Federal Court Cour fédérale

Date: 20240827

Docket: T-1772-23

Citation: 2024 FC 1326

Ottawa, Ontario, August 27, 2024

PRESENT: The Honourable Madam Justice Aylen

BETWEEN:

ZBIGNIEW TWARDOWSKI

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

<u>JUDGMENT AND REASONS</u>

[1] The Applicant seeks judicial review of a decision of the Social Security Tribunal – Appeal Division [Appeal Division] dated July 12, 2023. In that decision, the Appeal Division refused leave to appeal from a decision of the General Division of the Social Security Tribunal [General Division] because it found that none of the Applicant's arguments had a reasonable chance of success.

[2] The Applicant, who is self-represented, requests that this Court grant an order setting aside the decision under review and referring the matter back to the Appeal Division for redetermination, as he asserts that he is entitled to additional weeks of employment insurance [EI] benefits beyond the 50 weeks calculated by the General Division.

[3] For the reasons that follow, I see no basis to interfere with the Appeal Division's decision and accordingly, the application for judicial review shall be dismissed.

I. Background

A. Employment Insurance – Statutory Framework

[4] The *Employment Insurance Act*, SC 1996, c 23 [*EI Act*] establishes a public insurance program to preserve economic security and ensure Canadian workers' re-entry into the labour market. It accomplishes this objective by paying EI benefits to eligible claimants when their earnings are interrupted [see *Kuk v Canada (Attorney General)*, 2023 FC 1134 at para 7].

[5] Claimants must prove that they qualify for benefits [see *EI Act*, *supra* at s 48(1)]. To qualify, sections 7 and 8 of the *EI Act* require that a claimant have worked for a certain number of hours within a specified timeframe, referred to as the "qualifying period." The qualifying period is distinct from the "benefit period." The establishment of a benefit period, the period for which benefits are payable to a person, is governed by sections 9 and 10 of the *EI Act*. Subsection 12(2) of the *EI Act* provides that the maximum number of weeks for which benefits may be paid in a benefit period is determined in accordance with the table in Schedule I.

According to Schedule I, the number of weeks a claimant is entitled to benefits is based on the hours of insurable employment they accumulated in their qualifying period and the regional rate of unemployment where they reside.

[6] Subsection 12(2.1) of the *EI Act* provides for a maximum 50-week benefit period, for regular EI benefits, for claims commenced between September 27, 2020, and September 25, 2021. This was an exception introduced because of the COVID-19 pandemic [see *An Act to amend the Employment Insurance Act (additional regular benefits), the Canada Recovery Benefits Act (restriction on eligibility) and another Act in response to COVID-19*, SC 2021, c 3 at s 1(1)].

[7] Additionally, in March of 2020, the *COVID-19 Emergency Response Act*, SC 2020, c 5, amended the *EI Act* empowering the Minister of Employment and Social Development [Minister] to make interim orders to further mitigate the economic effects of COVID-19. Part VIII.3 of the *EI Act* outlines this power [see *EI Act*, *supra* at s 153.3]. The Minister made several such orders, one of which added a temporary benefit to the *EI Act*, called the EI Emergency Response Benefit [EI ERB] [see *EI Act*, *supra* at s 153.5]. Part VIII.4 of the *EI Act* establishes the rules for paying EI ERB benefits. Applications for regular EI benefits made between March 15, 2020, and October 3, 2020, were treated as applications for EI ERB [see *EI Act*, *supra* at s 153.5(2)(b), (3)(a)].

B. Applicant's Employment Insurance Benefits

[8] The Applicant worked for Rush Truck Centres of Canada Limited until March 28, 2020. His record of employment indicates that he stopped working due to "[s]hortage of work / [e]nd of contract or season."

[9] The Applicant applied for regular EI benefits on March 24, 2020. His application triggered payment of the EI ERB, which he received for the period of March 22, 2020, until October 3, 2020.

[10] Effective October 4, 2020, the Canada Employment Insurance Commission [Commission] automatically converted the EI ERB benefits to regular EI benefits. The Applicant was then paid 50 weeks of regular benefits between October 4, 2020, and September 18, 2021. The Commission decided the Applicant could receive 45 weeks of regular EI benefits, plus an additional five weeks under COVID-19 temporary measures, for a total of 50 weeks of regular EI benefits.

[11] The Applicant sought reconsideration of the Commission's decision. By letter dated May 3, 2022, the Commission advised the Applicant that the maximum number of benefit weeks payable to him was 50 weeks, for regular EI benefits, which were paid to him from October 4, 2020, to September 18, 2021.

