Federal Court  Cour fédérale

Date: 20221014

Docket: T-448-22

Citation: 2022 FC 1402

Toronto, Ontario, October 14, 2022

PRESENT: Mr. Justice Diner

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

FABIO VARIOLA

Respondent

ORDER AND REASONS

[1] The Attorney General of Canada has brought an Application for judicial review of a decision of the Appeal Division of the Social Security Tribunal [Appeal Division]. The Appeal Division denied leave to appeal a decision of the Tribunal's General Division. For the reasons outlined below, I will allow the judicial review.

I. Background

[2] Mr. Variola's child was born in September 2020. On August 31, 2021, Mr. Variola applied for 16 weeks of standard Employment Insurance [EI] parental benefits. The *Employment Insurance Act*, SC 1996, c 23 [*EI Act*] provides for two options for parental benefits: (i) the standard option with a higher benefit rate, paid for up to 35 weeks; and (ii) the extended option with a lower benefit rate, paid for up to 61 weeks.

[3] As of September 25, 2021 – three weeks into the 16 weeks of parental benefits for which Mr. Variola applied – the Canada Employment Insurance Commission [Commission] stopped paying benefits to Mr. Variola. This was because under the standard option, the Commission cannot pay benefits to a claimant more than 52 weeks after the week in which the child is born [parental benefits window].

[4] Mr. Variola subsequently asked the Commission to switch from the standard option to the extended option. The Commission refused Mr. Variola's request pursuant to subsection 23(1.2) of the *EI Act*, which states that a claimant cannot change their election option once the Commission starts paying parental benefits.

[5] Mr. Variola appealed the Commission's decision to the General Division on the basis that information about the parental benefits window was omitted from the application form, so that as a result, he had to seek information from his employer and turn to the Service Canada website. Based on (i) information Mr. Variola found on the Service Canada website and (ii) information

provided by his employer, Mr. Variola thought he could apply for and collect parental benefits anytime during the first 78 weeks after the birth of his child.

[6] The General Division found that Mr. Variola's election was invalid because the Commission's application form misled him into making the wrong choice. The General Division relied on a finding by the Appeal Division that an election made with misleading information from the Commission is not a valid election: *Canada Employment Commission Insurance Commission v SA*, 2021 SST 406 at para 4.

[7] The Commission applied for the Appeal Division's leave to appeal the General Division's decision. The Appeal Division denied the Commission leave because it found that the Commission's appeal did not have a reasonable chance of success. The Appeal Division also refused to consider new evidence included in the Commission's application for leave, namely a summary of information available on the Service Canada website about the parental benefits window and a hyperlink to access that information.

II. Issues and Standard of Review

[8] The sole issue raised in this judicial review, is whether the Appeal Division's decision to deny leave to appeal [Leave Decision] on the basis that none of the Commission's arguments had a reasonable chance of success on appeal, is unreasonable.

[9] Decisions of the Appeal Division on whether to grant leave to appeal are reviewable on a reasonableness standard (*Canada (Attorney General) v De Leon*, 2022 FC 527 at para 18

[*De Leon*], *Conte v Canada (Attorney General)*, 2021 FC 1182 at para 13, *Andrews v Canada (Attorney General)*, 2018 FC 606 at para 17). Under this standard, the Court must assess whether the administrative decision under review demonstrates reasoning that is rational and logical, such that it is justified under the relevant law and facts: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 102 and 105 [*Vavilov*].

III. Parties' Positions

[10] The Applicant submits the Appeal Division unreasonably determined that (i) there was no arguable case that the General Division made errors of law and fact by finding Mr. Variola was mislead by an unclear application form; and moreover (ii) that the General Division made an error of law by failing to apply subsection 23(1.2) of the *EI Act*.

[11] First, the Applicant contends that the EI application form was not misleading, and that Mr. Variola rather misunderstood the EI parental benefit scheme on the basis of information received from his employer. The Applicant further argues the Commission is not responsible for information provided by employers to their employees, and that the Appeal Division failed to consider the source of Mr. Variola's confusion.

