Federal Court  Cour fédérale

**Date: 20191002**

**Docket: T-1777-18**

**Citation: 2019 FC 1250**

**Ottawa, Ontario, October 2, 2019**

**PRESENT: Mr. Justice Boswell**

**BETWEEN:**

**SONYA ARKSEY**

**Applicant**

**and**

**ATTORNEY GENERAL OF CANADA**

**Respondent**

## JUDGMENT AND REASONS

[1] The Applicant, Sonya Arksey, has applied for judicial review of a decision of the Appeal Division of the Social Security Tribunal of Canada [SST]. The Appeal Division denied Ms. Arksey leave to appeal a decision of the General Division of the SST because the appeal had no reasonable chance of success.

[2] The Canada Employment Insurance Commission paid Ms. Arksey employment insurance benefits twice for the same period of time, once under a renewal claim and again under a new

initial claim. The General Division determined that Ms. Arksey was required to repay the overpayment of benefits. The Appeal Division found the General Division had not failed to observe a principle of natural justice and had not made an error of law.

[3] Ms. Arksey, who represents herself in this matter, now asks the Court to reverse the overpayment of benefits and declare that the Commission take some responsibility rather than just recognizing and apologizing for its error.

## I. Background

[4] Ms. Arksey worked for TG Minto Corporation before TG Minto terminated her employment and offered her a payout. Shortly after that, on September 12, 2016, Ms. Arksey called the Commission to request reactivation of her claim for benefits and conversion of her sickness benefits to regular benefits because she had been dismissed from her job. The Commission approved this request and Ms. Arksey received twelve weeks of regular benefits for the period of February 26 to May 20, 2017.

[5] After a series of negotiations, TG Minto provided Ms. Arksey with a severance payout of $19,604.60. When this information came to the Commission's attention, it sent a letter to Ms. Arksey in November 2016, stating that her file was under review. This letter also stated that the money she received upon separation from TG Minto constituted earnings and would be applied towards her claim for benefits from October 2, 2016 to February 25, 2017.

[6] Ms. Arksey submitted a renewal application for regular benefits in early March 2017. At the end of the 12-week regular benefit period, she telephoned the Commission to inquire about receiving additional benefits. The Commission advised Ms. Arksey it was to her advantage to cancel the renewal application and establish a new initial claim. The Commission confirmed Ms. Arksey's request to cancel the renewal application in favour of a new initial claim, commencing as of March 2, 2017.

[7] Shortly after this confirmation, the Commission mistakenly sent a duplicate payment of $6,000 for benefits covering the period from February 26 to May 20, 2017. In retroactively terminating the renewal application, the Commission failed to prevent the duplicate payment of benefits. Consequently, the Commission sent Ms. Arksey a Notice of Debt for the $6,000 overpayment in late June 2017.

[8] Following receipt of this Notice, Ms. Arksey called the Commission to request a review of her account. During this telephone call, the Commission communicated its first decision concerning the overpayment. It explained the error and told Ms. Arksey that she had to repay the overpayment. A month or so later, Ms. Arksey telephoned the Commission again and requested reconsideration of the overpayment decision.

[9] In early December 2017, the Commission communicated its reconsideration decision to Ms. Arksey during a telephone conversation and also in a follow-up letter. The Commission dealt with two issues: first, whether the overpayment was valid; and second, whether the separation payment constituted earnings. In the letter, the Commission indicated that the amount

of the overpayment would be adjusted and that the separation payment Ms. Arksey received would be applied against her employment insurance claim from August 21, 2016 to January 14, 2017.

A. *The General Division Decision*

[10] In early January 2018, Ms. Arksey appealed the Commission's reconsideration decision to the General Division of the SST. In its statement of representations to the General Division, the Commission stated it had adjusted the allocation date of the separation payment. This adjustment reduced the $6,000 overpayment by $1503, resulting in Ms. Arksey owing $4,497.

[11] The General Division addressed two issues: first, whether the money Ms. Arksey received from TG Minto constituted earnings, and if so, how these earnings should be allocated; and second, whether she had to repay the benefits to which she was not entitled.

[12] The General Division found that the money Ms. Arksey received from TG Minto constituted earnings under subsection 35(2) of the *Employment Insurance Regulations,* SOR/96-332 [the *Regulations*] because the payment compensated her for her dismissal. The General Division remarked that Ms. Arskey did not dispute that she received the money upon separation from her employer.

