Federal Court of Appeal | Cour d'appel fédérale

Date: 20250905

Docket: A-196-24

Citation: 2025 FCA 157

CORAM: **LASKIN J.A.**
ROUSSEL J.A.
HECKMAN J.A.

BETWEEN:

KERRY MAYHEAD

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard by teleconference at Ottawa, Ontario on June 5, 2025.

Judgment delivered at Ottawa, Ontario, on September 5, 2025.

REASONS FOR JUDGMENT BY: LASKIN J.A.

CONCURRED IN BY: ROUSSEL J.A.
HECKMAN J.A.

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REASONS FOR JUDGMENT

LASKIN J.A.

I. Overview

[1] Kerry Mayhead appeals from a judgment of the Federal Court (2024 FC 679, Whyte Nowak J.) dismissing her application for judicial review of a decision of the Social Security Tribunal of Canada – Appeal Division denying her leave to appeal a decision of the General Division of the Tribunal.

[2] Ms. Mayhead sought review by the General Division of a decision and a reconsideration decision of the Canada Employment Insurance Commission. In those decisions, the Commission denied her claim for employment insurance benefits on the basis that she had not accrued the requisite number of hours of insurable employment during her qualifying period for benefits. The General Division upheld the Commission's denial, and the Appeal Division found that Ms. Mayhead's appeal had no reasonable chance of success and denied leave to appeal.

[3] On judicial review, the Federal Court concluded that the Appeal Division's decision was reasonable. It also rejected Ms. Mayhead's arguments that she had been denied procedural fairness in the proceedings before the General Division and the Appeal Division. Ms. Mayhead now also submits that she was denied procedural fairness in this Court.

[4] For the reasons that follow, I would dismiss the appeal.

II. Background

A. *Employment insurance reconsiderations and appeals*

[5] The *Employment Insurance Act*, S.C. 1996, c. 23 (the *EIA*), and the *Department of Employment and Social Development Act*, S.C. 2005, c. 34 (the *DESDA*), together set out a multi-stage process through which a claimant dissatisfied with a decision of the Commission in relation to employment insurance may challenge the decision.

[6] The first stage, authorized by section 112 of the *EIA*, consists of a request to the Commission for reconsideration of the decision. If the claim is reconsidered and the claimant remains dissatisfied following the reconsideration decision, they may, by section 113 of the *EIA*, appeal the reconsideration decision to the General Division of the Tribunal. By subsection 54(1) of the *DESDA*, the General Division may dismiss the appeal or confirm, rescind or vary a decision of the Minister or the Commission in whole or in part or give the decision that the Minister or the Commission should have given.

[7] If the claimant remains dissatisfied following their appeal to the General Division, they may appeal to the Appeal Division of the Tribunal, but only on specified grounds, and only if they first obtain leave to appeal. Subsection 58(1) of the *DESDA* specifies that the only grounds on which an appeal to the Appeal Division may be brought are that the Commission failed to observe a principle of natural justice, otherwise committed an error of jurisdiction, erred in law, or based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard to the material before it.

[8] By subsection 58(2) of the *DESDA*, "[l]eave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success" on any of the available grounds. Decisions of the Appeal Division are subject to judicial review.

B. *The Commission's decision and reconsideration decision*

[9] Ms. Mayhead made a claim for EI benefits on January 7, 2022. In a decision dated January 10, 2022, the Commission denied her claim. In accordance with section 8 of the *EIA*, the

Commission considered the qualifying period for her claim to run from January 3, 2021 to January 1, 2022—the 52 weeks before January 7, 2022. The Commission calculated that Ms. Mayhead had 151 insurable hours during the qualifying period, far below the 420 required for eligibility. Accordingly, the Commission found that she did not have the minimum number of insurable hours to make her eligible for EI benefits.

[10] Ms. Mayhead sought reconsideration of her claim. In her request for reconsideration form, Ms. Mayhead alluded to the fact that COVID-related school closures had affected the number of paid weeks she worked and asked that "all years since used for [her] last claim should be included to support [her current] claim": Request for reconsideration, Appeal Book at PDF p. 297.

[11] In addition to her completed request form, Ms. Mayhead's reconsideration file contained two supplementary records of claim. The supplementary records comprised notes of two telephone calls between Ms. Mayhead and a Commission officer, one on February 16, 2022 and the other on March 4, 2022.

[12] The record from the February 16, 2022 call included the following (Appeal Book at PDF p. 274, underlining added):

> Client was advised that her request for reconsideration had been received by Service Canada. She was advised of the process of reconsideration under Employment Insurance Act 112, and that the officer currently reviewing the request was a different officer than any other who had previously worked on the file.

> Client verified receipt of the letter dated 10/01/2022 denying her benefits due to insufficient hours on 20/01/2022, which precipitated her request for reconsideration.
>
> Client confirmed that she had no other employment in the qualifying period. Client was advised that her entire claim would be reviewed, including the possibility of an antedate, and officer would email/request callback with any new information.