[12] On July 21, 2022, the Applicant requested reconsideration of the Commission's decision pursuant to section 112 of the *EI Act*. By letter dated January 20, 2023, the Commission issued a reconsideration decision, maintaining its original decision.

[13] The Applicant appealed the Commission's decision to the General Division. Before the General Division, the Applicant advanced a number of arguments as to why he should be entitled to additional EI benefits, including: (a) the hardship his financial circumstances caused ~~on~~ his family; (b) his 30-year contribution to the EI program, which meant that EI benefits were his "private assets"; (c) the government's fault that he became unemployed because of the pandemic restrictions it imposed; (d) the unfair treatment of him by his employer including the discrimination he faced in the workplace because of a physical disability; and (e) the unreasonability of government policies pertaining to crime, municipal property taxes, mental health services, illegal drugs, health care, and the COVID-19 pandemic.

[14] By decision dated April 28, 2023, the General Division dismissed the Applicant's appeal of the Commission's reconsideration decision. The General Division concluded that the Applicant's arguments had no merit and accepted the following findings made by the Commission: (a) the Applicant's region was Toronto which had a regional rate of unemployment of 13.7% at the relevant time; (b) the Applicant's qualifying period was the usual 52 weeks prior to March 15, 2020, plus the weeks from March 15 to October 3, 2020, the latter period added because no benefit period could start during the months under the COVID-19 emergency measures, meaning the Applicant's qualifying period ran from March 24, 2019, to October 3, 2020; and (c) the Applicant had worked 1,820 hours during his qualifying period.

[15] The General Division held that, based on the aforementioned findings and the table at Schedule I of the *EI Act*, the Applicant was entitled to receive 45 weeks of EI benefits. The addition of five extra weeks under COVID-19 emergency measures brought the total number of weeks of regular benefits to 50 weeks. The General Division concluded that 50 weeks was the maximum number of weeks of regular EI benefits to which the Applicant was entitled. The General Division held that the Applicant had not shown that he was entitled to more than the 50 weeks he received. In particular, the General Division noted that the Applicant did not dispute the Commission's decisions about which region and regional unemployment rate applied to him, that the qualifying period went from March 24, 2019, to October 3, 2020, or that the Applicant had worked 1,820 hours during the qualifying period.

[16] The Applicant appealed the General Division's decision to the Appeal Division, continuing to assert that he was entitled to receive more than 50 weeks of regular EI benefits.

[17] On July 12, 2023, the Appeal Division refused to grant leave to appeal. The Appeal Division was not satisfied that the reasons for appeal in the Applicant's submissions fell within the grounds of appeal enumerated in subsection 58(1) of the *Department of Employment and Social Development Act*, SC 2005, c 34 [*DESDA*] and therefore, there was no reviewable error that had a reasonable chance of success.

II. Preliminary Issues

A. Style of Cause

[18] In their memorandum of fact and law, the Respondent requests an order amending the style of cause to name the Attorney General of Canada (rather than the Social Security Tribunal of Canada) as the Respondent. Pursuant to Rule 303 of the *Federal Courts Rules*, SOR/98-106, the appropriate respondent in this application is the Attorney General of Canada. The style of cause shall be amended accordingly.

B. Admissibility of Evidence Filed by the Applicant

[19] The Respondent asserts that this Court should disregard new evidence the Applicant included at Exhibits D and I of his affidavit [Disputed Exhibits], because this evidence was not before the decision-maker and does not assist the Court in understanding the issues relevant to this application. Exhibit D includes a hospital diagnostic report, two letters from a physical medicine and rehabilitation consultant dated August 29, 2019, and February 13, 2020, and a medical report from the Scarborough Health Network dated March 16, 2020. Exhibit I is a letter from the Applicant's family law lawyer to his former spouse that post-dates the decision under review. The Court requested that the Applicant address this issue in his oral submissions, but he failed to do so.

[20] As a general rule, materials that were not before the decision-maker are not admissible on judicial review [see *Association of Universities and Colleges of Canada v Canadian Copyright*

Licensing Agency (Access Copyright), 2012 FCA 22 at para 19]. The Federal Court of Appeal has recognized certain exceptions to this general rule, such as where the new evidence: (i) provides general background that might assist the Court in understanding the issues relevant to the judicial review; (ii) is necessary to bring procedural defects to the Court's attention; or (iii) highlights the complete absence of evidence before the administrative decision-maker [see *Tsleil-Waututh Nation v Canada (Attorney General)*, 2017 FCA 128 at paras 97-98; *Maltais v Canada (Attorney General)*, 2022 FC 817 at para 21]. I find that none of these exceptions apply to the Disputed Exhibits. Accordingly, the Disputed Exhibits are inadmissible and will not be considered.

