Federal Court Cour fédérale

Date: 20181116

Docket: T-2111-17

Citation: 2018 FC 1138

Toronto, Ontario, November 16, 2018

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

ALEXANDRE PAPOUCHINE

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Mr. Alexandre Papouchine [Applicant] is self-represented in this proceeding. He brings this application under section 18.1 of the *Federal Courts Act,* RSC, 1985, c F-7. The Applicant seeks judicial review of the November 24, 2017 decision [Decision] of the Appeal Division [Appeal Division] of the Social Security Tribunal [Tribunal], in which the presiding member [Member] rejected the appeal.

[2] On August 5, 2014, the Applicant applied for sickness benefits under paragraph 12(3)(c) of the *Employment Insurance Act,* SC 1996, c 23 [EI Act] as he was unable to work due to illness, injury or quarantine. This application was approved, and benefits were paid to the Applicant. The Canada Employment Insurance Commission [Commission] terminated the Applicant's benefits after 15 weeks, which is the maximum allowable time under the EI Act.

[3] The Applicant requested an additional 25 weeks of payment on the basis that had he applied for regular benefits instead of sickness benefits, he would have received this additional amount. The Commission maintained its decision.

[4] The Applicant appealed the Commission's decision to the Social Security Tribunal – General Division [General Division]. He claimed that the relevant provision of the EI Act was contrary to section 15 of the *Canadian Charter of Rights and Freedoms* [*Charter*], as he received a lower benefit amount due to his disability.

[5] The General Division held a pre-hearing conference on October 27, 2016 to explain the *Charter* challenge process to the Applicant, and issued an order that required the Applicant file a notice in accordance with paragraph 20(1)(a) of the *Social Security Tribunal Regulations*, SOR/2013-60 [SST Regulations] by December 28, 2016.

[6] On December 5, 2016 the Applicant requested a 90-day extension of time to file his notice. The Applicant was granted two extensions: one until January 31, 2017 and the other until February 28, 2017.

[7] On March 2, 2017, the General Division ended the Applicant's *Charter* challenge on the basis that he failed to file his notice by the deadline. On March 3, 2017 the General Division sent the Applicant a Notice of Intention to Summarily Dismiss his appeal pursuant to section 22 of the SST Regulations. The Applicant did not file any submissions in response to this notice.

[8] The General Division concluded that in absence of the *Charter* challenge, it was plain and obvious that the appeal would fail. The Applicant had been fully paid the maximum amount under the EI Act, which provides no discretion to the Tribunal. It dismissed the Applicant's appeal in a decision dated April 12, 2017.

II. Decision Under Review

[9] The Applicant appealed the General Division's decision to the Appeal Division. In the Decision, the Member identified the following issues:

A. Did the Applicant have the opportunity to file a notice of constitutional challenge pursuant to paragraph 20(1)(a) of the SST Regulations?

B. Did the General Division fail to inform and assist the Applicant in filing his notice in accordance with paragraph 20(1)(a) of the SST Regulations?

C. Did the Applicant have a right to be provided legal counsel by the Respondent or the Tribunal?

D. Did the General Division commit a breach of procedural fairness or fail to follow the requirements of natural justice?

E. Did the General Division err when it summarily dismissed the Applicant's appeal?

III. Preliminary Matter

[10] The Respondent, as a preliminary point, requested that the style of cause be amended to reflect the Attorney General of Canada as the Respondent. The Applicant agreed. The change will accordingly be made in accordance with Rule 303 of the *Federal Courts Rules,* SOR/98-106.

IV. Parties' Positions

[11] The Applicant identified approximately fifteen issues in his memorandum of fact and law, many of which repeated issues raised at the General and Appeal Divisions. At the hearing of this judicial review, the Applicant appeared to understand that judicial review is not an opportunity to relitigate an unfavourable outcome, but rather to review the Decision. He retreated from this expansive list of issues, and focused only on the narrow issue raised as a result of paragraph 29 of the Decision, which reads in its entirety as follows:

> The Tribunal also notes that the Respondent's interlocutory motions in the file were communicated to the Appellant and that he had the opportunity to reply to them.

[12] The Applicant argues that the Appeal Division was incorrect in this statement because the General Division did not give him the opportunity to reply to the Respondent's position on these "motions".

[13] The Respondent asserts that there was no error of any kind with respect to paragraph 29 of the Decision. The Respondent refutes the arguments that the Applicant had previously put

forward in his written submissions (but resiled from in his oral submissions), by contending that the Decision as a whole was both reasonable and correct.