[13] The record from the March 4, 2022 call noted the following exchange (Appeal Book at PDF p. 299, underlining added):

> Client asked at this time if antedating her claim would be beneficial.
>
> ["Antedating" refers to the Commission's authority, under subsection 10(4) of the *EIA*, to deem an application for EI benefits to have been made at an earlier date than it actually was if the claimant shows that certain conditions are met.]
>
> She was advised that she would still need 420 hours in that case, and there were not enough hours available (288 hours from the start of her prior claim 27/09/2020) so the antedate would be denied.
>
> Client asked about special measures available to people because their hours were reduced due to Covid and lockdowns. She was advised that current legislation only required 420 hours to qualify, which was much lower than previous years.
>
> Client was advised that the decision she received 20/01/2022 of benefit period not established due to insufficient hours would be maintained by the Commission. She was advised that she would receive written confirmation of this decision.

[14] The officer advised Ms. Mayhead in the latter phone call that her reconsideration request would be denied. A letter issued on the same day confirmed the original denial of January 10, 2022.

C. *The General Division's decision*

[15] Ms. Mayhead appealed to the General Division. In her appeal, Ms. Mayhead raised the issue of antedating her claim to September 2021. She also argued that the Commission's reconsideration decision was illegal because she did not receive a request to contact the Commission until after the decision had been issued.

[16] The General Division dismissed Ms. Mayhead's appeal: *KM v. Canada Employment Insurance Commission*, 2023 SST 236. It found that the March 4, 2022 letter constituted the Commission's reconsideration decision and rejected Ms. Mayhead's arguments that the decision was not legal.

[17] The General Division also found that it had no jurisdiction to consider the antedating issue because the Commission had made no reconsideration decision about antedating. Citing sections 112 and 113 of the *EIA*, it stated that it "[could] only hear appeals on issues that have been reconsidered by the Commission": General Division decision at paras. 11-13.

[18] The General Division determined that the Commission had made no reconsideration decision about antedating either in writing or otherwise. This conclusion was based on, among other things, the General Division's findings that there was no initial decision letter about an antedate in Ms. Mayhead's file; there was no reconsideration request about antedating in the file; there was no written reconsideration decision about antedating in the file; and there was no supplementary record of claim or notice of decision in the file about the reconsideration of an

antedating decision. The General Division also accepted the Commission's submission that it had made no formal decision on antedating: General Division decision at para. 13.

[19] The General Division went on to consider whether Ms. Mayhead qualified for EI benefits based on the qualifying period that had been selected by the Commission, ending January 1, 2022. While the General Division expressed difficulty understanding the Commission's calculation of 151 insurable hours, it found based on Ms. Mayhead's record of employment that Ms. Mayhead must have worked fewer than 288 hours during the qualifying period. This was the total number of hours recorded in her record of employment which spanned from September 20, 2020, to March 30, 2021. Since 288 was still less than the 420-hour minimum, the General Division upheld the reconsideration decision.

D. *The Appeal Division's leave to appeal decision*

[20] The Appeal Division denied Ms. Mayhead the leave to appeal that she required to bring her claim before the Appeal Division on the merits. It found, in accordance with the standard established by subsection 58(2) of the *DESDA*, that the appeal had no reasonable chance of success. This was the case substantially for the same reasons that the General Division had dismissed the appeal: there had been no reconsideration decision on antedating and the number of insurable hours during the qualifying period selected by the Commission was below the minimum for eligibility.

III. Issues and Standard of Review

[21] Ms. Mayhead argues that the Appeal Division's decision was unreasonable, largely on the basis that it was inconsistent with the statutory provisions relevant to her case—section 153.17 and subsection 10(4) of the *EIA*. She also claims that she has been denied procedural fairness before every adjudicative body that has heard her matter, beginning with the Commission and extending to this Court.

[22] On an appeal of a decision by the Federal Court on judicial review, this Court is to step into the shoes of the Federal Court and determine whether it correctly selected and applied the standard of review: *Northern Regional Health Authority v. Horrocks*, 2021 SCC 42 at paras. 10-12.

[23] The standard of review of an Appeal Division decision denying leave to appeal is reasonableness: *Sennikova v. Canada (Attorney General)*, 2022 FCA 215 at paras. 7-8.

[24] As for the procedural fairness arguments that Ms. Mayhead raised in the Federal Court and renewed before us, they are subject to a standard akin to correctness. This Court is to determine whether the procedure employed by the Appeal Division was fair having regard to all the circumstances: *Canadian Pacific Railway Company v. Canada (Attorney General)*, 2018 FCA 69 at paras. 44-56.

IV. Analysis

A. *Was the Appeal Division's decision unreasonable?*

[25] In my view, the Appeal Division reasonably denied Ms. Mayhead leave to appeal. It could reasonably conclude that her appeal had no reasonable chance of success.

[26] As explained above, to obtain leave to appeal to the Appeal Division, Ms. Mayhead had to demonstrate that her appeal had a reasonable chance of success on at least one of the enumerated grounds of appeal— that the General Division decided an issue outside of its jurisdiction or failed to decide something it ought to have decided; that the General Division hearing process was not fair in some way; that the decision was based on an important error of fact; or that the General Division made an error of law: *DESDA*, s. 58(1).

