Federal Court Cour fédérale

Date: 20221212

Docket: T-1326-22

Citation: 2022 FC 1705

Ottawa, Ontario, December 12, 2022

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

PASQUALE FIORINO

Applicant

and

CANADA EMPLOYMENT SOCIAL SECURITY COMMISSION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review of a decision of the Appeal Division of the Social Security Tribunal of Canada [Appeal Division], dated May 23, 2022 [the Decision]. In the Decision, the Appeal Division refused to grant the Applicant leave to appeal the decision of the General Division of the Social Security Tribunal of Canada [General Division] that had

determined he was disentitled to employment insurance [EI] regular benefits because he was outside Canada.

[2] As explained in greater detail below, this application is dismissed, because the conclusion in the Decision, that the Applicant's appeal did not have a reasonable chance of success, is reasonable.

II. **Background**

[3] The Applicant applied for EI regular benefits in July 2021, and his application was approved. In November 2021, the Applicant left Canada and travelled to a secondary residence in the United States. He stayed there until April 2022.

[4] On December 5, 2021, the Applicant completed his bi-weekly report and reported that he was absent from Canada for a period of more than 24 hours. He explained that he has two homes and spends a part of the year at each of those homes. He indicated that while he was in the United States he had been actively applying for jobs in Canada and was able to return to Canada in under three hours.

[5] On that same day, the Applicant's benefits were suspended. The Canada Employment Insurance Commission [Commission] determined that the Applicant was not entitled to EI on the grounds that: (a) he was not available for work; and (b) he was residing outside of Canada.

[6] The Applicant applied for reconsideration. While the Commission reversed its determination that he was not available for work, it upheld its determination that the Applicant was residing outside the country.

[7] The Applicant appealed the Commission's decision to the General Division on the ground of an error of law, arguing that paragraph 37(b) of the *Employment Insurance Act,* SC 1996, c 23 [Act] should not be interpreted as a stand-alone requirement that disentitles him from EI benefits. (Paragraph 37(b) is the provision that disentitles a claimant to benefits for any period during which the claimant is not in Canada.) The Applicant argued that the Commission should have considered the requirements under section 18 of the Act when deciding if he was entitled to benefits under paragraph 37(b) of the Act. (Like section 37, section 18 provides for circumstances in which a claimant is disentitled to benefits.)

[8] The General Division dismissed the appeal. The General Division noted that the onus is on claimants to prove that they meet the requirements of the law. Citing *Granger v Canada Employment and Immigration Commission*, [1986] 3 FC 70 (FCA), 1986 CanLII 3962 (FCA), the General Division noted that the law does not give the General Division member the power to depart from its provisions, for any reason, no matter how compelling the circumstances.

[9] The General Division noted that paragraph 37(b) of the Act has to be read together with section 55 of the *Employment Insurance Regulations*, SOR/96-332 [Regulations]. That section sets out exceptions to the operation of paragraph 37(b) of the Act. The General Division concluded that the only consideration in determining entitlement to EI benefits while outside

Canada is whether the claimant falls within one or more of the exceptions listed in section 55 of the Regulations. The General Division also concluded that it did not have the authority to expand the exceptions. As such, the General Division upheld the decision that the Applicant was not entitled to receive any benefits when he was not in Canada.

[10] The Applicant applied for leave to appeal the General Division's decision to the Appeal Division. He argued that the General Division erred in law when it concluded that it did not have the authority to expand the list of exceptions found in section 55 of the Regulations.

III. **Decision under Review**

[11] In the Decision under review in this application, the Appeal Division explained the available grounds of appeal, including a circumstance where the General Division made an error of law. The Appeal Division also explained that the test for whether leave can be granted is whether the Applicant has a reasonable chance of success based on the possible grounds of appeal, a reasonable chance of success meaning that a claimant could argue their case and possibly win. As noted by the Appeal Division, the "reasonable chance of success" threshold is lower than the threshold an applicant must meet when an appeal is heard on the merits in the event leave is granted.

[12] The Appeal Division determined that the Applicant's arguments had no reasonable chance of success. It agreed with the General Division's conclusion that section 55 of the Regulations provides an exhaustive list of exceptions and that there is nothing in the language of

section 55 of the Regulations to suggest that other circumstances may be taken into consideration.

[13] The Appeal Division found that the General Division had considered the Applicant's arguments that the law, as written, does not recognize that claimants no longer need to be physically present in Canada in order to apply for jobs and attend interviews. However, the Appeal Division found that the General Division had properly concluded that the law must be applied as written. The Appeal Division was not satisfied that the appeal had a reasonable chance of success and therefore denied leave to appeal.