III. Issue for Determination and Standard of Review

[21] The sole issue for determination is whether the Appeal Division's decision refusing to grant leave to appeal from the General Division's decision was reasonable.

[22] The standard of review for Appeal Division decisions denying leave to appeal is reasonableness [see *Davidson v Canada (Attorney General)*, 2023 FC 1555 at para 35].

[23] In *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67, Justice Rowe explained what is required for a reasonable decision and what is required of a Court reviewing on the reasonableness standard. He stated:

> [31] A reasonable decision is "one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker" (*Vavilov*, at para. 85). Accordingly, when conducting reasonableness review "[a] reviewing court must begin its inquiry

> into the reasonableness of a decision by examining the reasons provided with 'respectful attention' and seeking to understand the reasoning process followed by the decision maker to arrive at [the] conclusion" (*Vavilov*, at para. 84, quoting *Dunsmuir*, at para. 48). The reasons should be read holistically and contextually in order to understand "the basis on which a decision was made" (*Vavilov*, at para. 97, citing *Newfoundland Nurses*).
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> [32] A reviewing court should consider whether the decision as a whole is reasonable: "…what is reasonable in a given situation will always depend on the constraints imposed by the legal and factual context of the particular decision under review" (*Vavilov*, at para. 90). The reviewing court must ask "whether the decision bears the hallmarks of reasonableness – justification, transparency and intelligibility – and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov*, at para. 99, citing *Dunsmuir*, at paras. 47 and 74, and *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5, at para. 13).
>
> [33] Under reasonableness review, "[t]he burden is on the party challenging the decision to show that it is unreasonable" (*Vavilov*, at para. 100). The challenging party must satisfy the court "that any shortcomings or flaws relied on ... are sufficiently central or significant to render the decision unreasonable" (*Vavilov*, at para. 100).

IV. Analysis

[24] Pursuant to subsection 56(1) of the *DESDA*, an appeal of a decision of the General Division to the Appeal Division may only be brought if leave to appeal is granted by the Appeal Division. In order to obtain leave to appeal, an applicant is required to demonstrate at least one of the grounds of appeal enumerated in subsection 58(1) of the *DESDA*:

Grounds of appeal — Employment Insurance Section	**Moyens d'appel — section de l'assurance-emploi**
(58) (1) The only grounds of appeal of a decision made by the Employment Insurance Section are	**(58) (1)** Les seuls moyens d'appel d'une décision rendue par la section de l'assurance-emploi sont les

that the Section	suivants :
(a) failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;	**a)** la section n’a pas observé un principe de justice naturelle ou a autrement excédé ou refusé d’exercer sa compétence;
(b) 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) 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.

[25] Leave to appeal will be refused where the Appeal Division is satisfied that the appeal has no reasonable chance of success [see *DESDA*, *supra* at s 58(2)]. As this Court stated in *Osaj v Canada (Attorney General)*, 2016 FC 115 at paragraph 12, “having a ‘reasonable chance of success’ in this context means having some arguable ground upon which the proposed appeal might succeed.”

[26] The determination of whether the Appeal Division’s decision was reasonable must start with the Applicant’s grounds of appeal in his application for leave to appeal. These set out the key issues and central arguments that the Appeal Division had to grapple with [see *Hazaparu v Canada (Attorney General)*, 2024 FC 928 at para 13]. Before the Appeal Division, the Applicant made the following submissions, among others:

A. It was not his intention to apply for regular EI benefits on March 24, 2020. Rather, on March 24, 2020, he states he was informed by human resources at Rush Truck Centres of Canada Limited that the company had already contacted

Service Canada and had sent a record of his employment to the Canada Revenue Agency [CRA]. The Applicant claims that at the time, he was not aware of the rules and was in shock because he had been a good worker for over 17 years at the company.

B. The General Division compromised procedural fairness, and committed errors of jurisdiction, law and fact.

C. The federal government committed crimes, including fraud, in stealing his EI because the Commission automatically converted the EI ERB to regular EI benefits, which conversion the Applicant describes as "unlawful, unjust, unethical" and illogical.

