Federal Court  Cour fédérale

**Date: 20200526**

**Docket: T-1502-19**

**Citation: 2020 FC 642**

**Ottawa, Ontario, May 26, 2020**

**PRESENT: Madam Justice McDonald**

**BETWEEN:**

**JODY FRANCIS**

**Applicant**

**and**

**THE ATTORNEY GENERAL OF CANADA AND D-J COMPOSITES INC.**

**Respondents**

## JUDGMENT AND REASONS

[1] The issue on this judicial review is the reasonableness of the Social Security Tribunal (SST) Appeal Division (AD) decision of March 6, 2019. In this decision, the AD concluded that the employer had the right to seek leave to appeal a decision of the SST General Division (GD) under section 55 of the *Department of Employment and Social Development Act* (*DESDA*), SC 2005 c 34. This issue arises in the factual context where the employer choose not to participate in the General Division proceedings.

[2] For the reasons that follow, this judicial review is granted, as I am not satisfied that the Appeal Division's decision was reasonable.

**Background**

[3] The Applicant, Mr. Francis, was employed with D-J Composites (the Employer) in Gander, NL. When the Applicant's employment ended, he applied to the Canada Employment Insurance Commission (the Commission) for employment insurance (EI) benefits. The issue before the Commission was whether the Applicant's employment ended as the result of a labour dispute.

[4] Mr. Francis' application for EI benefits was denied as the Commission determined that there was a labour dispute within the meaning of the *Employment Insurance Act*, SC 1996 c 23, (*EI Act*) which precluded him, and the other employees who had been laid off, from receiving EI benefits.

[5] The Applicant appealed the Commission's decision to the GD. Prior to considering the matter, the GD notified the Employer, in writing, of the appeal and advised the Employer that it could request to be added as a party with the right to make submissions and participate in the hearing. The Employer, D-J Composites, did not request to be added as a party and therefore was not involved in the proceeding before the GD. I note that there is no evidence that D-J Composites did not receive this communication from the GD.

[6] Following a hearing, the GD determined that a labour dispute had not been established on the relevant date; therefore, the Applicant (and the other laid off employees) were entitled to EI benefits.

[7] The Employer, after receiving the GD decision, filed an application for leave to appeal that decision to the AD.

[8] In the decision of March 6, 2019, the AD granted the Employer leave to appeal the GD decision. The Applicant disputes that the Employer has the right to be involved in the appeal and seeks judicial review of the AD decision.

[9] For clarification, the existence of a labour dispute or the timing of any such labour dispute at the workplace is not at issue on this judicial review.

[10] At the hearing of this judicial review, the Employer was represented by legal counsel, and legal counsel for the Attorney General participated in the hearing.

**Decision Under Review**

[11] The AD concluded that the Employer was entitled to appeal the GD decision pursuant to s. 55 of the *DESDA* as the Employer's application for leave was filed on time and the Employer's appeal had a reasonable chance of success.

[12] The AD noted that it had not been able to locate any decision interpreting the meaning of "any person who is the subject of the decision" as set out in s. 55 of the *DESDA*, and that "little of substance" had been said about s. 55 since the *DESDA* came into force in 2013.

[13] The AD determined that the issue came down to a matter of statutory interpretation and it cited *Rizzo & Rizzo Shoes Ltd (Re*), [1998] 1 SCR 27, for the proposition that "a decision-maker must consider the ordinary meaning of the words in its immediate context and the scheme as a whole" (AD Decision and Reasons at para 24).

[14] The AD relied on definitions from *Black's Law Dictionary* (2nd ed) and the *Merriam Webster Dictionary* to conclude that a "person who is subject to the decision of the General Division is a person who is dependent on its decision, affected or possibly affected by it, and liable or prone to suffer something from it" (AD Decision at para 34).