V. Analysis and Standard of Review

[14] The Respondent argues that the standard of review for any findings of fact, and for the interpretation of the Tribunal's home statute, the *Department of Employment and Social Development Act,* SC 2005, c 34 [DESDA], is reasonableness, relying on *Reinhardt v Canada (AG)*, 2016 FCA 158 and *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36. The Applicant agrees.

[15] On the other hand, the standard of review for procedural unfairness alleged to have occurred in the proceedings before the Appeal Division or in its Decision is correctness, as recently confirmed in *Canadian Pacific Railway Co v Canada (Attorney General)*, 2018 FCA 69. Here, the Applicant's allegation is that the procedural unfairness occurred at the General Division, which was then errantly reviewed by the Appeal Division. The Respondent rejects this assertion, arguing that the Appeal Division reasonably – and correctly – found no procedural unfairness at the General Division.

[16] After all is said and done, the germane legal question before this Court is the appropriate standard of review for the Appeal Division in its review of the General Division. While case law was not presented on the standard of review specific to the Appeal Division – or indeed for any appellate tribunal – in the review of procedural fairness at a lower tribunal, I make two observations.

[17] First, the matter is far from settled, and the analysis requires a highly contextual assessment, which starts with the statute governing the Tribunal (see Paul Daly, "Les Appels Administratifs Au Canada" (2015) 93 Can Bar Rev 71 at 77, 81; see also *Rozas Del Solar v Canada (Citizenship and Immigration),* 2018 FC 1145).

[18] Second, I agree with the Respondent that in certain appellate contexts, a reasonableness standard applies to the review of any procedural fairness determinations of first level tribunals – for instance, in the context of the Immigration and Refugee Board, when the Refugee Appeal Division reviews the Refugee Protection Division (see, for instance, *Gebremedhin v Canada (Minister of Immigration, Refugees and Citizenship)*, 2017 FC 497 at para 11).

[19] However, in the context of the Social Security Tribunal, the case law has held that the review is to be conducted on a correctness standard, where Justice McDonald held in *Parchment v Canada (Attorney General*), 2017 FC 354: "The applicable standard of review of an Appeal Division decision is reasonableness" (at para 14), and "[i]ssues of procedural fairness are considered on the standard of correctness" (at para 16). This is consistent with Justice Evans' analysis, who wrote for the Federal Court of Appeal in *Hillary v Canada (Citizenship and Immigration)*, 2011 FCA 51:

> [27] This is an unusual case in that the decision under review is a decision of an administrative tribunal that another panel of the tribunal had not breached a principle of natural justice in dismissing an appeal. Because section 71 of IRPA only permits the IAD to reopen an appeal for breach of a principle of natural justice, the question before us is whether the panel erred when it found that no breach had occurred at the appeal hearing and therefore refused to reopen the decision.
>
> [28] It is settled law that administrative decision-makers are not entitled to curial deference on whether they afforded an individual

> a fair opportunity to participate in a proceeding that culminated in an adverse decision[.] In my opinion, this principle is equally applicable in the present case, where the IAD was required to rule on whether another panel of the same tribunal had breached a principle of natural justice.
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> [Citations omitted]

[20] Either way, I find the approach of the General Division in this case was correct and thus reasonable as well.

[21] My analysis will centre on the narrow issue focused on by the Applicant at the hearing arising from paragraph 29 (reproduced above), but for the sake of completeness, I also will consider the reasonableness of the Decision as a whole, as the Respondent addressed these points at the hearing.

A. *Summary Dismissal Finding*

[22] The Appeal Division's decision to uphold the General Division's summary dismissal of the Applicant's appeal was reasonable. As the Respondent points out, the only grounds for appeal are set out in subsection 58(1) of the DESDA.

Grounds of appeal	**Moyens d'appel**
58 (1) The only grounds of appeal are that	58 (1) Les seuls moyens d'appel sont les suivants:
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] The Appeal Division had to determine whether the Applicant had made out one of the three grounds listed in subsection 58(1) of the DESDA. The Applicant did not make out any of these grounds. There was only one decision that the Appeal Division could have reached, given the issue appealed, and the 15 week limitation on sickness benefits under paragraph 12(3)(c) of the EI Act, which stipulates:

