Federal Court  Cour fédérale

Date: 20200918

Docket: T-376-19

Citation: 2020 FC 913

[ENGLISH TRANSLATION]

Ottawa, Ontario, September 18, 2020

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

PAUL CARDIN MALONGA

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] Paul Cardin Malonga has filed an application for judicial review of the decision rendered by the Social Security Tribunal (Appeal Division) on February 1, 2019. The application for judicial review is brought pursuant to section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7 [the Act]. As for the decision submitted for judicial review, it upheld the decision of the Social

Security Tribunal (General Division), which stated that Mr. Malonga's appeal had no reasonable chance of success.

[2] This case lacks clarity. In fact, the Court is of the opinion that the decision must be referred back to the administrative tribunal, as it does not meet the conditions set out in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*].

I. Facts

[3] This case involves Employment Insurance benefits that the applicant allegedly received between March 22, 2010, and December 25, 2010, while employed with Canada Safeway Limited. It appears that the applicant is being accused of having received Employment Insurance benefits to which he was not entitled, by means of false representations that resulted in overpayments of more than $14,000.

[4] It would be an understatement to say that this case is confusing. It has led to decisions of the Social Security Tribunal that are difficult to understand, be it from the General Division (August 7, 2018) or the Appeal Division (February 1, 2019).

II. Standard of review

[5] It should be noted that the decision for which judicial review is being sought was rendered well before the decision of the Supreme Court of Canada in *Vavilov* (above). The

lessons of that decision could therefore not be applied. That is nonetheless the state of the law that must guide the Court in the decision it must make.

[6] In *Vavilov*, the Supreme Court stated that it was affirming "the need to develop and strengthen a culture of justification in administrative decision making" (para 2). The reviewing court must therefore examine whether the decision bears the hallmarks of reasonableness–justification, transparency and intelligibility–and ask whether it "is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov* at para 99).

[7] In *Vavilov*, the Court suggested that the discipline of drafting contributes to a better articulation of the analysis (para 80). The administrative decision maker will demonstrate the reasonableness of the decision rendered through the reasons provided, and this will have implications for the legitimacy of the decision (para 81). A reviewing court examines the reasons provided to understand the reasoning process that led to the conclusion (para 84). The Court insists on justification. A decision must be justified "to those to whom the decision applies" (para 86). The outcome alone is not sufficient; a court conducting a reasonableness review "properly considers both the outcome of the decision and the reasoning process that led to that outcome" (para 87).

[8] The Supreme Court rejects obtuse reasons, as justification, intelligibility and transparency benefit the person who is subject to the decision:

> [95] That being said, reviewing courts must keep in mind the principle that the exercise of public power must be justified, intelligible and transparent, not in the abstract, but to the individuals subject to it. It would therefore be unacceptable for an

> administrative decision maker to provide an affected party formal reasons that fail to justify its decision, but nevertheless expect that its decision would be upheld on the basis of internal records that were not available to that party.

[9] Ultimately, the administrative decision maker has to explain. It should not be up to the reviewing court to articulate reasons and substitute its own justification for the outcome. The administrative decision maker must provide justification. I find paragraph 96 of *Vavilov* to be unequivocal.

> [96] Where, even if the reasons given by an administrative decision maker for a decision are read with sensitivity to the institutional setting and in light of the record, they contain a fundamental gap or reveal that the decision is based on an unreasonable chain of analysis, it is not ordinarily appropriate for the reviewing court to fashion its own reasons in order to buttress the administrative decision. Even if the outcome of the decision could be reasonable under different circumstances, it is not open to a reviewing court to disregard the flawed basis for a decision and substitute its own justification for the outcome: *Delta Air Lines*, at paras. 26-28. To allow a reviewing court to do so would be to allow an administrative decision maker to abdicate its responsibility to justify to the affected party, in a manner that is transparent and intelligible, the basis on which it arrived at a particular conclusion. This would also amount to adopting an approach to reasonableness review focused solely on the outcome of a decision, to the exclusion of the rationale for that decision. To the extent that cases such as *Newfoundland Nurses* and *Alberta Teachers* have been taken as suggesting otherwise, such a view is mistaken.