[12] The Applicant submits this Court confirmed in *De Leon* at paras 27-28 that the EI application form was not itself misleading or lacking in information about applying for parental benefits. The Applicant also relies on *Karval v Canada (Attorney General)*, 2021 FC 395 at para 14 [*Karval*], to submit that it was ultimately Mr. Variola's responsibility to understand what he agreed to when he submitted his application.

[13] Second, the Applicant argues that under subsection 23(1.2) of the *EI Act*, parental benefit election is irrevocable once payments start. The Applicant submits that the Appeal Division unreasonably found there was no arguable case the General Division failed to apply this provision of the *EI Act*.

[14] Specifically, the Applicant cites *Canada (Attorney General) v Hull*, 2022 FCA 82 at paras 46-47 [*Hull*], to argue that the Federal Court of Appeal [FCA] is clear about the interpretation of subsection 23(1.2) of the *EI Act*: the election for parental benefits the claimant makes on the application form is irrevocable once payments start. The Applicant argues that the legislative intent as explained at para 57 of *Hull* confirms the irrevocability of the election so that neither the Commission, nor the General Division, nor the Appeal Division, could revoke or alter that election.

[15] Mr. Variola, in response, requests the Application be dismissed and for the Court to order the payment of the difference between the benefits he already received under the standard option ($1,914.00), and those he would have received had he selected the extended option on the application form ($6,128.00), for a total of $4,214.00.

[16] First, Mr. Variola argues that it would be unfair for this Court to allow the Application for judicial review of the Leave Decision, because it would result in a lengthy process of redetermination of leave to appeal, a potential appeal, and ultimately further delay for Mr. Variola to receive payment of the remainder of the parental benefits owed to him under the extended option.

[17] Second, Mr. Variola submits that the Commission's interpretation of subsection 23(1.2) of the *EI Act* was erroneous, and that the correct interpretation is that of the General Division, which takes into consideration contextual factors such as human error, unclear instructions, stress, language barriers and functional illiteracy. Mr. Variola submits that therefore, deference should be given to the decisions of the General and Appeal Divisions. At the hearing on September 28, 2022, Mr. Variola added that the law should not be applied in a rigid "all-or-nothing" manner that would lead to an unfair result because it fails to take into account an individual's circumstances.

[18] Third, Mr. Variola contends the jurisprudence the Applicant relies on is irrelevant or that the facts are distinguishable from his case. He states that in *Karval*, the evidence showed that the claimant was not mislead by the application form but that she intended to change her election in order to request benefits she was not entitled to.

[19] Mr. Variola submits that in *De Leon* and *Hull*, both the claimants were guaranteed financial support through parental benefits, because they were disputing their option election within the parental benefits window, but says that he would be deprived of any financial support beyond the parental benefits window under the standard option.

[20] Lastly, Mr. Variola stresses that he is self-represented, without a background in law (he is a Professor of Engineering), and asks this Court to consider that he is at a disadvantage as an unrepresented party. At the hearing, Mr. Variola stated that it was Kafkaesque that he was relentlessly being pursued (with appeals) by the very entity that is supposed to assist him, as a

taxpayer, in obtaining parental benefits, and that ultimately, he was simply defending his rights and not asking for more than what he believed he was entitled to in terms of parental benefits.

IV. Analysis

[21] Subsection 58(2) of the *Department of Employment and Social Development Act*, SC 2005, c 34 [*DESD Act*] states that "leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success." The Courts have interpreted this to mean that the threshold to grant leave to appeal is low (*Ingram v Canada (Attorney General)*, 2017 FC 259 at para 14), requiring an applicant to demonstrate only "an arguable case" on the grounds of appeal (*Fancy v Canada (Attorney General)*, 2010 FCA 63 at paras 2-3).

[22] Subsection 58(1) of the *DESD Act* provides that the only grounds of appeal to the Appeal Division are that:

(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, whether or not the error appears on the face of the record; or	b) elle a rendu une décision entachée d'une erreur de droit, 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.

[23] I find that the Appeal Division unreasonably concluded that there is no arguable case on any of the grounds of appeal. First, the General Division erred in fact and law by finding that Mr. Variola was mislead by the application form, and the Appeal Division unreasonably upheld this finding. Second, the General Division erred in law by failing to apply subsection 23(1.2) of the *EI Act*, as interpreted by the binding jurisprudence of *Karval*, *De Leon* and *Hull*.