Benefits	**Prestations**
12 (1) If a benefit period has been established for a claimant, benefits may be paid to the claimant for each week of unemployment that falls in the benefit period, subject to the maximums established by this section.	12 (1) Une fois la période de prestations établie, des prestations peuvent, à concurrence des maximums prévus au présent article, être versées au prestataire pour chaque semaine de chômage comprise dans cette période.
…	…
Maximum — special benefits	**Maximum : prestations spéciales**
(3) The maximum number of weeks for which benefits may be paid in a benefit period; …	(3) Le nombre maximal de semaines pendant lesquelles des prestations peuvent être versées au cours d'une période de prestations est :

…	…
(c) because of a prescribed illness, injury or quarantine is 15;	c) dans le cas d'une maladie, d'une blessure ou d'une mise en quarantaine prévue par règlement, quinze semaines;

[24] Section 53 of the DESDA states:

Dismissal	**Rejet**
53 (1) The General Division must summarily dismiss an appeal if it is satisfied that it has no reasonable chance of success.	**53 (1)** La division générale rejette de façon sommaire l'appel si elle est convaincue qu'il n'a aucune chance raisonnable de succès.

[25] The Appeal Division made no error of law in interpreting this provision and applying it to the General Division's decision. Had the *Charter* challenge not been discontinued, it would have been inappropriate to summarily dismiss the appeal because the Applicant could then have challenged the validity of that provision. However, the Applicant failed to comply with the statutory requirement to file a notice of constitutional challenge despite his two extensions of over two months. At that point, the General Division ended the *Charter* challenge. Doing so was entirely open to the Tribunal, and the Appeal Division's rationale in this regard was entirely reasonable.

[26] Therefore, absent a *Charter* challenge, the Applicant could only receive the relief sought that was within the Tribunal's statutory power to grant. The Appeal Division reasonably concluded that the appeal before the General Division was bound to fail no matter what evidence

or arguments might have been presented at the hearing, given the clear wording of the statutory regime: the Applicant received the maximum number of weeks for which sickness benefits could be paid under the statute, which does not afford the Tribunal any discretion.

B. *Opportunity to Respond to "Motions"*

[27] The Applicant argues that the Appeal Division erred when it found that he had been given an opportunity to reply to the Respondent's "motions" (Decision at para 29, as reproduced above). He refers to the December 21, 2016 letter in which the Tribunal requested the parties file their respective submissions by January 10, 2017, rather than a staggered process, as might occur in a court setting.

[28] I note that the Applicant was unable to point to any statutory authority for his assertion that receiving responses from the parties at the same time, without providing an opportunity for a reply from the Applicant, was incorrect. He only referred to what he asserted was standard practice in general motion procedure as provided in certain courts.

[29] The Respondent, by way of reply, noted that the Social Security Tribunal (both Appeal and General Divisions) is entirely a creation of statute. It is responsible for governing its own proceedings. Where the statute prescribes procedure or law, the Tribunal must follow it (e.g. section 53 of DESDA, or sections 20 and 22 of the SST Regulations relating to *Charter* notice and summary dismissal, respectively).

[30] The relevant provisions as contained in the DESDA and SST Regulations provide no guidance for procedures regarding "motions", as they are colloquially referred in both the Appeal and General Division decisions. Rather, the SST Regulations only provide for procedural "requests":

Requests to Tribunal	**Demande au Tribunal**
4 A party may request the Tribunal to provide for any matter concerning a proceeding, including the extension of a time limit imposed by these Regulations, by filing the request with the Tribunal.	**4** À la demande déposée par une partie auprès du Tribunal, celui-ci peut déterminer la règle applicable à toute question relative à l'instance, notamment la prorogation des délais impartis par le présent règlement.

[31] More generally, section 2 of the SST Regulations provides that:

General principle	**Principe général**
2 These Regulations must be interpreted so as to secure the just, most expeditious and least expensive determination of appeals and applications.	**2** Le présent règlement est interprété de façon à permettre d'apporter une solution à l'appel ou à la demande qui soit juste et la plus expéditive et économique possible.

[32] After a review of the relevant provisions, I find that the Appeal Division was correct in its response. The Tribunal has no obligation to allow an applicant the opportunity to make a written reply to a respondent's request. The General Division's direction was made to secure the just, most expeditious proceeding. It is not clear to me where any breach of procedural fairness took place. The letter stated that the Applicant could make his submissions at any time before January 10, 2017.

[33] The Applicant raised *Sketchley v Canada (Attorney General),* 2005 FCA 404 [*Sketchley*] at paragraph 119 for the proposition that the Tribunal is the master of its own procedure. As explained to the Applicant during the hearing, *Sketchley* arises in an entirely different context, namely before the Canadian Human Rights Commission, and does not support the Applicant's position that there was a breach of procedural fairness. I note that it neither supports the Applicant's position on the correctness of the Decision, nor on the substance discussed in the first issue above.