[10] No one is suggesting that the decision of the Social Security Tribunal (Appeal Division) should be reviewed on a standard other than reasonableness. Nonetheless, the decision must bear the hallmarks of reasonableness: justification, transparency and intelligibility. I believe that to examine this, the decision at issue must be reviewed in context.

III. The administrative decisions

[11] The decision under review is an appeal from a decision of the General Division of the Social Security Tribunal. That decision originated in a notice of appeal filed by Mr. Malonga on January 15, 2018. He had already been complaining for some time that the Employment Insurance Commission had not established that he had received benefits to which he was not entitled. He claimed that he had not made any false representations allowing him to receive benefits between March 2010 and December 2010. One would think that the Employment Insurance Commission would have little difficulty proving that benefits had been paid while the applicant was employed. It appears that this was not done. At best, there is mention of the Commission's April 14, 2016, decision, which is far from explicit: it states that the applicant received employment income from May 9, 2010, to December 25, 2010. It perfunctorily indicates that the applicant would have to reimburse [TRANSLATION] "the benefits to which [he was] not entitled". The letter goes on to state that the Commission had [TRANSLATION] "concluded that [the applicant] knowingly made 18 false representations in 18 declarations [he] submitted to claim benefits". The rest of the letter notes that because this was a first offence, no penalty was being imposed. A [TRANSLATION] "notice of debt, with repayment instructions" would follow.

[12] It is understood from the file that the applicant requested reconsideration, but his request for reconsideration was not sent to the Employment Insurance Commission until 213 days later, on December 13, 2016. The time limit for reconsideration is 30 days. As we will see, this applicant is often late. An application for an extension of time was refused by the Commission. It

took an appeal to the Social Security Tribunal (General Division) to have the extension refusal overturned, in a decision dated October 31, 2017. In that decision, Mr. Syverin, a member of the General Division, noted that the applicant was trying to understand the [TRANSLATION] "notice of debt" and that his confusion persisted:

> [TRANSLATION]
>
> [38] The Tribunal also takes into account that the delay can be partially explained by the fact that the appellant made numerous attempts to understand the notice of debt but was unable to obtain an explanation, despite the various calls the appellant made to the Commission, not to mention the fact that the appellant also went to a Commission office to obtain clarification of the notice of debt. The Tribunal also takes into account the confusion that remains for the appellant as to why the debt was established. The appellant maintains that he always declared his income to the Canada Revenue Agency, whereas the debt was established in the context of an application for Employment Insurance benefits. The Tribunal also takes into consideration the fact that the appellant waited to receive a copy of his file through an access to information request, and filed his request for reconsideration shortly thereafter.

It appears that nothing came of this.

[13] The decision of the Employment Insurance Commission followed on December 18, 2017. It can be summarized in very few words: the issue was the [TRANSLATION] "overpayment", and the perfunctory decision was that the Commission had [TRANSLATION] "not changed [its] decision on this issue. The decision communicated to [the applicant] on April 14, 2016, [was] therefore maintained". There is nothing more. Mr. Syverin observed in his October 31, 2017, decision that the [TRANSLATION] "notice of debt did not provide any information as to why the debt had been established" (para 17). The April 14, 2016, decision on file does not provide any additional information. It merely lists the amounts earned by the applicant between May 9, 2010, and December 19, 2010. It alleges false representations, nothing further.

[14] It is hardly surprising that the applicant sought to bring his file before the General Division of the Social Security Tribunal. This he did, on January 15, 2018. At that time, he complained that the documents supporting the allegations that false representations had been made had never been produced and that [TRANSLATION] "[he had] been unjustly accused of continuing to receive employment insurance benefits". In fact, the applicant stated at the hearing before this Court that he had not received any benefits.

