Federal Court  Cour fédérale

Date: 20181207

Docket: T-1960-17

Citation: 2018 FC 1228

Ottawa, Ontario, December 7, 2018

PRESENT: The Honourable Mr. Justice Favel

BETWEEN:

ALAN BERKIW

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant is seeking judicial review under s 18.1 of the *Federal Courts Act*, RSC 1985, c F-7 of a decision by the Social Security Tribunal Appeal Division [the Appeal Division], dated November 9, 2017, which dismissed the Applicant's appeal of a decision of the General Division of the Social Security Tribunal [the General Division] pursuant to section 58 of the

Department of Employment and Social Development Act, SC 2005, c 34. The General Division summarily dismissed the appeal, having found that the Applicant had not raised any grounds of appeal that demonstrated a reasonable chance of success. The application for judicial review is dismissed.

II. Background

[2] The Applicant, aged 61, was employed in the oil industry at Cenovus TL ULC as a long-tenured worker from August 1, 2001. Due to shortage of work, the Applicant was laid off from the company on July 31, 2014.

[3] The Applicant submitted an application for Employment Insurance [EI] benefits on August 9, 2014. The Applicant received a letter from the Employment Insurance Commission [the Commission], on October 17, 2014, informing him that the start date of his EI benefits was August 3, 2014 and that if it was to his advantage, they delayed the start date of his claim. On January 4, 2017, after requesting a calculation of his claim had he applied for benefits on January 5, 2015, the Commission informed the Applicant that if his claim had been extended under the Bill C-15 legislation on July 3, 2016, and if he had been considered a long-tenured worker, he would have been entitled to 25 additional weeks of benefits.

[4] The 2014 decision from the Commission was appealed to the General Division on August 29, 2016. The Applicant argued that he could have claimed additional weeks of benefits under the *Employment Insurance Act*, SC 1996, c 23 [EI Act] had he delayed the application process

for his EI benefits. The Applicant also argued that his benefit period did not start on August 3, 2014, because he did not receive benefits until August 16, 2015.

[5] On February 13, 2017, the General Division found that the Applicant's benefit period started on August 3, 2014, as stated in the letter from the Commission dated October 17, 2014. In response to the Applicant's argument, the General Division then explained that "the date that benefits were payable do not alter the fact that the Appellant's benefit period started on August 3, 2014". "[T]he benefit period start date and the date that benefits are paid or payable are separate concepts".

[6] The General Division found that the Applicant could have requested a benefit period cancellation pursuant to subsection 10(6) of the EI Act. He could have then met the entitlement conditions of subsections 12(2.1) to 12(2.6) of the EI Act if he had established a benefit period after January 4, 2015. Having found that the benefit period started on August 3, 2014, the General Division concluded that subsections 12(2.1) to 12(2.6) of the EI Act did not apply to the Applicant's situation.

[7] On April 19, 2017, the Applicant appealed the General Division's decision to the Appeal Division.

III. Decision Under Review

[8] On November 9, 2017, the Appeal Division dismissed the appeal. The Appeal Division found that the General Division did not err in concluding that the Applicant had no reasonable chance of success.

[9] The Appeal Division noted that the Commission considered the Applicant's request for additional weeks of benefits. The Commission then denied the Applicant's request on the basis that his benefit period did not begin between January 4, 2015 and October 29, 2016, and therefore, the Applicant "could not possibly meet the criteria".

[10] The Appeal Division reviewed both facts that the General Division relied on to conclude that the benefit period commenced on August 3, 2014: i) the date was established by the Commission in the letter dated October 17, 2014; and ii) the Applicant applied for benefits shortly after he had stopped working on July 31, 2014. The Appeal Division found that the letter "does not establish, beyond proof of argument, either that a benefit period was established, or that it was appropriately established, outside of the eligibility period that would permit the Appellant to access additional weeks". As for the second fact on which the General Division had relied on, the Appeal Division found that this was not disputed by the Applicant.

[11] The Appeal Division then reviewed how the benefit period had been established. According to subsection 10(1) of the EI Act, a benefit period begins on the later of the Sunday of the week in which the "interruption of earnings" occurs, and the Sunday of the week in which the

initial claim for benefits is made. The Applicant had a complete severance from employment on July 31, 2014, pursuant to subsection 10(1) of the EI Act and subsection 14(1) of the *Employment Insurance Regulations*, SOR/96-332 [Regulations]. The Appeal Division acknowledged that the Applicant did not begin his waiting period until after August 2, 2015, because of his severance allocation. Consequently, the Appeal Division found that the Applicant's "interruption of earnings" could only be the date when he was separated or laid off from employment in accordance with subsection 35(2) of the Regulations.

