Federal Court  Cour fédérale

Date: 20200117

Docket: T-441-19

Citation: 2020 FC 74

Ottawa, Ontario, January 17, 2020

PRESENT: Mr. Justice Boswell

BETWEEN:

THUYA MAUNG

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Thuya Maung, has applied for judicial review of a decision of the Appeal Division of the Social Security Tribunal of Canada [SST] dated January 25, 2019. The Appeal Division denied Mr. Maung leave to appeal a decision of the General Division of the SST because the appeal had no reasonable chance of success.

[2] Mr. Maung, who represents himself in this proceeding, asks the Court for an order setting aside the Appeal Division's decision and granting leave to appeal the General Division's

decision to the Appeal Division. Alternatively, he asks for an order setting aside the Appeal Division's decision and returning the matter to the Appeal Division for redetermination by a different member, with such directions as the Court considers appropriate. The issue, therefore, is whether this relief should be granted.

I. Background

[3] Mr. Maung applied for compassionate care benefits under section 23.1 of the *Employment Insurance Act*, SC 1996, c 23 [*EIA*] in late April 2017 to permit him to care for his critically ill mother. The Canada Employment Insurance Commission [the Commission] approved the application and Mr. Maung received 26 weeks of benefits beginning in mid-May 2017. These 26 weeks of benefits were the maximum allowed by subsection 12(3) of the *EIA*.

[4] Mr. Maung's employment ended in April 2018. He says he lost his job after being assaulted in the workplace. Prior to termination of his employment, Mr. Maung had completed 495 qualifying hours of work, 105 hours short of the 600 required for regular *EIA* benefits.

[5] He therefore applied for family caregiver benefits under section 23.3 of the *EIA*. These benefits were approved for five weeks ending in mid-May 2018. This corresponded to the end date of the 52-week benefit period under section 10 of the *EIA*, which for Mr. Maung began on the date of his first compassionate care benefits in April 2017. If the benefit period had not ended, Mr. Maung may have been entitled to a maximum of 15 weeks of family caregiver benefits under subsection 12(3) (f) of the *EIA*.

[6] Mr. Maung requested reconsideration of the decision granting him only five weeks of family caregiver benefits. The Commission informed him in late June 2018 that it would not reconsider its decision. Mr. Maung appealed the Commission's decision to the General Division a week or so later.

[7] The General Division requested that Mr. Maung provide correspondence from the Commission indicating the result of its reconsideration. After the Commission provided this correspondence, the General Division scheduled a hearing by teleconference for early October 2018. The General Division denied Mr. Maung's appeal a month or so later because the 52-week benefit period operated to end his benefits in mid-May 2018, and none of the criteria in subsection 10(10) of the *EIA* applied to extend the benefit period. Mr. Maung applied to the Appeal Division for leave to appeal the General Division's decision in early December 2018.

II. The Appeal Division Decision

[8] The Appeal Division refused leave to appeal in its decision dated January 25, 2019 because it found there was no reasonable chance of success on any of the grounds of appeal raised by Mr. Maung.

[9] The Appeal Division identified two issues raised by the application for leave: whether there was an arguable case that the General Division had (i) failed to observe a principle of natural justice, or (ii) based its decision on an erroneous finding of fact without regard for the nature of Mr. Maung's application.

[10] The Appeal Division noted that subsection 58(1) of *the Department of Employment and Social Development Act*, SC 2005, c 34 [*DESDA*] provides limited grounds of appeal. This subsection does not give the Appeal Division jurisdiction to conduct any reassessments. It sets out the grounds of appeal are limited to whether the General Division: (i) failed to observe a principle of natural justice or made a jurisdictional error; (ii) made an error in law; or (iii) based its decision on an erroneous finding of fact made in a perverse or capricious manner or without regard for the material before it.

[11] In the Appeal Division's view, Mr. Maung had not identified any issues of procedural fairness or natural justice relating to the General Division proceeding; nor had he suggested that the General Division deprived him of an opportunity to fully and fairly present his case, or that it might have exhibited any bias against him. The Appeal Division was not satisfied that the appeal had a reasonable chance of success on this ground.

[12] The Appeal Division then proceeded to assess Mr. Maung's claim that that the General Division had based its decision on an erroneous finding of fact that he was trying to seek an extension of benefits or an extension of the benefit period, rather than deciding if he was entitled to a new set of benefits with a new benefit period.

[13] The Appeal Division noted that the General Division had failed to distinguish between the two types of special benefits. This was not fatal, the Appeal Division found, because the Commission had accepted the application for family caregiver benefits on top of the compassionate care benefits Mr. Maung had already received in 2017.