[15] By letter dated April 5, 2018, the Social Security Tribunal informed the applicant that it was inclined to summarily dismiss his appeal. It sought the applicant's comments on the following two paragraphs:

> [TRANSLATION]
> *It appears that the appellant is appealing the amount that the Commission is claiming from him. However, a decision regarding overpayment cannot be the subject of the review provided for in section 112.1 of the Employment Insurance Act (Act). Pursuant to section 113 of the Act, the Tribunal may only hear challenges of decisions made by the Employment Insurance Commission under section 112 of the Act. As such, the Tribunal does not have jurisdiction to rule on the issue of the overpayment imposed on the appellant.*
>
> *The Tribunal notes that if the appellant wishes to challenge the decisions of the Employment Insurance Commission with respect to his earnings and how they were allocated by the Commission, or the notice he received, the appellant must make a formal request to the Commission under section 112 of the Act for reconsideration of those decisions.*
>
> [Italics in original]

[16] The applicant did not see it that way. On May 24, 2018, he responded to the notice of April 5. In his response, he stated that the issue was not the amount of money per se, but rather the very decision to claim money from him. As he told the Court, and as he repeated to the

chairperson of the Social Security Tribunal (Appeal Division) at the January 17, 2019, hearing of the appeal (which I listened to), the applicant claims not to have received any benefits. In his letter of May 24, 2018, he argued that the issue is [TRANSLATION] "rather the decision to have [him] repay money that [he] never received based on groundless reasons put forward by the Commission in support of that decision". The rest of his response was along the same lines: [TRANSLATION] "I was never paid any benefits whatsoever during that period". Mr. Malonga also asked for more time to retrieve certain documents. In fact, this is another example of a recurring situation with the applicant: he is late and asks for additional time to complete his file, which he does not always seem to do.

[17] We thus find in the August 7, 2018, decision of the Social Security Tribunal (General Division) that a deadline had been granted until July 6, 2018, although nothing was submitted.

[18] The August 7 decision of the General Division states that the applicant wished to challenge the debt claimed. This may be true in a broad sense, but what is really at issue appears not to be the quantum of the debt, but rather its very existence, since the applicant claims not to have received anything. The debate could have been closed by proof of benefits paid during the relevant period, when the applicant does not dispute that he was working.

[19] The General Division's decision was made on the basis that Mr. Malonga received Employment Insurance benefits (para 5), even though that is the point he was challenging. For the General Division, Mr. Malonga was seeking cancellation of his debt, which strikes me as inconsistent with the explanation of the complaint filed by the applicant on May 24, 2018.

[20] And yet, the General Division decision notes that the request for reconsideration stated that Mr. Malonga was complaining that he had not received an explanation for a debt of $14,000. The General Division claims to be puzzled given that the letter of April 14, 2016, explained the employment earnings that had been allocated (para 9). The General Division concludes with respect to the [TRANSLATION] "overpayment" that "[it] presume[d] therefore that he did receive an explanation for the overpayment imposed by the Commission, and [could not] accept his argument" (para 9). This conclusion clearly ignores the applicant's May 24 letter, in which the argument is not about disputing that he worked, but rather about the fact that he did not receive any benefits. In reality, the Commission's letter of April 14, 2016, does not explain anything. It merely reports employment earnings, whereas the applicant's claim is that he did not receive benefits. This is never even commented on.

[21] The General Division is not wrong to comment that there [TRANSLATION] "appears to be confusion on both sides" with regard to the matter (para 10). The problem is that the decision in no way resolves this confusion because it does not deal with the applicant's grievance: did he receive benefits? Rather, without providing an explanation, the General Division concludes [TRANSLATION] "that the Commission should have reconsidered the disputes regarding earnings and allocation, and [accepts] his request that the file be returned to the Commission so that it may render a decision under section 112 of the Act on those disputes" (para 10). I have been unable to find any reference anywhere to such a request. The letter of May 24, 2018, does not mention one, the hearing before the Appeal Division confirmed that there would not have been a hearing before the General Division, and in any event, the issue of earnings (and by definition the allocation of earnings) was not the subject of the appeal.