[15] On the issue of whether Mr. Francis was entitled to benefits under s. 36(1) of the *EI Act*, the AD noted that the issue before the GD was whether Mr. Francis lost his employment, or was unable to resume his employment, because of a work stoppage attributable to a labour dispute. The AD noted that the GD made this determination "in the context of a collective bargaining relationship between the bargaining agent of the Claimant and the Employer" (AD Decision at para 36). The AD found that because of this context, the Employer was within the definition of "a person that is dependent on the General Division decision, affected or possibly affected by it, and liable or prone to suffer something from it and therefore subject of the decision of the General Division as per section 55 of the DESD Act" (AD Decision at para 37).

[16] The AD granted the Employer standing to participate in the proceeding.

**Issue**

[17] Was the AD's interpretation of s. 55 of the *DESDA* reasonable?

**Standard of Review**

[18] In *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, at para 115 [*Vavilov*], the Supreme Court states that "matters of statutory interpretation are not treated uniquely and, as with other questions of law, may be evaluated on a reasonableness standard"

[19] "[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).

[20] "While some outcomes may be so at odds with the legal and factual context that they could never be supported by intelligible and rational reasoning, an otherwise reasonable outcome also cannot stand if it was reached on an improper basis" (*Vavilov* at para 86).

**Legislative Provisions**

[21] The relevant provision of the *DESDA* states:

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| **55.** Any decision of the General Division may be appealed to the Appeal | **55** Toute décision de la division générale peut être portée en appel devant la |

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| Division by any person who is the subject of the decision and any other prescribed person. | division d'appel par toute personne qui fait l'objet de la décision et toute autre personne visée par règlement. |

[22] Prior to the introduction of the *DESDA* the applicable legislative provision was s. 115(1) of the *Employment Insurance Act*, SC 1996, c. 23 (*EI Act)*, which was in force from January 1, 2003 to March 31, 2013, which stated:

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|---|---|
| **115 (1)** An appeal as of right to an umpire from a decision of a board of referees may be brought by<br>(a) the Commission;<br>(b) a claimant or other person who is the subject of a decision of the Commission;<br>(c) the employer of the claimant; or<br>(d) an association of which the claimant or employer is a member. | **115 (1)** Toute décision d'un conseil arbitral peut, de plein droit, être portée en appel devant un juge-arbitre par la Commission, le prestataire, son employeur, l'association dont le prestataire ou l'employeur est membre et les autres personnes qui font l'objet de la décision. |

**Analysis**

[23] The Applicant argues that the AD's analysis is flawed because the AD analyzed the wrong words. The words used in s. 55 are "… by any person who is the subject of the decision…", however, the AD analyzed the words "… by any person who is subject to the decision…" The Applicant also argues that the removal of the word "employer" from s. 55 of the *DESDA*, as compared to the previous legislative provision, was an intentional choice by Parliament and the AD failed to properly consider this change.

[24] In the decision, the AD starts by noting that the phrase "any person who is the subject of the decision" as contained in s. 55 of the *DESDA* had not been interpreted. At paragraphs 28, 29, and 30 the AD compares s. 55 to the repealed provisions of the *EI Act*, specifically sections 112, 113 and 115(1). The AD notes that section 115(1) of the *EI Act* specifically lists those who are entitled to appeal. At paragraph 30, the AD notes that under s. 55 of the *DESDA* the employer does not have "as of right, authority to bring an appeal to the Appeal Division and is not specifically mentioned in section 55 of the DEDS Act as a person who can appeal a General Division decision".

[25] However, at paragraph 32 of the decision, the AD shifts to considering the phrase "subject to the decision" without explaining why. This transition happens between paragraphs 31 and 32, where the AD states:

> [31] Section 55 of the DESD Act gives the right to appeal to the Appeal Division to any person who is the subject of the decision and any other prescribed person. However, there are no regulations defining "other persons" for the purposes of this section.
>
> [32] The Tribunal must therefore ask itself: Who is a person subject to the decision of the General Division?

[26] Following which, the AD proceeds to consider s. 55 as if it contained the "subject to" language. However, the AD does not provide any transitionary statement or explanation as to why it considered different words from those contained in s. 55. Having not provided any explanation as to why it was considering different statutory language, one must assume that the AD made an error.