[14] The Appeal Division found that even though Mr. Maung received two different types of special benefits, this was immaterial to the General Division's determination because it had to decide whether it could extend the benefit period. The Appeal Division noted that subsection 10(3) of the *EIA* provides that no new benefit period can begin if an earlier benefit period has not ended.

[15] The Appeal Division further found that the General Division had properly identified the issue before it and determined whether Mr. Maung was entitled to an extension of the benefit period.

[16] The Appeal Division thus concluded that it was not satisfied that the appeal had a reasonable chance of success on any of the grounds raised by Mr. Maung and refused the application.

III. The Parties' Submissions

A. *Applicant*

[17] Mr. Maung's main contention is that he intended to begin a new benefit period with his April 2018 claim for family caregiver benefits. In his view, this was unfairly regarded as an application for extension of the benefit period since he fell short of the minimum 600 insurable hours to begin a new benefit period.

[18] Mr. Maung says he was told too late that he could get up to 15 weeks of family caregiver benefits, but only during the 52-week benefits period. He asserts that the Commission's delay in issuing the reconsideration decision letter harmed his case, and that the requirement that he accumulate at least 600 insurable hours was unrealistic given his situation of having to care for his mother.

[19] According to Mr. Maung, the decision-makers have not properly considered the physical assault that led to him losing his job.

B. *Respondent*

[20] In the respondent's view, the Appeal Division's conclusion - that Mr. Maung had no reasonable chance of success on appeal - was reasonable. The respondent notes that the 52-week benefit period initiated at the first payment of his compassionate care benefit in mid-May 2017 could not be extended because none of the criteria in subsection 10(10) of the *EIA* applied. According to the respondent, while that benefit period lasted, subsection 10(3) prevented initiation of a new period even if Mr. Maung had accumulated enough insurable hours to ground a new claim for benefits.

[21] The respondent argues that Mr. Maung received adequate procedural fairness at the Commission, the General Division, and the Appeal Division. According to the respondent, Mr. Maung knew of the evidence before the SST and had a full opportunity to prepare. The respondent says the delay in producing the Commission's reconsideration decision did not affect

the fairness of the proceeding because the hearing was scheduled only after the General Division received the decision, and Mr. Maung had approximately seven weeks to prepare for the hearing.

[22] In the respondent's view, the consideration accorded to the alleged assault was sufficient, given that Mr. Muang did not raise it in writing until his appeal to the Appeal Division.

[23] According to the respondent, the decision denying leave to appeal was reasonable because the operation of the *EIA* compelled the decision reached by the Commission, resulting in no reviewable error that allowed the General Division to grant relief. The respondent says the General Division straightforwardly applied the *EIA*, leaving no ground under subsection 58(1) of the *DESDA* for Mr. Maung's appeal to the Appeal Division.

[24] The respondent notes that the 52-week benefit period ended in May 2018, terminating the payment of family caregiver benefits after five weeks out of a possible 15. The respondent further notes that this period could not be extended and be replaced by a new period after a new 600-hour period of employment. According to the respondent, the only way Mr. Maung could receive any family caregiver benefits at all was during the existing benefit period, so long as it lasted.

IV. Analysis

[25] Two questions require the Court's attention: (i) did the Appeal Division deny Mr. Maung procedural fairness? and (ii) was it reasonable for the Appeal Division to refuse Mr. Maung's application for leave to appeal because it had no reasonable chance of success?

A. *What is the standard of review?*

[26] The applicable standard of review with respect to the Appeal Division's decision to deny leave to appeal is reasonableness (*Sjogren v Canada (Attorney General)*, 2019 FCA 157 at para 6 [*Sjogren*]; *Sherwood v Canada (AG)*, 2019 FCA 166 at para 7; *Andrews v Canada (Attorney General)*, 2018 FC 606 at para 17; *Canada (Attorney General) v Bernier*, 2017 FC 120 at para 7).

[27] The reasonableness standard of review tasks the Court with reviewing an administrative decision for internally coherent reasoning and the presence of justification, transparency and intelligibility; and with determining whether the decision is justified in relation to the relevant factual and legal constraints (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 86 and 99; *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

[28] If the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome; nor is it the function of the reviewing court to reweigh the evidence (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paras 59 and 61 [*Khosa*]).

[29] The standard of review for an allegation of procedural unfairness is correctness (*Mission Institution v Khela*, 2014 SCC 24 at para 79; *Khosa* at para 43; *Sjogren* at para 6). The Court must determine whether the process followed in arriving at the decision under review achieved

the level of fairness required by the circumstances of the matter (*Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 at para 115).