IV. **Issues and Standard of Review**

[14] The only issue to be addressed by the Court is whether the Decision is reasonable. As is implicit in that articulation of the issue, the Decision is reviewable on the reasonableness standard (*Hicks v Canada (Attorney General)*, 2021 FC 298 at para 15; *Hurtubise v Canada (Attorney General)*, 2016 FCA 147 at para 5).

V. **Legislative Provisions**

[15] Before considering the Applicant's arguments, it is useful to set out the principal legislative provisions at issue in this application. These are section 37 of the Act and subsection 55(1) of the Regulations, which read as follows:

Employment Insurance Act, SC 1996, c. 23	***Loi sur l'assurance-emploi, LC 1996, ch 23***
Prison inmates and persons outside Canada	**Prestataire en prison ou à l'étranger**

37 Except as may otherwise be prescribed, a claimant is not entitled to receive benefits for any period during which the claimant

(a) is an inmate of a prison or similar institution; or
(b) is not in Canada.

Employment Insurance Regulations, SOR/96-332

Claimants Not in Canada

55 (1) Subject to section 18 of the Act, a claimant who is not a self-employed person is not disentitled from receiving benefits for the reason that the claimant is outside Canada

(a) for the purpose of undergoing, at a hospital, medical clinic or similar facility outside Canada, medical treatment that is not readily or immediately available in the claimant's area of residence in Canada, if the hospital, clinic or facility is accredited to provide the medical treatment by the appropriate governmental authority outside Canada;
(b) for a period of not more than seven consecutive days to attend the funeral of a member of the claimant's immediate family or of one of the following persons, namely
(i) a grandparent of the claimant or of the claimant's spouse or common-law partner,
(ii) a grandchild of the claimant or of the claimant's spouse or common-law partner,
(iii) the spouse or common-law partner of the claimant's son or daughter or of the son or daughter of the claimant's spouse or common-law partner,
(iv) the spouse or common-law partner of a child of the claimant's father or mother or of a child of the spouse or common-law partner of the claimant's father or mother,
(v) a child of the father or mother of the claimant's spouse or common-law partner or a child of the spouse or common-law partner of the father or mother of the claimant's spouse or common-law partner,

37 Sauf dans les cas prévus par règlement, le prestataire n'est pas admissible au bénéfice des prestations pour toute période pendant laquelle il est :
a) soit détenu dans une prison ou un établissement semblable;
b) soit à l'étranger.

Règlement sur l'assurance-emploi, DORS/97-332

Prestataires à l'étranger

55 (1) Sous réserve de l'article 18 de la Loi, le prestataire qui n'est pas un travailleur indépendant n'est pas inadmissible au bénéfice des prestations du fait qu'il est à l'étranger pour l'un des motifs suivants :
a) subir, dans un hôpital, une clinique médicale ou un établissement du même genre situés à l'étranger, un traitement médical qui n'est pas immédiatement ou promptement disponible dans la région où il réside au Canada, si l'établissement est accrédité pour fournir ce traitement par l'autorité gouvernementale étrangère compétente;

b) assister, pendant une période ne dépassant pas 7 jours consécutifs, aux funérailles d'un proche parent ou des personnes suivantes :

(i) un de ses grands-parents, ou un des grands-parents de son époux ou conjoint de fait,
(ii) un de ses petits-enfants, ou un des petits-enfants de son époux ou conjoint de fait,
(iii) l'époux ou le conjoint de fait de son enfant, ou de l'enfant de son époux ou conjoint de fait,

(iv) l'époux ou le conjoint de fait de l'enfant de son père ou de sa mère, ou de l'enfant de l'époux ou du conjoint de fait de son père ou de sa mère,
(v) l'enfant du père ou de la mère de son époux ou conjoint de fait, ou l'enfant de l'époux ou du conjoint de fait du père ou de la mère de son époux ou conjoint de fait,