[24] Before I begin the analysis, I note that the outcome of this judicial review may be financially harsh on Mr. Variola. Clearly, he is earnest in his perception that it is as an unjust result. However, as Justice Rivoalen recently held in *Hull*, "the outcome of this judicial review may be financially harsh for the respondent" (para 25), but as previously noted by Justice de Montigny of the same Court in *Wilson v Canada (Attorney General)*, 2019 FCA 49 at para 14, "the law as it stands must be applied and it is beyond the role of this Court to make compassionate rulings."

[25] Turning to the analysis, first, on the issue of Mr. Variola being mislead by the application form, Justice Barnes provided helpful comments on that argument at para 14 of *Karval*:

> It is undoubtedly the case that many government benefit programs will have complex features and strict eligibility requirements. More information, clearer language and better explanations can almost always be proposed in hindsight. Where a claimant is actually misled by relying on official and incorrect information, certain legal recourse may be available under the doctrine of reasonable explanations. However, where a claimant like Ms. Karval is not misled but merely lacks the knowledge necessary to accurately answer unambiguous questions, no legal remedies are available. Fundamentally it is the responsibility of a claimant to carefully read and attempt to understand their entitlement options and, if still in doubt, to ask the necessary questions.

[26] Justice Barnes' comments highlight three important concepts: (i) government benefit programs have complex schemes and there could always be more explanations provided about them in hindsight so the absence of clear information cannot constitute misleading information; (ii) the onus is on the claimant to seek additional information; and (iii) there remains legal recourse if a claimant is actually mislead.

[27] Mr. Variola indicated in his application to the Commission for reconsideration, in his appeal to the General Division, and in his submissions to this Court that he was mislead by (i) the omission of information about the parental benefits window and (ii) information he sought from his employer. However, the case law establishes two points that controvert Mr. Variola's arguments. First, the mere absence of clear information – if that were indeed to have been the case here – cannot constitute misleading information, and second, the onus is on the claimant to seek additional information (see *Karval* at para 14, *De Leon* at para 27).

[28] In this case, Mr. Variola claims he met his onus by looking on the Service Canada website. Mr. Variola explains that the length of the parental window is provided multiple times, which led him to believe that duration was the main condition to satisfy.

[29] While the Service Canada website does provide the length of the parental window, the Commission pointed out in its leave submissions to the Appeal Division that the website also specifies that "you must take [parental benefits] within specific periods starting the week of your child's date of birth" (online: https://www.canada.ca/en/services/benefits/ei/ei-maternity-parental.html).

[30] Despite the Appeal Division's refusal to consider this evidence because it was new evidence, I find the information about the parental benefits window on the Service Canada website to be neither unclear nor misleading. That said, I do not doubt Mr. Variola's sincerity both in his efforts to clarify his position before his application for parental benefits, and subsequently in his assertions to this Court about being confused regarding information that he found on the website.

[31] Indeed, and as mentioned above, this Court has previously recognized that the parental benefits scheme is a complex one (*Karval* at para 14). It thus requires particular attention from claimants like Mr. Variola, with demanding responsibilities as parents and working professionals. However, this Court has a duty to apply the law as intended by the legislator and as interpreted in binding legal precedents. As explained by Justice Evans in *Canada (Attorney General) v Knee*, 2011 FCA 301 at para 9, in the context of the EI benefits regime: "… rigid rules are always apt to give rise to some harsh results that appear to be at odds with the objectives of the statutory scheme. However, tempting as it may be in such cases (and this may well be one), adjudicators are permitted neither to re-write legislation nor to interpret it in a manner that is contrary to its plain meaning."

[32] Mr. Variola also states that he sought information from his employer, which he claims turned out to be incorrect information. Although a claimant can be mislead by relying on "official and incorrect information" (*Karval* at para 14), the information Mr. Variola relied on was not official information as it was provided to him by his employer. The Commission cannot be held responsible for information provided by an employer to their employees.