[30] An issue of procedural fairness "requires no assessment of the appropriate standard of judicial review. Evaluating whether procedural fairness, or the duty of fairness, has been adhered to by a tribunal requires an assessment of the procedures and safeguards required in a particular situation" (*Moreau-Bérubé v New Brunswick (Judicial Council)*, 2002 SCC 11 at para 74). As the Federal Court of Appeal has observed, "even though there is awkwardness in the use of the terminology, this reviewing exercise is 'best reflected in the correctness standard' even though, strictly speaking, no standard of review is being applied" (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54).

B. *Was Mr. Maung denied procedural fairness?*

[31] The ultimate question before the Court in assessing whether Mr. Maung was denied procedural fairness is whether he knew the case to meet and had a full and fair opportunity to respond (*Kwan v Amex Bank of Canada*, 2018 FCA 189 at para 22).

[32] Mr. Maung has not raised any reviewable violations of procedural fairness, either by the Appeal Division, or by the General Division that the Appeal Division ought to have corrected. He was aware of the evidence before the decision makers and provided a full and fair opportunity to prepare and present his arguments.

[33] The approximately two-month delay by the Commission in issuing a written decision that the General Division could review did not prejudice Mr. Maung's rights to know the case against him, to prepare, or to be heard. The hearing date was promptly set once the General Division had received all the required documents to perfect the appeal.

[34] Contrary to Mr. Maung's view, the assault against him that resulted in loss of his job was not ignored. His notice of appeal to the General Division filed in July 2018 failed to mention the workplace assault. The first decision-maker to whom he raised it clearly considered the assault.

[35] The Appeal Division acknowledged the assault in addressing Mr. Maung's argument that the General Division based its decision on an erroneous finding of fact that he was trying to seek an extension of benefits or an extension of the benefit period, rather than deciding whether he was entitled to a new set of benefits with a new benefit period.

C. *Was the decision reasonable?*

[36] I agree with the Respondent that the Appeal Division's decision was reasonable. The Appeal Division's reasoning is coherent and consistent with the factual constraints in the record and the statutory context of the *EIA*.

[37] Mr. Maung failed to demonstrate to the Appeal Division that his appeal had a reasonable chance of success (*Osaj v Canada (AG)*, 2016 FC 115 at para 12 [*Osaj*]). The Appeal Division reasonably refused his request for leave to appeal because the grounds for his appeal had no reasonable chance of success.

[38] Subsection 58(1) of the *DESDA* prescribes only three grounds of appeal: (i) a breach of natural justice; (ii) an error of law; or (iii) an erroneous finding of fact made in a perverse and capricious manner or without regard for the material before it (*Cameron v Canada (AG)*, 2018 FCA 100 at para 2). Subsection 58(2) provides that leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success. A reasonable chance of success means having some arguable ground upon which the proposed appeal might succeed (*Osaj* at para 12).

[39] The reasonableness of Appeal Division's decision must be assessed in the context of the entire record. The Appeal Division was not required to refer to all the arguments or to make an explicit finding on each constituent element of reasoning leading to its conclusion (*Newfoundland and Labrador Nurses Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16). The Court must pay respectful attention to the reasons offered, and to those which could have been offered, in support of a decision (*Newfoundland Nurses* at para 12).

[40] Since the record indicated that Mr. Maung had not met the insured hours' threshold for a fresh benefit period, the Appeal Division reasonably concluded that his argument—that the General Division had failed to provide for a fresh benefit period—had no reasonable chance of success.

[41] It also was reasonable for the Appeal Division to frame Mr. Maung's appeal for continued payment of benefits (beyond the five weeks granted for the family caregiver benefits)

primarily as an application for an extension of his benefit period under subsection 10(10) of the *EIA*.

V. Conclusion

[42] Mr. Maung has raised no reviewable error with Appeal Division's decision.

[43] In short, the Appeal Division's reasons for refusing Mr. Maung's application for leave to appeal the General Division's decision are intelligible, transparent, and justifiable; and its decision is justified in relation to the relevant factual and legal constraints. Mr. Maung's application for judicial review is therefore dismissed.

[44] As the Respondent does not seek costs, there will be no order as to costs.

JUDGMENT in T-441-19

THIS COURT'S JUDGMENT is that: the application for judicial review is dismissed; and there is no order as to costs.

"Keith M. Boswell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-441-19
STYLE OF CAUSE:	THUYA MAUNG v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
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APPEARANCES:

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