[13] On the second issue, the General Division found Ms. Arksey liable to repay any amount the Commission paid her as benefits to which she was not entitled under section 43 of the *Employment Insurance Act*, SC 1996, c 23 [the *Act*]. It determined that the overpayment of

$4,497 was a debt due to the Crown and recoverable in the Federal Court subject to a 72-month limitation period under subsections 47(1) to (3) of the *Act*. In the General Division's view, the Commission had properly assessed the overpayment and Ms. Arksey's liability to pay the debt. The General Division also noted that, although the Commission had the sole authority to write-off any employment insurance related debt, its refusal to deny a write-off of the overpayment was not at issue; and, in any event, section 112.1 of the *Act* provides that a decision of the Commission about writing off any debt owed to it is not subject to review by the SST.

## II. The Appeal Division Decision

[14] Ms. Arksey sought leave to appeal the General Division's decision to the Appeal Division of the SST in late August 2018. In a decision dated September 11, 2018, the Appeal Division refused her application for leave to appeal because the appeal had no reasonable chance of success.

[15] The Appeal Division noted that it could not intervene in a General Division decision unless the decision contained one of the types of errors set out in subsection 58(1) of the *Department of Employment and Social Development Act*, SC 2005, c 34 [the *DESDA*]. This subsection provides that the only grounds of appeal are where the General Division:

> (a) failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;
>
> (b) erred in law in making its decision, whether or not the error appears on the face of the record; or
>
> (c) 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.

[16] The Appeal Division further noted that the test at the leave stage was whether there was a reasonable chance of success on one or more grounds of appeal to grant leave in order to allow the appeal to go forward. The Appeal Division referenced Federal Court jurisprudence in stating that a reasonable chance of success has been equated to "an arguable case".

[17] The Appeal Division focused on two issues: first, whether there was an arguable case that the General Division failed to observe a principle of natural justice; and second, whether there was an arguable case that the General Division made an error of law.

[18] On the first issue, the Appeal Division determined there was no arguable case that the General Division failed to observe a principle of natural justice. It noted that natural justice refers to fairness of process and includes procedural protections such as the right to an unbiased decision-maker and the right of a party to be heard and to know the case against him or her. The Appeal Division found Ms. Arksey had not raised any concerns of this nature, and that her only argument was that she thought it unfair to repay an amount paid to her in error.

[19] On the second issue, the Appeal Division concluded that there was no arguable case the General Division had erred in law under paragraph 58(1) (b) of the *DESDA* in confirming that Ms. Arksey must repay the overpayment or in refusing to consider a write-off of her debt. The Appeal Division noted that she did not argue she was entitled to all the benefits the Commission paid her but, rather, argued that she should not have to repay benefits paid to her as a result of the Commission's mistake.

[20] The Appeal Division observed that, although section 56 of the *Regulations* permits the Commission to write-off debts in certain circumstances, section 112.1 of the *Act* does not allow it to reconsider a write-off decision under section 112. The Appeal Division also noted that the General Division has jurisdiction to hear only appeals of the Commission's decisions reconsidered under section 112 of the *Act*.

[21] Thus, the Appeal Division refused the application for leave to appeal because the appeal had no reasonable chance of success.

## III. Analysis

[22] This application for judicial review raises one main issue: that is, was it reasonable for the Appeal Division to refuse Ms. Arksey's application for leave to appeal because it had no reasonable chance of success?

### A. *Standard of Review*

[23] The applicable standard of review in respect of the Appeal Division's decision to deny leave to appeal is reasonableness (*Andrews v Canada (Attorney General)*, 2018 FC 606 at para 17; *Canada (Attorney General) v Bernier*, 2017 FC 120 at para 7).

[24] The reasonableness standard tasks the Court with reviewing an administrative decision for the existence of justification, transparency, and intelligibility within the decision-making process, and with determining whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir v New Brunswick*, 2008

SCC 9 at para 47). Those criteria are met if the reasons allow the reviewing court to understand why the tribunal made its decision and permit the court to determine whether the conclusion is within the range of acceptable outcomes (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16).

B. *The Parties' Submissions*

[25] Ms. Arksey does not identify any error in the Appeal Division's decision in her notice of application or in her memorandum of fact and law; nor did she do so at the hearing of this matter. In her notice of application, she relies upon subsection 56(2) of the *Regulations* (which grants the Commission jurisdiction to write-off overpayments) to argue that she should be granted relief from the overpayment. Ms. Arksey emphasizes that there were no errors on her part and that she acted promptly in all her communications with the Commission.

[26] According to the Respondent, the Appeal Division identified and applied the proper test for granting leave to appeal under subsection 58(1) of the *DESDA* in finding that the appeal had no reasonable chance of success. The Respondent says that having a reasonable chance of success, in the context of a decision on leave to appeal, means having an arguable case upon which the proposed appeal might succeed.

[27] The Respondent further says that a disagreement with the application of settled principles to the facts does not afford the Appeal Division a basis for intervention with a decision of the General Division. In the Respondent's view, the Appeal Division's decision was reasonable because the *Act* does not grant the General Division authority to write-off Ms. Arksey's debt.

