

Federal Court  
of Appeal



Cour d'appel  
fédérale

**Date: 20120203**

**Docket: A-304-10**

**Citation: 2012 FCA 37**

**CORAM: PELLETIER J.A.  
DAWSON J.A.  
STRATAS J.A.**

**BETWEEN:**

**JOHN S. MERCER**

**Applicant**

**and**

**ATTORNEY GENERAL OF CANADA**

**Respondent**

Heard at Halifax, Nova Scotia, on January 31, 2012.

Judgment delivered at Ottawa, Ontario, on February 3, 2012.

REASONS FOR JUDGMENT BY:

STRATAS J.A.

CONCURRED IN BY:

PELLETIER J.A.  
DAWSON J.A.

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**Respondent**

**REASONS FOR JUDGMENT**

**STRATAS J.A.**

[1] Mr. Mercer applies for judicial review of the decision dated June 18, 2010 of the Umpire (CUB 74655). The Umpire rejected Mr. Mercer's appeal from the Board of Referees.

[2] Mr. Mercer was being paid benefits under the *Employment Insurance Act*, S.C. 1996, c. 23. Later, the Commission took the view that Mr. Mercer was overpaid and sought repayment from him. Both the Board and the Umpire agreed with the Commission.

[3] The alleged overpayment stemmed from short-term disability benefits Mr. Mercer was receiving under a private group plan. Such benefits are considered to be income for the purposes of calculating benefits under the Act: *Employment Insurance Regulations*, SOR/96-332, subparagraph 35(2)(c)(i), subsection 36(1) and paragraph 36(12)(b). This inclusion into income reduces the benefits to which Mr. Mercer was entitled.

[4] In this Court, Mr. Mercer admits he was overpaid. But he submits that the Commission was aware that he was being overpaid and should have advised him of that, but failed to do so. He also submits that the Commission should be accountable for not counselling him on how to avoid the problem.

[5] There is no evidence in the record that the Commission's advice was deficient. But even if it were, such deficiency does not assist Mr. Mercer: *Canada (Attorney General) v. Granger*, [1986] 3 F.C. 70 (C.A.), aff'd [1989] 1 S.C.R. 141. I would add that Mr. Mercer knew at an early stage he would have to account for benefits received under the private group plan: see, for example, Respondent's Record, pages 49-52.

[6] In his written submissions, Mr. Mercer also submits that since the payments from the private group plan are not included into income under the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) they should not be included into income for the purposes of the *Employment Insurance Act* and the *Employment Insurance Regulations*.

[7] I reject the submission. For the purposes of determining Mr. Mercer's employment insurance rights and obligations, the provisions of the *Employment Insurance Act* and *Regulations* apply, not the provisions of other legislation.

[8] Overall, I see no reviewable error in the decision of the Umpire.

[9] The respondent has brought to our attention that the proper respondent to Mr. Mercer's judicial review is the Attorney General of Canada, not Human Resources and Skills Development: *Federal Courts Rules*, SOR/98-106, rule 303(1). At the hearing, the Court agreed that this change should be made and, accordingly, these reasons and the Court's judgment reflect this.

[10] Therefore, for the foregoing reasons, I would dismiss Mr. Mercer's application with costs.

"David Stratas"

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J.A.

"I agree  
J.D. Denis Pelletier J.A."

"I agree  
Eleanor R. Dawson J.A."

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** A-304-10

**AN APPLICATION FOR JUDICIAL REVIEW FROM A DECISION OF THE  
UMPIRE, LOUIS S. TANNENBAUM, DATED JUNE 18, 2010**

**STYLE OF CAUSE:** John S. Mercer v. Attorney  
General of Canada

**PLACE OF HEARING:** Halifax, Nova Scotia

**DATE OF HEARING:** January 31, 2012

**REASONS FOR JUDGMENT BY:** Stratas J.A.

**CONCURRED IN BY:** Pelletier and Dawson JJ.A.

**DATED:** February 3, 2012

**APPEARANCES:**

John S. Mercer ON HIS OWN BEHALF

Sarah E. Drodge FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

Myles J. Kirvan FOR THE RESPONDENT  
Deputy Attorney General of Canada