[22] At the suggestion of the Commission, the General Division concluded that it did not have jurisdiction to hear the appeal, and returned the file to the Commission to reconsider [TRANSLATION] "the appellant's earnings and the allocation of those earnings during the benefit period" (para 11). But the applicant maintains that this was not the issue before the Commission. In fact, the decision was premised on the notion that benefits had been paid to the applicant, which he argues has not been established. It is not a matter of accepting that no benefits were paid and received, but rather of answering the correct question.

[23] The General Division declined jurisdiction given that [TRANSLATION] "because questions relating to the existence of the applicant's earnings and their allocation during the weeks of benefits [were] not the subject of a reconsideration decision in this file, the Tribunal [did] not have jurisdiction to rule on them" (para 7). This was not the subject of the January 15, 2018, appeal, nor of the May 24, 2018, letter, which I find clearly sets out that the dispute involves the actual payment of benefits. The issue is the existence of benefits, not that there were earnings while benefits were being paid. Mr. Malonga states that there were no benefits. It should not be difficult to establish these benefits, if they were paid.

[24] I recall that the December 18, 2017, decision of the Employment Insurance Commission is itself devoid of any explanation, and merely confirms the decision of April 14, 2016, which also fails to provide any explanation, not even dealing with the benefits that Mr. Malonga says he did not receive.

[25] The situation became almost Kafkaesque for Mr. Malonga two weeks later, on August 21, 2018, when the Employment Insurance Commission rendered its decision on the General Division's referral to deal with the earnings and allocation. The reconsideration sets out the genesis of the case by stating [TRANSLATION] "this is in response to your request for reconsideration, received on April 7, 2018, of the decision of the Employment Insurance Commission rendered on December 18, 2017". It seems to me that this only adds to the confusion. The request for reconsideration was actually the referral ordered by the General Division and was to deal with [TRANSLATION] "disputes regarding the appellant's earnings and the allocation of those earnings during the benefit period". It was not Mr. Malonga's request that was received on August 7, 2018. As noted earlier, Mr. Malonga says he did not receive benefits. Moreover, the decision of December 18, 2017, is itself a reconsideration–this one dealing with the overpayment–and confirms the decision of April 14, 2016, which does not in any way deal with benefits that were not received.

[26] Counsel for the respondent noted in argument, quite sincerely, that the reconsideration–which appears to be the effect of a second reconsideration–of a reconsideration had to be the result of an error. The fact remains that the August 21, 2018, reconsideration upholds the December 18, 2017, reconsideration. I believe the crux of the August 21, 2018, decision can be found in a statement of the Commission's treatment of the document entitled "Pay History Details". I reproduce the statement faithfully: "Nous affirmons qu'en fait ce sommaire et le résultat une fois l'application des gains a été faite par la Commission" [We affirm that in fact this summary and the result once the application of gains has been made by the Commission].This is understandably puzzling. In any event, the August 21, 2018, decision again deals with earnings.

The only reference to Employment Insurance benefits is the suggestion that the litigant consult his 2010 T4 slip.

[27] This brings us to the February 1, 2019, decision of the Social Security Tribunal (Appeal Division). The appeal hearing took place on January 17. At the hearing, Mr. Malonga made it clear that his appeal related to his claim that he had not received benefits between May and December 2010.

[28] It must be said that Mr. Malonga is not always on the side of clarity. But his presentation to the Appeal Division had the advantage of making it clear that he was claiming that he had not received benefits. In fact, the Tribunal Chairperson gave the applicant until January 26 to submit his 2010 T4 slip into evidence. The Employment Insurance Commission's August 21, 2018, decision also referred to that document.