According to the Respondent, any decision by the Commission with respect to a write-off of the debt is not appealable to the SST and is not before this Court on judicial review.

C. *Analysis*

[28] As noted by the Appeal Division, Ms. Arksey believes it is unfair that she is required to repay the benefits to which she was not entitled, especially since it was the Commission (and not her) who made the error. This, however, as the Appeal Division also noted, has nothing to do with whether the General Division process was fair or conducted in accordance with principles of natural justice.

[29] Ms. Arksey did not raise before the Appeal Division any concerns with respect to: the adequacy of the notice of the General Division hearing; the pre-hearing disclosure of documents; the manner in which the General Division hearing was conducted or her understanding of the process; or any other action or procedure affecting her right to be heard or to answer the case. She made no allegation that the General Division member was biased or had prejudged the appeal.

[30] Before this Court, Ms. Arksey raises no issues or concerns that the Appeal Division acted unfairly or breached any principle of natural justice. It was reasonable, in my view, for the Appeal Division to determine that there was no arguable case that the General Division failed to observe a principle of natural justice under paragraph 58(1)(a) of the *DESDA*.

[31] It also was reasonable for the Appeal Division to find there was no arguable case that the General Division made an error of law. As explained below, the General Division lacks jurisdiction to review the Commission's decision of whether to write-off Ms. Arksey's debt resulting from the overpayment of benefits to which she was not entitled.

[32] Paragraph 43(b) of the *Act* states that a claimant is liable to repay an amount paid by the Commission to which the claimant was not entitled. Section 44 and subsections 47(1) and (3) require that this debt must be paid to Her Majesty without delay, provided that no amount due may be recovered more than 72 months after the day on which the liability arose. This limitation period does not run when there is a pending appeal or other review of a decision establishing liability. Subsection 47(2) of the *Act* empowers the Commission to deduct the amount of indebtedness as additional benefits become payable to a claimant.

[33] Section 111 of the *Act* permits the Commission to rescind or amend a decision on any particular claim for benefits if new facts are presented or if it is satisfied that the decision was made without knowledge of, or based on a mistake as to, some material fact. Subsection 112(1) allows a claimant to request the Commission to reconsider a decision at any time within 30 days after the day on which that decision is communicated to him or her, or any further time that the Commission may allow. Once a claimant makes a request for reconsideration in the prescribed form and manner, the Commission is obligated under subsection 112(2) to reconsider its decision.

[34] Section 113 of the *Act* provides that a claimant may appeal a reconsideration decision of the Commission to the SST. Section 112.1, however, limits the types of decisions the SST can review; this section stipulates that a decision made by the Commission under section 56 of the *Regulations*, concerning the writing off of any debt, is not subject to review under section 112 of the *Act*.

[35] Section 112.1 of the *Act* clearly states that the SST lacks jurisdiction to review the Commission's write-off decisions under section 56 of the *Regulations*:

> **112.1** A decision of the Commission made under the *Employment Insurance Regulations* respecting the writing off of any penalty owing, amount payable or interest accrued on any penalty owing or amount payable is not subject to review under section 112.

[36] In summary, it was reasonable for the Appeal Division to conclude there was no arguable case that the General Division erred in law under paragraph 58(l) (b) of the *DESDA* in confirming that Ms. Arksey must repay the overpayment or in refusing to consider a write-off of her debt.

## IV. Conclusion

[37] In short, the Appeal Division's reasons for refusing Ms. Arksey's application for leave to appeal the General Division's decision are intelligible, transparent, and justifiable, and its decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law. This application for judicial review is, therefore, dismissed.

[38] The Respondent does not seek costs and, accordingly, there will be no order as to costs.

**JUDGMENT in T-1777-18**

**THIS COURT'S JUDGMENT is that:** the application for judicial review is dismissed; and there is no order as to costs.

"Keith M. Boswell"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | T-1777-18 |
| **STYLE OF CAUSE:** | SONYA ARKSEY v ATTORNEY GENERAL OF CANADA |
| **PLACE OF HEARING:** | TORONTO, ONTARIO |
| **DATE OF HEARING:** | SEPTEMBER 11, 2019 |
| **REASONS FOR JUDGMENT AND JUDGMENT:** | BOSWELL J. |
| **DATED:** | OCTOBER 2, 2019 |

**APPEARANCES:**

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| Sonya Arksey | FOR THE APPLICANT (ON HER OWN BEHALF) |
| John Unrau | FOR THE RESPONDENT |

**SOLICITORS OF RECORD:**

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| Attorney General of Canada<br>Ottawa, Ontario | FOR THE RESPONDENT |