[27] The question is if this error is significant enough to affect the reliability of the AD's analysis. I note that "[o]missions are not stand-alone grounds for judicial intervention: the key question is whether the omitted aspect of the analysis causes the reviewing court to lose confidence in the outcome reached by the decision maker" (*Vavilov* at para 122). In other words, is the "error" of such significance that it renders the AD's analysis and conclusion unreasonable.

[28] The Respondents argue that the substitution of the word "to" for the word "of" does not affect the outcome. They argue that under either analysis, a person has to be affected to have appeal rights and therefore the change in wording considered by the AD was a "minor misstep" and not a fatal flaw.

[29] The Respondents argue that the Employer has a right of appeal under the *DESDA* because the wording of s. 55 is broad and anyone who can show they are the subject of a decision has a right of appeal. The Respondents acknowledge that the although the word "party" does not appear in s. 55, it should not be read to restrict the rights of those who are the "subject of" decisions, but are not necessarily a party. The Respondents also argue that the AD properly considered the fact that the underlying issue was the existence of a labour dispute, which, according to the Respondents by necessity includes the interests of the Employer. Finally, the Respondents argue that it is nonsensical for the Employer to have the right to be involved in the General Division but not the Appeal Division.

[30] By contrast, the Applicant argues that the AD should have considered the fact that Parliament intentionally did not include the "employer" as being one of those entitled to seek

leave to appeal in s. 55 of *DESDA*, especially in light of the fact that an employer had an explicit right of appeal under previously applicable provisions of the *EI Act*. This issue was not specifically considered by the AD.

[31] In my view on the specific facts of this case, the AD ought to have also considered the fact that the Employer, D-J Composites, choose note to participate in the GD proceedings. I accept that in the circumstances where the employer participates at the GD level, the employer would have the right to seek to appeal as outlined in s. 55. Here the Employer did not participate at the GD level. This raises a number of questions about the appeal rights of employers such as:

- Do employers have to establish grounds or reasons why they should be entitled to participate at the AD level when they choose not to participate at the GD level?
- Do employers have full participatory rights at the AD level when they did not participate at the GD level?
- Do employers have the right to file new evidence or make new arguments at the AD level?

[32] These questions arise on the facts of this case, but were not considered by the AD. In my view, the fact that the AD did not consider these questions, and the fact that the AD did not analyze the proper language of the provision, renders the overall analysis unreliable.

[33] In my view, the AD decision is not internally coherent with an apparent rational chain of analysis (*Vavilov* at para 85). These shortcomings go to the core of the issue considered by the

AD (*Vavilov* at para 100). Although ultimately the conclusion of the AD that the employer had a right of appeal in these circumstances may be correct, "an otherwise reasonable outcome …cannot stand if it was reached on an improper basis" (*Vavilov* at para 86).

[34] Accordingly, the decision is not reasonable and the matter is returned for redetermination.

**Costs**

[35] The Applicant is entitled to costs which I fix in the amount of $1,200.00 including taxes and disbursements.

**JUDGMENT IN T-1502-19**

**THIS COURT'S JUDGMENT is that** this judicial review is granted. The Applicant shall have costs in the fixed amount of $1,200.00 in costs, inclusive of taxes and disbursements.

"Ann Marie McDonald"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | T-1502-19 |
| **STYLE OF CAUSE:** | JODY FRANCES v ATTORNEY GENERAL OF CANADA ET AL |
| **PLACE OF HEARING:** | ST. JOHN'S, NEWFOUNDLAND AND LABRADOR |
| **DATE OF HEARING:** | FEBRUARY 20, 2020 |
| **JUDGMENT AND REASONS:** | MCDONALD J. |
| **DATED:** | MAY 26, 2020 |

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| Barry E. Wadsworth | FOR THE APPLICANT |
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| Blair Mitchell | FOR THE RESPONDENT D-J COMPOSITES INC |

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