed at $4,710.00. A notice of serious violation was therefore issued to Mr. Bellil and a monetary penalty of $2,355.00 was imposed on him under subsection 7.1(5) and section 38 of the Act.

[6] Following a request for reconsideration by Mr. Bellil, the Commission agreed to reduce the amounts owed. The Commission considered Mr. Bellil eligible for employment insurance during the first 14 days of his second period of absence in Tunisia since he had still been looking for work. It also considered his job search to be a mitigating circumstance for reducing his monetary penalty. Mr. Bellil's debt was therefore revised to $3,608.00 for the excess benefits and to $1,082.00 for the penalty. The notice of serious violation was maintained, however, because of the number of false representations and the amount of the overpayment resulting from the act or omission.

[7] Mr. Bellil disputed that decision. On appeal, the SST-GD noted that Mr. Bellil had indeed submitted inaccurate reports, but accepted his explanations that he had not intended to commit fraud. Deciding from his testimony that Mr. Bellil is a man of integrity, the Tribunal concluded that it was beyond doubtful that he would deliberately choose to jeopardize his reputation by committing an offence. The SST-GD also considered that Mr. Bellil is a professional who is a

player on the world market, that his stays abroad were motivated by his job search, that he sincerely believed that he was entitled to his employment insurance benefits while he travelled outside the country for the purpose of looking for work and that he was not very familiar with the Act and the Regulations. Consequently, the SST-GD vacated the monetary penalty and the notice of violation.

[8] On appeal, the SST-AD rejected the allegations of the Attorney General that the SST-GD had erred in its assessment of the evidence and in its interpretation of the word "knew" in paragraph 38(1)(a) of the Act. After citing a long excerpt from the SST-GD's decision, the SST-AD stated that it was of the view that the SST-GD had correctly applied this Court's case law to the effect that a person's knowledge concerning the falsity of the offending statement has to be decided on a subjective basis and that it was for the SST-GD to assess that knowledge. The SST-AD thus dismissed the appeal on the ground that the SST-GD had believed and assigned credibility to Mr. Bellil's testimony and that the requirement with regard to the fact that the claimant had to have known, on a subjective level, that his representation was false was not met.

[9] The parties agree, with good reason, that the applicable standard of review for an SST-AD decision regarding entitlement to employment insurance benefits and, more specifically, the interpretation that should be given to a provision of the Act, is reasonableness. It is now well established that deference will result where an administrative tribunal is interpreting its own statute or statutes closely connected with its function (*Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 54, [2008] 1 S.C.R. 190; *Canada (Attorney General) v. Jean*, 2015 FCA 242 at para. 14, [2015] F.C.J. No. 1315; *Thibodeau v. Canada (Attorney General)*, 2015 FCA 167 at

paras. 40–41, 477 N.R. 104). Taking into account paragraphs 58(1)(b) and (c) of the *Department of Employment and Social Development Act*, S.C. 2005, c. 34, the issue before this Court is whether the SST-AD could reasonably conclude that the SST-GD did not err in law in making its decision or did not base its decision on an erroneous finding of fact.

[10] Paragraph 38(1)(a) of the Act provides that the Commission may impose a penalty if the claimant has made a representation that he or she "knew" was false or misleading in relation to a claim for benefits. That provision (as well as subsection 33(1) of the *Unemployment Insurance Act*, R.S.C. 1985, c. U-1, which is essentially to the same effect) has been interpreted several times by this Court, notably in *Canada (Attorney General) v. Gates*, [1995] 3 F.C. 17, 125 D.L.R. (4th) 348 (F.C.A.) (*Gates*); *Canada (Attorney General) v. Purcell*, [1996] 1 F.C.R. 644, 40 Admin. L.R. (2d) 40 (F.C.A.) (*Purcell*); and *Mootoo v. Canada (Minister of Human Resources Development)*, 2003 FCA 206, 304 N.R. 198. This case law shows that the provision does not create a criminal offence but results in a simple administrative penalty, for which the Commission bears the burden of proof on the balance of probabilities.

[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.

[12] In this case, I am of the view that the SST-AD erred both in its interpretation and in its application of paragraph 38(1)(a).