D. The Prime Minister is guilty of malfeasance in office.

E. The federal government violated the *Charter of Rights and Freedoms*.

F. The federal government's EI policies caused national turmoil and broken families, such as his own.

G. By requiring him to pay EI, the Applicant has an automatic entitlement to collect benefits. In other words, the payments he made into EI are his "private assets, which he owns."

H. There are a variety of issues with the federal government's COVID-19 pandemic policies with respect to paying the EI ERB, as well other policies such as climate change.

I. His employer, Rush Truck Centres of Canada Limited, ignored his attempts at communication.

[27] I am satisfied that the Appeal Division reasonably concluded that the Applicant had not raised an argument in his leave application that had a reasonable chance of success. The Appeal Division considered the applicable law and the underlying decisions and was satisfied that the mathematical formula used to determine entitlement to benefits was properly applied. The Appeal Division outlined the General Division's findings that: (i) the Applicant had 1,820 hours of insured employment in his qualifying period of March 24, 2019, to October 3, 2020; (ii) at the time of his application, the rate of unemployment in his region of residence was 13.7%; (iii) the Commission correctly calculated the Applicant's benefit period to be a maximum of 45 weeks; (iv) the addition of the extra five weeks under COVID-19 emergency measures brings the total number of weeks of regular benefits to 50 weeks; (v) 50 was the maximum number of weeks of regular EI benefits the Applicant was entitled to receive under EI law; (vi) Schedule I is based on the number of hours of insurable employment in a qualifying period, adjusted to the regional rate of unemployment at the place of the Applicant's residence; and (vii) the mathematical formula to determine the Applicant's benefit entitlement was properly applied to the Applicant's circumstances. While the Applicant asserts that he is entitled to more than 50 weeks of EI benefits, he did not identify in either his leave submissions to the Appeal Division or to this Court any error by the General Division in the application of the mathematical formula used to determine his entitlement to benefits, or any other statutory basis, for additional weeks of benefits.

[28] The Appeal Division also reasonably considered the Applicant's arguments and found that there was no reviewable error constituting a ground of appeal, as required by subsection 58(1) of the *DESDA*. This was reasonable, as the Applicant, in his submissions, did not

particularize any errors of the nature enumerated in subsection 58(1) of the *DESDA*. At most, he made bald assertions that utilized some of the language from subsection 58(1). However, absent any particulars, these bald assertions had no reasonable chance of success.

[29] I find that the Appeal Division accurately summarized the Applicant's arguments for leave to appeal in describing them as follows:

> The Claimant now seeks leave to appeal of the General Division's decision to the Appeal Division. He is seeking fairness and social justice. The Claimant submits that he has contributed to the EI program for 30 years. That makes EI benefits his private asset. He submits that the government has stolen the EI benefits he is entitled to receive until he finds a job. The Claimant is unhappy with government actions that have brought poverty and misery to his family.

[30] The Appeal Division noted that it sympathised with the Applicant, but that the tribunal is "bound by the applicable legislation," as "[n]either the General Division nor the Appeal Division has the power to deviate from the EI insurance rules established by Parliament for the granting of benefits, even for compassionate reasons." This is an accurate statement and it applies equally to this Court, which also has no power to ignore the law governing the administration of the EI system, even on grounds of equity [see *Wegener v Canada (Attorney General)*, 2011 FC 137 at para 11].

[31] Many of the Applicant's submissions describe personal struggles and name concerns about broader policy issues that fall outside the scope of the Appeal Division's legal mandate under subsection 58(1) of the *DESDA*. As such, they simply cannot form the basis for the

granting of leave to appeal. As Justice Pentney noted in *Cecchetto v Canada (Attorney General)*, 2023 FC 102 at paragraph 46:

> [46] […] [I]t is likely that the Applicant will find this result frustrating, because my reasons do not deal with the fundamental legal, ethical, and factual questions he is raising. That is because many of these questions are simply beyond the scope of this case. It is not unreasonable for a decision-maker to fail to address legal arguments that fall outside the scope of its legal mandate.

[32] In light of the law and the record that was before the Appeal Division, I find that the Appeal Division's decision is reasonable.

[33] Accordingly, the Applicant's application for judicial review shall be dismissed. The Respondent is not seeking costs and none will be awarded.

JUDGMENT in T-1772-23

THIS COURT'S JUDGMENT is that:

1. The style of cause is hereby amended to name the Attorney General of Canada as Respondent.

2. The application for judicial review is dismissed.

3. There shall be no award of costs.

"Mandy Aylen"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1772-23
STYLE OF CAUSE:	ZBIGNIEW TWARDOWSKI v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	TORONTO, ONTARIO
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APPEARANCES:

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