[29] On February 1, the Appeal Division rendered its decision. There is no indication in this decision of whether Mr. Malonga had submitted his 2010 T4 slip: nothing is said in this regard. It is possible that the document was not provided.

[30] The Appeal Division mentioned the decision of the Employment Insurance Commission that followed the decision of the General Division (paras 3 and 4), but did not discuss it. In the end, it merely stated that:

> [TRANSLATION]
>
> [15] The Tribunal finds that the Claimant's appeal before the General Division was clearly bound to fail given that the General Division does not have the jurisdiction to decide on an

> overpayment. Only the Federal Court of Canada has the jurisdiction to provide recourse of this kind.
>
> [16] The Claimant is also free to challenge the source of the overpayment–the Commission's reconsideration decision made on August 21, 2018, on the issue of the allocation of earnings.

IV. Discussion

[31] The decision does not provide further details as to why the General Division would not have jurisdiction. As I have striven to demonstrate in these reasons, the issue raised by Mr. Malonga does not appear to have been considered or even understood over the course of the various iterations.

[32] This is not to say that Mr. Malonga is correct in claiming that he did not receive Employment Insurance benefits. Rather, it means that a litigant is entitled to a decision that is justified, transparent and intelligible, and that the reviewing court should not offer its own justifications. Confusion reigned throughout this case, and no one dealt with the matter head-on.

[33] The person who is the subject of a decision is entitled to a decision that is justified, transparent and intelligible, and not in the abstract (*Vavilov*, para 95). It is not enough to simply state the decision: the decision maker is required "to justify [it] to the affected party, in a manner that is transparent and intelligible" (para 96). This does not mean conducting an exchange of letters with a litigant or providing long and perhaps even tedious reasons. But there must be a justification that is both transparent and intelligible, and not simply the declaration of a decision. For this to happen, I believe it useful for the decision maker to have a clear understanding of the issue at hand. In *Vavilov* the Court wrote, "[w]here a decision maker's rationale for an essential

element of the decision is not addressed in the reasons and cannot be inferred from the record, the decision will generally fail to meet the requisite standard of justification, transparency and intelligibility" (para 98). In my view, that is what happened in this case.

[34] The General Division commented in its August 7, 2018, decision that confusion had reigned on both sides. This is true. But that confusion was never cleared up through a reasoned reconsideration providing a basis for understanding the issue, which could then have been resolved by means of a justification that was both transparent and intelligible.

[35] The decision for which judicial review is sought is that of the Appeal Division dated February 1, 2019. It is consistent with the other decisions in this case, which is actually rather simple. I stress that nothing in these reasons should be interpreted as suggesting that Mr. Malonga was correct in claiming that he did not receive benefits between May and December 2010. We don't know. And that is the crux of the matter as presented by the litigant.

V. Conclusion

[36] Pursuant to section 18.1 of the *Federal Courts Act*, the February 1, 2019, decision of the Social Security Tribunal (Appeal Division) must therefore be set aside. It does not meet the requirement of a justification that is both transparent and intelligible. The matter is therefore referred back for a reconsideration that should take specific account of the applicant's claim that he did not receive any benefits during the period in question. The issue raised by the applicant does not deal with his earnings or an overpayment: he claims not to have received benefits.

[37] The applicant has not sought the equivalent of costs and disbursements. This is not a case in which costs would have been awarded to either party in any event.

JUDGMENT in T-376-19

THE COURT'S JUDGMENT is as follows:

1. The February 1, 2019, decision of the Social Security Tribunal (Appeal Division) is set aside; and
2. The matter is referred back to the Social Security Tribunal (Appeal Division) to be reconsidered in light of these reasons for judgment.

"Yvan Roy"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-376-19
STYLE OF CAUSE:	PAUL CARDIN MALONGA v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	BY VIDEOCONFERENCE BETWEEN OTTAWA, ONTARIO; EDMONTON, ALBERTA; AND MONTRÉAL, QUEBEC
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