(vi) an uncle or aunt of the claimant or of the claimant's spouse or common-law partner, and	(vi) son oncle ou sa tante, ou l'oncle ou la tante de son époux ou conjoint de fait,
(vii) a nephew or niece of the claimant or of the claimant's spouse or common-law partner;	(vii) son neveu ou sa nièce, ou le neveu ou la nièce de son époux ou conjoint de fait;
(c) for a period of not more than seven consecutive days to accompany a member of the claimant's immediate family to a hospital, medical clinic or similar facility outside Canada for medical treatment that is not readily or immediately available in the family member's area of residence in Canada, if the hospital, clinic or facility is accredited to provide the medical treatment by the appropriate governmental authority outside Canada;	c) accompagner, pendant une période ne dépassant pas 7 jours consécutifs, un proche parent à un hôpital, une clinique médicale ou un établissement du même genre situés à l'étranger pour un traitement médical qui n'est pas immédiatement ou promptement disponible dans la région où ce parent réside au Canada, si l'établissement est accrédité pour fournir ce traitement par l'autorité gouvernementale étrangère compétente;
(d) for a period of not more than seven consecutive days to visit a member of the claimant's immediate family who is seriously ill or injured;	d) visiter, pendant une période ne dépassant pas 7 jours consécutifs, un proche parent qui est gravement malade ou blessé;
(e) for a period of not more than seven consecutive days to attend a bona fide job interview; or	e) assister à une véritable entrevue d'emploi pour une période ne dépassant pas 7 jours consécutifs;
(f) for a period of not more than 14 consecutive days to conduct a *bona fide* job search.	f) faire une recherche d'emploi sérieuse pour une période ne dépassant pas 14 jours consécutifs.

[16] It is also noteworthy that the word "prescribed", which is used in the introductory language of section 37 of the English version of the Act, is defined in section 2 as follows:

> ***prescribed*** means prescribed by the regulations or determined in accordance with rules prescribed by the regulations; (*Version anglaise seulement*)

VI. **Analysis**

[17] The Applicant argues that the Decision is unreasonable on two principal bases. First, he submits that the Appeal Division erred by considering the merits of his appeal, rather than whether his appeal had a reasonable chance of success. Secondly, he submits that the Appeal

Division failed to recognize and consider the particular legal arguments that he wishes to raise in his appeal. These arguments are: (a) that the Act should be given a liberal interpretation; and (b) that the Social Security Tribunal of Canada [Tribunal] has the authority to expand the list of exceptions in section 55 of the Regulations.

[18] I accept that the Appeal Division engaged to some extent in an analysis of the merits of the Applicant's appeal. However, it did so in the course of considering whether the Applicant met the threshold of raising an argument that had a reasonable chance of success. The Appeal Division recognized that this is a lower threshold than the one that must be met when an appeal is heard on the merits.

[19] The Applicant sought to appeal on the basis that the General Division made an error of law. The Appeal Division considered what it understood to be the Applicant's arguments, in support of his position that the General Division erred in its analysis, but it was not satisfied that these arguments had a reasonable chance of success. The Decision demonstrates no error by the Appeal Division in either its articulation or its application of the threshold for an application for leave to appeal.

[20] I have also considered whether the Decision demonstrates a misunderstanding, or other unreasonable treatment, of the Applicant's arguments. Arguing that the Act should be given a liberal interpretation, the Applicant relies on the interpretive principle in section 12 of the *Interpretation Act*, RSC 1985, c I-21, that every enactment is deemed remedial and shall be given such fair, large and liberal interpretation as best ensures the attainment of its objects. He

also relies on the explanation by the Supreme Court of Canada in *Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27, 1998 CanLII 837 (SCC) [*Rizzo*], that the words of a statute are to be read in their entire context and in their grammatical and ordinary sense, harmoniously with the scheme of the statute, the object of the statute, and the intention of Parliament (at para 21).

[21] In support of his position that the Appeal Division misunderstood his arguments, the Applicant draws the Court's attention to paragraph 15 of the Decision, which reads as follows:

> 15. The Claimant relies on decisions of the Supreme Court of Canada in support of his position that an additional exception can be read into section 55 [citing, *inter alia*, *Rizzo*]. However, these decision [sic] involved the interpretation of the words used in a provision of legislation. The case law does not support the proposition that an additional exception can be read into legislation where the text does not support such an interpretation. Section 55 of the EI Regulations does provide an exhaustive list of exceptions to the general rule in section 37(b) of the EI Act.

[22] The Applicant submits that the Decision's reference to *Rizzo* demonstrates a misunderstanding of his argument, as he relies on *Rizzo* for relevant principles of statutory interpretation, not to support his position that the Tribunal had authority to expand the list of exceptions in section 55 of the Regulations.