C. *Subsidiary Issues*

[34] Finally, I note that over and above the concern that arose in paragraph 29 of the Decision regarding the right to reply to the Respondent's submissions, the Applicant raised in written submissions more general procedural fairness concerns regarding his ability to be heard while before the General Division. These were commented upon by the Respondent and the Applicant in reply, so for the sake of completeness, I will briefly address this issue.

[35] Again, I find that there were no incorrect findings in the Decision regarding the fact that the Applicant's procedural fairness rights were respected by the General Division.

[36] First, I agree that the Applicant had ample opportunity to make his case, including several opportunities to provide submissions in response to the Notice of Intention to Summarily Dismiss his appeal. This occurred over and above the prior pre-hearing conference and two subsequent extensions to submit his *Charter* arguments. Ultimately, the General Division

process took four months to conclude (not considering the period of time prior to the pre-conference hearing).

[37] Second, the Appeal Division found that was a sufficient time frame to prepare a *Charter* challenge and to allow the Applicant to file his notice in accordance with paragraph 20(1)(a) of the SST Regulations. It was open to the Appeal Division to find that a four month period was adequate to file a notice, notwithstanding that the Applicant represented himself. The Appeal Division noted that the Applicant "chose to dedicate his valuable time to filing accusations against the opposing party and counsel, accusations that were without any merits [*sic*], instead [of] concentrating on filing his notice of constitutional challenge in the allowed period of time" (Decision at para 28). There were no errors in these findings.

[38] I will make one final comment with respect to the Applicant's submission that it was both unreasonable and incorrect for the Tribunal to hold that he was not a client of the Respondent, and as such should have been provided representation by the Respondent's counsel. I find no flaw in the Appeal Division's finding on this point:

> [20] The attorneys on file represent the Respondent. Their client and mandate are clear. Contrary to the Appellant's position, he did not become "client" of the Respondent's attorneys just because he applied for Employment Insurance benefits. The fact that the Respondent's responsibilities include the obligation to advise claimants on the programs and services available to them does not include the right to be provided legal counsel by the Respondent in case of litigation. This could not be considered as a reasonable belief on the part of the Appellant.
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> [21] The Tribunal also finds that the General Division did not have an obligation to provide legal counsel to the Appellant.
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> [22] Although access to legal services is fundamentally important in any free and democratic society, the Supreme Court

> of Canada, in *B.C. v. Christie* [2007] l SCR 873, stated that the text of the Constitution, the jurisprudence and the historical understanding of the rule of law, did not support the conclusion that there is a general constitutional right to counsel in proceedings before courts and tribunals dealing with rights and obligations.
>
> [23] Furthermore, the DESD Act and the SST Regulations do not mention an obligation for the Tribunal to provide legal assistance.

[39] The Applicant further submits that filing a notice of constitutional challenge requires specific skills. Again, the Tribunal has no obligation to provide legal assistance in this regard. Further, the Tribunal noted that the Applicant is no stranger to the litigation process, having filed numerous legal proceedings both federally and provincially, and concluded that the Applicant possesses whatever skills are required to file a notice of constitutional challenge.

[40] The Appeal Division reached conclusions that were reasonable and correct, according to the standard they are reviewed under. The Applicant may be a client of the Commission, but that does not make the Applicant a client of the Commission's lawyers. Taking the Applicant's position would be akin to accepting that a person suing a company he patronizes automatically becomes a client of the company's counsel. Or to consider an example in the public sphere, when applicants apply for immigration to Canada, they become clients of the department for a period of time. If their immigration application fails and they decide to litigate, they do not become clients of the Attorney General or the Department of Justice, which represent the Crown and Government Departments, and do not serve as legal representatives of the public who are refused access to or have a grievance with government services.

VI. Conclusion

[41] The application for judicial review is dismissed. The style of cause shall be amended to reflect the appropriate respondent, the Attorney General of Canada, with immediate effect. The Respondent did not seek costs, and none will be ordered.

JUDGMENT in T-2111-17

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is dismissed.
2. The style of cause is amended to reflect the Attorney General of Canada as the Respondent.
3. There is no award as to costs.

"Alan S. Diner"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2111-17
STYLE OF CAUSE:	ALEXANDRE PAPOUCHINE V ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	TORONTO, ONTARIO
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APPEARANCES:

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