Federal Court Cour fédérale

Date: 20200512

Docket: T-763-19

Citation: 2020 FC 609

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Ottawa, Ontario, May 12, 2020

PRESENT: The Honourable Associate Chief Justice Gagné

BETWEEN:

FERNAND MARCOUX

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] In September 2014, after Fernand Marcoux exhausted his remedies before the General Division of the Social Security Tribunal [General Division], he was denied employment insurance on the ground that he had lost his employment with the Canadian Food Inspection Agency due to misconduct.

[2] In addition to applying for employment insurance, Mr. Marcoux filed a grievance for unjust dismissal, which resulted in a settlement in June 2016.

[3] In January 2019, Mr. Marcoux filed an application to rescind or amend the September 2014 decision, based on subsection 66(2) of the *Department of Employment and Social Development Act*, SC 2005, c 34 [the Act], presenting as a new fact the resolution of his grievance in June 2016.

[4] The General Division dismissed his application on the basis that he had filed it beyond the one-year time limit established by the Act, and the Appeal Division of the Social Security Tribunal [Appeal Division] dismissed his appeal on the grounds that the criteria set out in section 58 of the Act had not been met and that the appeal had no reasonable chance of success.

[5] It is that decision of the Appeal Division that is the subject of the application for judicial review before the Court.

II. Impugned decision

[6] Mr. Marcoux argued before the Appeal Division that he could not apply to rescind or amend the September 2014 decision until his grievance for unjust dismissal had been resolved. Given that his dismissal was set aside through the settlement, he was entitled to employment insurance benefits for the period between his dismissal and his reinstatement.

[7] The Appeal Division denied this application for leave pursuant to subsection 58(1) of the Act, which provides that the Appeal Division may only consider an appeal from a decision of the General Division in the following cases:

- The General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;
- The General Division erred in law in making its decision, whether or not the error appears on the face of the record; or
- 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.

[8] Given that section 66 of the Act does not give the General Division any discretion to waive the one-year time limit for applying to rescind or amend one of its decisions, the Appeal Division found that the General Division had not made any of the errors mentioned in subsection 58(1). The application filed almost four years after the General Division had rendered its final decision was late and could not be allowed.

III. Issue and standard of review

[9] This application for judicial review involves only one issue: did the Appeal Division err in concluding that the appeal that Mr. Marcoux was trying to file had no reasonable chance of success?

[10] The standard of review applicable to this issue is reasonableness (*Andrews v Canada (Attorney General)*, 2018 FC 606 at para 17; *Canada (Minister of Citizenship and Immigration)*

v Vavilov, 2019 SCC 65 at para 16). The Court must therefore consider both the reasonableness of the Appeal Division's rationale and its conclusions and intervene only to safeguard the legality, rationality and fairness of the administrative process (*Vavilov* at para 13).

IV. Analysis

[11] Mr. Marcoux's main criticism of the General Division is that it did not suggest in September 2014 that the file before it be suspended pending the outcome of his unjust dismissal grievance. In his view, this is a breach of the principles of procedural fairness that warrants the Court's intervention.

[12] As explanation for the delay between the time of the settlement in June 2016 and the filing of his application to rescind in January 2019, Mr. Marcoux claims that he did not receive a copy of the settlement agreement until late 2018. He was unsuccessful when he asked his employer for a copy and eventually obtained one from his union representative.

[13] With respect to the decision under review, Mr. Marcoux criticizes the Appeal Division for not taking into account in 2019 the breach of procedural fairness committed by the General Division in September 2014.

[14] However, the Appeal Division was called upon to review the General Division's 2019 decision relating to the impact of the one-year limitation period to determine whether the appeal had a reasonable chance of success, not the final decision rendered in 2014. With respect to the

2014 decision, the remedy would have been to seek leave to appeal within 30 days, which Mr. Marcoux did not do.

[15] It is not uncommon for an employee who has been dismissed for cause to apply for employment insurance benefits while challenging the dismissal. Mr. Marcoux knew that he had filed a grievance, is presumed to know the law and was, moreover, represented by his union. He could have requested that his file before the General Division be suspended in 2014 pending the outcome of his grievance, which he did not do. He cannot now criticize the General Division for not having offered him a remedy that he himself did not seek.

[16] Returning to the 2019 decisions, the issue for the Appeal Division was whether, in his grounds of appeal, Mr. Marcoux had identified an error of the type listed in subsection 58(1) of the Act that had been committed by the General Division and that would have given the appeal a reasonable chance of success.

[17] To answer this question, the Appeal Division had to consider whether the General Division correctly applied the strict conditions listed in section 66 of the Act allowing for an application to rescind or amend one of the General Division's decisions. There are three:

- A new fact must have arisen since the decision was made;
- There may not be more than one application to review a given decision; and
- The application for review must be made within one year following receipt of the decision that is the subject of the application to rescind or amend.

[18] In 2019, the General Division acknowledged, for purposes of discussion, that the first two conditions had been met. It noted, however, that there was no dispute that the initial decision was issued on September 2, 2014, and mailed to Mr. Marcoux on September 3, 2019. Pursuant to paragraph 19(1)(a) of the *Social Security Tribunal Regulations*, SOR/2013-60, Mr. Marcoux is deemed to have received a copy of the decision ten days after it was mailed, which would be September 13, 2014. His deadline for filing an application to rescind or amend was therefore September 13, 2015. Therefore, the application he filed in January 2019 was late. The General Division dismissed it on that ground alone.

[19] For its part, the Appeal Division saw no error in this analysis and concluded, on the same ground, that the appeal had no reasonable chance of success.

[20] Because the Act does not give the General Division any discretion in the application of the time limit forest out in subsection 66(2) of the Act (*Maclean v Canada (Attorney General)*, 2019 FCA 277 at para 6), not only is this decision reasonable, but it is the only decision that the General Division could have made. Therefore, the rationale offered and the conclusions reached by the Appeal Division are reasonable.

V. Conclusion

[21] Given that the General Division was under no obligation in 2014 to suspend Mr. Marcoux's file on its own initiative, and since his application to rescind or amend was submitted beyond the time limit, the Appeal Division's decision is inherently logical and rational

and is one of the reasonable outcomes that can be justified in light of the facts and the law. The application for judicial review is therefore dismissed.

[22] The Attorney General has not requested that the Court award legal costs, and no such costs will be awarded.

JUDGMENT in T-763-19

THIS COURT'S JUDGMENT is as follows:

1. The application for judicial review is dismissed.

2. There is no order as to costs.

"Jocelyne Gagné"
Associate Chief Justice

Certified true translation
This 22nd day of May 2020

Margarita Gorbounova, Reviser

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-763-19
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