[23] As explained in his Memorandum of Fact and Law in this application for judicial review, the Applicant takes the overall position that both the General Division and the Appeal Division erred by applying a literal interpretation of paragraph 37(b) of the Act and section 55 of the Regulations. He argues that it was an error to apply the law as written without recourse to the broader interpretive principles derived from the *Interpretation Act* and *Rizzo*. The Applicant submits that, applying a fair, large and liberal interpretation of the words "Except as may

otherwise be prescribed" in section 37 of the Act supports the conclusion that the list of exceptions in section 55 of the Regulations is not exhaustive. On this basis, he takes the position that the Tribunal has authority to read into section 55 another exception for individuals who are outside of Canada if they are residing temporarily in their second home and continuing to seek employment.

[24] I final little merit to the Applicant's submission that paragraph 15 of the Decision demonstrates a misunderstanding of his arguments. The Applicant's invocation of principles of statutory interpretation and his position that the section 55 exceptions are not exhaustive are inextricably linked. It was therefore reasonable for the Appeal Division to reference the jurisprudence surrounding statutory interpretation in considering the Applicant's argument that, properly interpreted, the legislation permits the Tribunal to apply exceptions other than those set out in section 55.

[25] The Applicant also submits that the Decision merely repeats and agrees with the General Division's analysis, without disclosing independent analysis or reasons sufficient to show an appreciation of the Applicant's arguments.

[26] As I read the Decision, the Appeal Division's substantive analysis is set out principally in paragraphs 13 to 16 of the Decision. The Appeal Division refers to the General Division's consideration whether it could expand the exceptions in section 55 of the Regulations, including the Applicant's argument that it has such authority because section 55 does not state that it provides an exhaustive list. The Appeal Division then notes the General Division's rejection of

this argument, based on the text of paragraph 37(b) of the Act, which states “except as may otherwise be prescribed” and the fact that it is section 55 of the Regulations where the exceptions are prescribed. The Appeal Division refers to the General Division’s finding that there is nothing in the section 55 language to suggest that other circumstances may be taken into consideration.

[27] The Appeal Division then provides the analysis in paragraph 15 of the Decision (as set out earlier in these Reasons), in which it rejects the Applicant’s argument and explains that the relevant principles of statutory interpretation do not support a conclusion that an additional exemption can be read into section 55 where the text does not support such an interpretation. The Appeal Division therefore concludes that the General Division properly found that the Tribunal must apply the law as written.

[28] In my view, the Decision demonstrates an understanding of the General Division’s analysis, an engagement with the Applicant’s proposed appeal arguments, and an independent analysis as to why those arguments did not raise a reasonable chance of success in establishing that the General Division had erred in law. This analysis has the hallmarks of reasonableness, as it is intelligible and transparent and provides justification for the result (see *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 99).

[29] The Court’s role in this judicial review is to consider the reasonableness of the Decision, not to assess whether the Appeal Division was correct in its interpretation of the Act and Regulations. Without departing from that standard of review, I have considered whether the Applicant has raised a compelling argument that the Appeal Division erred in its application of

the relevant principles of statutory interpretation to the legislative and regulatory provisions at issue. The Applicant submits that those principles require that the Act and Regulations be interpreted in the context of a modern digital society, in which an individual need not be physically present in Canada in order to be actively seeking employment. He further submits that such an interpretation is consistent with the objects of the Act, being to provide temporary income support to unemployed workers while they look for employment or to upgrade their skills.

[30] I accept that the applicable interpretive principles include the interpretation of legislation in light of contemporary technology, including changes to the technological environment in which legislation is to be applied (see *Society of Composers, Authors and Music Publishers in Canada v Canadian Association of Internet Providers*, 2004 SCC 45 at para 43; *eBay Canada Ltd v Canada (National Revenue)*, 2008 FCA 348 [*eBay*] at para 42). However, while statutory interpretation requires recourse to the text, context and purpose of legislation, the text has been described as "the point of departure for any interpretive exercise", such that the text of the statute should be interpreted in a manner which furthers the legislative purpose "whenever possible" (see *eBay* at para 32).

[31] Against the backdrop of those principles, I find nothing unreasonable in the Appeal Division's reasoning that there is no jurisprudential support for the proposition that an additional exception can be read into legislation where the text does not support such an interpretation.

[32] I have considered the Applicant's arguments and find the Decision reasonable. As such, this application for judicial review must be dismissed.

VII. **Costs**

[33] As the Respondent does not seek costs against the Applicant, no costs are awarded.

JUDGMENT IN T-1326-22

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is dismissed.

2. No costs are awarded.

"Richard F. Southcott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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