[12] The Appeal Division was of the view that the Applicant's benefit period commenced the Sunday of the week of his claim on August 3, 2014. The Appeal Division therefore concluded that it is not possible that the Applicant's benefit period began between January 4, 2015 and October 29, 2016. "This is an unavoidable conclusion with reference to the undisputed facts and the application of the law to those facts".

[13] Finally, in response to the Applicant's argument that he could have delayed his application until January 2015, the Appeal Division concluded the following in its reasons:

> [31] However, the issue before me is not whether there is some inequity inherent in the provisions of the Act and Regulations. That is a question for Parliament. It is not an argument with any chance of success on appeal. The issue before me is whether the General Division erred in finding that the appeal had no reasonable chance of success.

IV. Issue

[14] After reviewing both parties' submissions, the Court agrees with the Respondent on the issue to be determined in the present matter: Was it reasonable for the Appeal Division to dismiss the Applicant's appeal of the General Division's summary dismissal decision?

[15] The applicable standard of review for any findings of fact made by the Social Security Tribunal, as well as the interpretation of its "home statute", the *Department of Employment and Social Development Act*, is reasonableness (*Thibodeau v Canada (Attorney General)*, 2015 FCA 167 at paras 40-41; *Rose v Canada (Attorney General)*, 2017 FC 185 at para 17). The Court must accord deference to the Social Security Tribunal when reviewing its decision from the Appeal Division.

V. Relevant Provisions

[16] The following provision from the *Department of Employment and Social Development Act* is relevant 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 exercise its jurisdiction;	a) la division générale n'a pas observé un principe de justice naturelle ou a autrement excédé ou refusé d'exercer sa compétence;
(b) the General Division erred in law in making its decision,	b) elle a rendu une décision entachée d'une erreur de droit,

whether or not the error appears on the face of the record; or	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.

[17] Subsections 10(1) and 10(6) of the Employment Insurance Act are also relevant in this proceeding:

Beginning of benefit period	**Début de la période de prestations**
10 (1) A benefit period begins on the later of	10 (1) La période de prestations débute, selon le cas :
(a) the Sunday of the week in which the interruption of earnings occurs, and	a) le dimanche de la semaine au cours de laquelle survient l’arrêt de rémunération;
(b) the Sunday of the week in which the initial claim for benefits is made.	b) le dimanche de la semaine au cours de laquelle est formulée la demande initiale de prestations, si cette semaine est postérieure à celle de l’arrêt de rémunération.
Cancelling benefit period	**Annulation de la période de prestations**
(6) Once a benefit period has been established for a claimant, the Commission may	(6) Lorsqu’une période de prestations a été établie au profit d’un prestataire, la Commission peut :
(a) cancel the benefit period if it has ended and no benefits were paid or payable during the period; or	a) annuler cette période si elle est terminée et si aucune prestation n’a été payée, ou ne devait l’être, pendant cette

	période;
(b) whether or not the period has ended, cancel at the request of the claimant that portion of the benefit period immediately before the first week for which benefits were paid or payable, if the claimant	b) à la demande du prestataire, que la période soit ou non terminée, annuler la partie de cette période qui précède la première semaine à l'égard de laquelle des prestations ont été payées ou devaient l'être si :
(i) establishes under this Part, as an insured person, a new benefit period beginning the first week for which benefits were paid or payable or establishes, under Part VII.1, as a self-employed person within the meaning of subsection 152.01(1), a new benefit period beginning the first week for which benefits were paid or payable, and	(i) d'une part, une nouvelle période de prestations, commençant cette semaine-là, est, si ce prestataire est un assuré, établie à son profit au titre de la présente partie ou est, si ce prestataire est un travailleur indépendant au sens du paragraphe 152.01(1), établie à son profit au titre de la partie VII.1;
(ii) shows that there was good cause for the delay in making the request throughout the period beginning on the day when benefits were first paid or payable and ending on the day when the request for cancellation was made.	(ii) d'autre part, le prestataire démontre qu'il avait, durant toute la période écoulée entre la date à laquelle des prestations lui ont été payées ou devaient l'être et la date de sa demande d'annulation, un motif valable justifiant son retard.