[33] Second, on the issue of the application of subsection 23(1.2) of the *EI Act*, I find that the Appeal Division's conclusion that there is no arguable case that the General Division made an error of law on the application of the *EI Act* is unreasonable. The General Division erroneously relied on a series of Appeal Division decisions where a claimant's election is determined to be invalid from the beginning (*Canada Employment Insurance Commission v MO*, 2021 SST 435, *Canada Employment Insurance Commission v SA*, 2021 SST 406).

[34] Based on these decisions, the General Division allowed Mr. Variola to change his election after the Commission had already paid him parental benefits. These decisions interpret subsection 23(1.2) of the *EI Act* to mean that the claimant's election is irrevocable once benefits are paid only if it is a valid election in the first place. In the Leave Decision, the Appeal Division further elaborates that allowing Mr. Variola to make a valid election is not the same as allowing Mr. Variola to change options.

[35] However, this interpretation of subsection 23(1.2) has been corrected by the Federal Court of Appeal in *Hull*, to the extent that the tribunals below decided not to follow this Court's ruling in *Karval* – itself binding on those tribunals. In *Hull*, Justice Rivoalen provides an unequivocal interpretation of these provisions, in light of the many conflicting Tribunal decisions issued by the General and Appeal Divisions about subsections 23(1.1) and 23(1.2) of the *EI Act*. The Court found that the choice between the two parental benefits options made by the claimant on the application form is the claimant's election (subsection 23(1.1)) and it is irrevocable once payments start (subsection 23(1.2)): *Hull* at paras 46-49.

[36] Thus, the FCA's interpretation in *Hull* removes any doubt as to whether the Commission and Tribunal should consider the context in which the claimant made an election to determine whether the election was invalid, or whether the Commission and Tribunal can substitute an invalid election with a valid alternative.

[37] The FCA further explains that removing doubt for certainty is precisely why Parliament specifically chose to make the election irrevocable (*Hull* at para 57). Although the *Hull* decision was rendered after the Leave Decision, the irrevocability of the election under subsection 23(1.2) of the *EI Act* was affirmed in *Karval*, at para 14 and both the General Division and the Appeal Division failed to follow the principles of that previous binding precedent.

[38] Mr. Variola elected to receive parental benefits under the standard option when he submitted his application form. He cannot change this election now that he has received the parental benefits payments. The Appeal Division's and the General Division's interpretation of subsection 23(1.2) of the *EI Act* is not justified in relation to the law and facts of the binding jurisprudence in *Karval, De Leon* and *Hull* (*Vavilov* at paras 102 and 105). Thus, the General Division erred in law in its interpretation of subsection 23(1.2) of the *EI Act*. This renders the decision of the Appeal Division unreasonable.

[39] I will end with two comments relating to Mr. Variola. First, regarding his poise and professionalism as a self-represented litigant, I found both his conduct in Court, and his written submissions, to be exemplary. Despite the fact that his arguments were unable to carry the day, I commend him for his significant work, and assistance to the Court.

[40] Second, at the September 28, 2022 hearing, Mr. Variola suggested that the Service Canada website could be improved to highlight the start date of the parental benefits window. There may well be an update that Service Canada will consider in the future, to further elucidate the distinction between the benefits selected and the consequences of that selection.

[41] In addition, as noted by Justice Rivoalen in *Hull* at para 25, citing a decision of the Appeal Division, "it would be useful if the Commission could send a statement to each claimant before they send the first parental benefit payment, as a matter of practice."

[42] Such clarifications, according to Mr. Variola, would have avoided the situation in which he now finds himself. They would certainly inform similarly placed individuals going forward, as they navigate the parental benefits scheme.

[43] Finally, considering all the circumstances, including the fact that the Applicant did not request costs, none will be ordered.

V. Conclusion

[44] For the reasons outlined above, I will allow the application for judicial review, quash the decision of the Appeal Division dated February 1, 2022, and remit the matter back to the Appeal Division for redetermination in accordance with this Judgment and Reasons, all without costs.

JUDGMENT in T-448-22

THIS COURT ORDERS that:

1. The application is allowed
2. The Appeal Division decision is set aside and remitted back to a different Member for re-determination in accordance with these Reasons.
3. The whole without costs.

"Alan S. Diner"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

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None	FOR THE RESPONDENT