[13] First, the SST-GD introduced an element of fraud into its analysis of the respondent's conduct, which the wording of paragraph 38(1)(a) does not support. It thus noted more than once that it believed the respondent when he stated that he had [TRANSLATION] "never intended to deliberately defraud the employment insurance program by making false statements" (see the SST-GD decision at paras. 37 and 59). Concluding from his testimony that he is a man of integrity, the SST-GD found it [TRANSLATION] "beyond doubtful that the [respondent] would deliberately choose to jeopardize his reputation by committing a fraudulent act" (at para. 56). Far from expressing its disagreement with that approach, as it was invited to do by the Attorney General, the SST-AD was content to reproduce the erroneous conclusions of the SST-GD and stated that it was of the view that the decision complied with the legislative provisions and the case law.

[14] The SST-AD erred in implicitly endorsing the SST-GD's decision according to which an intent to defraud is required for a person to be considered to have knowingly made a false or misleading representation. As previously mentioned, the only requirement imposed by

Parliament is that of knowingly, that is, with full knowledge of the facts, making a false or misleading representation. The lack of defrauding or the fact of having integrity has no relevance. The SST-AD should have intervened under paragraph 58(1)(b) of the *Department of Employment and Social Development Act* to correct this error in law. By not doing so and thereby maintaining the confusion denounced by this Court between subjective knowledge of a false or misleading representation and intent to defraud, the SST-AD rendered an unreasonable decision.

[15] Second, that error on the part of the SST-AD was not without consequence for its assessment of the evidence. In *Gates* and *Purcell*, this Court ruled that the burden of proof is reversed as soon as the claimant has wrongly answered a very simple question or a question on the report card. In this case, the question the respondent had to answer on his report cards was very simple: Were you outside Canada between Monday and Friday during the period of this report? Accordingly, it fell to Mr. Bellil to explain the existence of his inaccurate answers; he had to show that he had not known that his answers were wrong.

[16] The only explanation provided by Mr. Bellil to justify his erroneous answers was his inattention to the questions. In his answer to the questionnaire sent to him by the Commission, he stated that he had paid attention to the questionnaire the first time, but that he had subsequently filled it out mechanically. Not only was the question he had to answer unambiguous, but claimants also receive many warnings. Under the heading “Your responsibilities” in the rights and responsibilities section of the initial claim for employment insurance benefits, it is indicated that claimants must report any absences from their area of residence and/or any absence from

Canada when requesting regular benefits. In addition, under the heading “Absence from Canada” in the section that contains other important information, claimants are also given a warning that they must report any absences from Canada.

[17] A warning is also given to claimants regarding false or misleading representations, and claimants must also acknowledge that they have read and understood the part about their rights and responsibilities. Finally, claimants must attest that the answers provided in their report are correct at the end of each report card that they complete for each week of unemployment.

[18] In my view, the SST-GD erred in accepting the explanations provided by the respondent and did not take all of the evidence into account. Mr. Bellil is an engineer and is certainly capable of understanding the meaning of a question as clear as the one he had to answer. Moreover, he was in Tunisia when he answered the question of whether he was outside Canada. Even assuming that he could have developed some “automatism” after completing only two reports (his report dated June 30 was only his third report), Mr. Bellil did not explain how he could have disregarded the numerous above-mentioned instructions and warnings or why he had not understood the question the first time he read it. In the end, he provided erroneous information seven times.

[19] As stated by this Court in *Gates*, the subjective knowledge test makes it possible to take objective elements into account. Contrary to what is stated by the SST-AD, such an approach does not imply that a claimant acted knowingly each time that he or she answered a simple, unambiguous question incorrectly. No doubt every case will turn on its particular facts. In this case, the SST-GD erred in not taking into account the objective evidence submitted to it and in

relying on irrelevant factors such as the good faith of the respondent. It is all very well to state that it is for the trier of fact to assess the claimant's knowledge, but the assessment must be based on the evidence on the record, disregard considerations excluded by the case law and take into account any presumptions that may apply. I am thus of the opinion that the SST-AD rendered an unreasonable decision by affirming a decision that was rendered without taking into account the elements brought to its attention and by allowing, for all practical purposes, a claimant to avoid an administrative penalty by relying on his own negligence under the cover of automatism.

[20] The application for judicial review should therefore be allowed, and the file should be referred back to the SST-AD for redetermination in accordance with these reasons.

"Yves De Montigny"
J.A.

"I agree.
A.F. Scott J.A."
"I agree.
Richard Boivin J.A."

Certified true translation
Janine Anderson, Revisor

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

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