[27] As the Appeal Division observed at paragraphs 11 and following of its reasons, Ms. Mayhead's essential submission was that the General Division erred by not addressing her argument that the Commission should have granted her an antedate. However, Ms. Mayhead has offered no authority to show that the General Division erred in holding its jurisdiction on appeal to be limited to the review of the issues on which the Commission has made a reconsideration decision. The Appeal Division's determination that there was no reconsideration decision on antedating here was based on the factual findings detailed above in paragraph 18—findings supported by the record before it. The Appeal Division therefore did not act unreasonably when it concluded that Ms. Mayhead's appeal on this issue had no reasonable chance of success.

[28] Ms. Mayhead also argues that some of the information she was provided by the Commission officer in the telephone conversations referred to above was inaccurate.

[29] Even if that was so, this Court has held in similar situations that claimants cannot rely on representations by Commission representatives to obtain a result that is contrary to law: *Puig v. Canada (Attorney General)*, 2024 FCA 48 at para. 38. Therefore, whether the Commission representative's statements may have failed to paint the complete picture of Ms. Mayhead's case can have no impact on the General Division's jurisdiction to deal with the antedating issue. A reconsideration decision on that question would still have been required.

B. *Was Ms. Mayhead denied procedural fairness?*

[30] Ms. Mayhead raised issues of procedural fairness before the Federal Court related to the handling of her claim before the Commission and throughout the appeal process. She renewed those arguments before this Court and took further issue with aspects of the procedure related to this appeal.

[31] I would not accede to Ms. Mayhead's arguments regarding the fairness of the process employed by the Commission and the Social Security Tribunal, substantially for the reasons provided by the Federal Court at paragraphs 40 to 44 of its reasons.

[32] As to the process before this Court, Ms. Mayhead argues that she suffered unfairness in two ways: first, because her motion for additional time to make oral submissions was denied and

second, because she was not permitted to raise the constitutional question of which she served notice. I will consider these submissions in turn.

[33] The scheduling order issued when the hearing of this matter was fixed, approximately one month before the hearing, informed the parties that the duration of the hearing would be up to two hours in total. Ordinarily, the time for oral argument in this Court in a two-party hearing is divided equally between the parties.

[34] A few days before the hearing of the appeal, Ms. Mayhead filed a motion seeking "a new decision … for 3 to 5 hours for each to represent plus time for questioning." The grounds included "Protect Natural justice, right of a fair trial," and "Protect Natural Law, protection of the justice system against residual effects," and misinterpretation of the rule of law as written.

[35] The motion was referred to the panel for disposition. The panel dismissed the motion. Among the reasons for doing so was that granting additional time for oral submissions is a discretionary matter, and that in addition to making an hour-long oral argument, Ms. Mayhead had filed a 30-page single-spaced memorandum of fact and law in which she made submissions on both the substance of the decisions of the Commission and Social Security Tribunal and the procedure followed in her case, as well as on what she described as "Natural law." The written and oral argument available to her was sufficient for her to present her case.

[36] As for the notice of constitutional question (NCQ), section 57 of the *Federal Courts Act*, R.S.C. 1985, c. F-7, requires that, absent an order otherwise, a party wishing to raise a

constitutional question in this Court must serve notice on the Attorney General of Canada and the attorney general of each province at least 10 days before the question is to be argued. Ms. Mayhead failed to do so. While the affidavit of service that she filed showed timely service on the Attorney General of Canada (by registered mail), it also showed short service on the provincial attorneys general (by ordinary mail). They therefore did not get the benefit of the notice to which they were entitled.

[37] The deadline for service and filing of an NCQ is no "mere formality": *Kreishan v. Canada (Citizenship and Immigration)*, 2019 FCA 223 at para. 53. The notice requirement is aimed at ensuring that governments have the fullest opportunity to address matters of public concern: *Kreishan* at paras. 55-60. Ms. Mayhead provided no explanation for her delay in serving and filing her NCQ until it was too late to provide 10 days' notice to all those entitled to it. The Court was at a minimum entitled to exercise its discretion not to hear her on the constitutional questions she sought to raise.

V. Proposed Disposition

[38] For the reasons set out above, I would dismiss the appeal. The Attorney General has not sought costs of the appeal, and in all of the circumstances I would make no order as to costs.

"J.B. Laskin"
J.A.

"I agree.
Sylvie E. Roussel"

"I agree.
Gerald Heckman"

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-196-24
STYLE OF CAUSE:	KERRY MAYHEAD v. ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	BY TELECONFERENCE AT OTTAWA, ONTARIO
DATE OF HEARING:	JUNE 5, 2025
REASONS FOR JUDGMENT BY:	LASKIN J.A.
CONCURRED IN BY:	ROUSSEL J.A. HECKMAN J.A.
DATED:	SEPTEMBER 5, 2025

APPEARANCES:

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