VI. Analysis

[18] The Applicant mainly argued that he should have been allowed to cancel his benefit period pursuant to subsection 10(6) of the EI Act to meet the entitlement conditions as set out in the amended subsections 12(2.1) to 12(2.6) of the EI Act (temporarily enacted) and receive payment of benefits for additional weeks. He also argued that the Commission owed him a fiduciary duty to present him with any options available to him.

[19] The Respondent, on the other hand, submitted that the Appeal Division did not err in finding that the General Division adequately summarily dismissed the appeal as it did not have a reasonable chance of success. The Respondent also argued that the Commission does not owe the Applicant a fiduciary duty.

A. *Was it reasonable for the Appeal Division to dismiss the Applicant's appeal of the General Division's summary dismissal decision?*

[20] For the following reasons, the application for judicial review is dismissed. The Court agrees with the Respondent's position. There is no reviewable error for this Court to intervene in the present application for judicial review. The Court also finds that the Commission does not owe the Applicant a fiduciary duty as the Applicant did not present any convincing evidence to establish such a relationship.

[21] It is the decision of the Appeal Division that is the subject of the present application for judicial review.

[22] The Court finds that the Appeal Division reasonably concluded that the General Division did not err in finding that the Applicant had no reasonable chance of success in his appeal. The Appeal Division reviewed the findings made by the General Division and found no errors on any of the grounds of appeal as set out in subsection 58(1) of the *Department of Employment and Social Development Act*.

[23] After reviewing the evidence on file, it is clear that the Applicant filed his application for benefits on August 9, 2014. The Commission established that the starting date for the Applicant's benefit period was August 3, 2014, pursuant to subsection 10(1) of the EI Act.

[24] According to subsection 14(1) of the Regulations, the Appeal Division found that there was an "interruption of service" in the case of the Applicant, namely because "an interruption of earnings occurs where, following a period of employment with an employer, an insured person is laid off or separated from that employment". Consequently, the Appeal Division found that the Applicant's EI payments had been delayed due to his severance allowance as the Applicant did not begin his waiting period until August 2, 2015. The determination of the Applicant's case turned on when his benefit period commenced.

[25] The Court concludes that the Appeal Division's findings are reasonable. The Applicant was receiving severance payments on July 31, 2014 and his severance pay was allocated to the weeks from August 3, 2014 to August 1, 2015.

[26] The Court finds that no error was made by the Appeal Division in the assessment of the Applicant's arguments under section 58(1) of the *Department of Employment and Social Development Act*. It is clear from the evidence on file that the Applicant, himself, was aware of the delay that his severance pay would cause. When being laid off by his employer, the Applicant signed an exit form in which it is clearly mentioned that his "EI payments may be delayed if, for example, [he] is receiving vacation or severance pay."

[27] The Court notes that "Parliament intended for the SST [Social Security Tribunal] to be afforded deference by our Court" (*Atkinson v Canada (Attorney General)*, 2014 FCA 187 at para 31). The SST acted within its expertise by interpreting and applying its home statute. As concluded by the Appeal Division, whether or not there is inequity with Bill C-15, "that is a question for Parliament".

[28] As concluded by this Court in *Ayres v Canada (Minister of Citizenship and Immigration)*, 2016 FC 633, at paragraph 5, "it is essential for the judicial branch to show proper deference to the executive and legislative branches".

[29] Although it is an unfortunate situation for the Applicant, the Court concedes with the conclusion found in *Miter v Canada (Attorney General)*, 2017 FC 262, at paragraph 35:

> The Court must apply the law and cannot bend the requirements of this complex contributory social benefits scheme. The same applies to the Appeal Division, the General Division and the decision makers within the Department of Employment and Social Development.

[30] Having reviewed the entire record in this matter, and having considered the Applicant's written and oral submissions, the Court is not convinced that the Appeal Division committed an error in dismissing the appeal. The Appeal Division's decision is reasonable and 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).

VII. Conclusion

[31] The application for judicial review is dismissed.

JUDGMENT in T-1960-17

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed.

There is no order as to costs.

"Paul Favel"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1960-17
STYLE OF CAUSE:	ALAN BERKIW v THE ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	CALGARY, ALBERTA
DATE OF HEARING:	SEPTEMBER 12, 2018
JUDGMENT AND REASONS:	FAVEL J.
DATED:	DECEMBER 7, 2018

APPEARANCES:

Alan Berkiw	FOR THE APPLICANT (ON HIS OWN BEHALF)
Carole Vary	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Attorney General for Canada Calgary, Alberta	FOR THE RESPONDENT