Federal Court  Cour fédérale

Date: 20231229

Docket: T-366-23

Citation: 2023 FC 1766

[ENGLISH TRANSLATION]

Ottawa, Ontario, December 29, 2023

PRESENT: Madam Justice St-Louis

BETWEEN:

NECULAI OTOMAN

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] Paragraph 18(1)(a) of the *Employment Insurance Act*, SC 1996, c 23 [the Act] provides that a claimant is not entitled to be paid benefits for a working day in a benefit period for which the claimant fails to prove that on that day the claimant was capable of and available for work and unable to obtain suitable employment.

[2] The administrative authorities in turn denied Mr. Neculai Otoman benefits and concluded that he had not proven that he was available for work, according to the applicable criteria, during the relevant period. First, the General Division of the Social Security Tribunal of Canada [General Division] concluded that Mr. Otoman was not available for work and unable to obtain suitable employment between December 20, 2021, and June 24, 2022, because (1) Mr. Otoman was not actively seeking employment; and (2) his availability for work was unduly limited by his choice to wait for the lifting of Transport Canada's interim order [the interim order], a COVID-19 vaccination policy.

[3] Ultimately, on January 25, 2023, the Appeal Division of the Social Security Tribunal of Canada [Appeal Division] refused Mr. Otoman's application for leave to appeal the decision of the General Division. The Appeal Division then concluded that the appeal had no reasonable chance of success.

[4] Mr. Otoman is seeking judicial review of this Appeal Division decision.

[5] For the following reasons, I will dismiss the application for judicial review. Mr. Otoman has not demonstrated that the decision of the Appeal Division is unreasonable according to the applicable standard of proof. In addition, the evidence demonstrates, among other things, that Mr. Otoman admitted that he had not made efforts to seek suitable employment and that he had instead chosen to wait for the lifting of the interim order. Therefore, the Appeal Division reasonably concluded that Mr. Otoman's appeal had no chance of success based on the evidence on the record and the applicable law.

II. Background

[6] Mr. Otoman is employed by Clarke Inc. as a deckhand at Traverse Rivière-du-Loup-Saint-Siméon, a ferry service, and on November 12, 2021, he stopped working.

[7] Mr. Otoman applied for Employment Insurance benefits, starting December 19, 2021.

[8] On April 13, 2022, Mr. Ottoman spoke with a representative of the Canada Employment Insurance Commission [the Commission], and on April 14, 2022, the Commission denied Mr. Otoman benefits. The Commission concluded that Mr. Otoman had voluntarily taken a period of leave authorized by the employer starting November 15, 2021, without just cause. The Commission also concluded that Mr. Otoman was not available for work because he was willing to accept work only as a deckhand, which reduced his chances of obtaining employment.

[9] On May 11, 2022, Mr. Otoman requested a reconsideration of these decisions. On July 4, 2022, Mr. Otoman spoke with a representative of the Commission, and on July 5, 2022, the Commission denied the request for reconsideration.

[10] Mr. Otoman appealed the Commission's decisions to the General Division. On November 8, 2022, the General Division heard Mr. Ottoman's appeal, and he testified before the Tribunal.

[11] On November 10, 2022, the General Division allowed the appeal in part. With respect to the file on the period of leave, the General Division concluded that Mr. Otoman did not voluntarily take leave on November 15, 2021. However, with respect to the file on availability for work, the General Division concluded that Mr. Otoman had failed to demonstrate that he was

available for work between December 20, 2021, and June 24, 2022, within the meaning of subsection 50(8) and paragraph 18(1)(a) of the Act and pursuant to sections 9.001 and 9.002 of the *Employment Insurance Regulations*, SOR/96-332 [the Regulations]. The General Division considered the evidence and Mr. Otoman's testimony that he did not take any steps to find employment, that he was not interested in finding employment other than as a deckhand, and that no employer would hire him because he was not vaccinated. The General Division noted that Mr. Otoman told the Commission that he was waiting for the interim order to be lifted. The General Division determined, among other things, that (1) Mr. Otoman had shown a certain desire to return to work as soon as suitable employment was offered; (2) Mr. Otoman had not expressed his desire to return to the labour market through significant efforts to find suitable employment each working day of his benefit period between December 20, 2021, and June 24, 2022; (3) Mr. Otoman's availability for work was unduly limited because he did not wish to seek employment other than as a deckhand; and (4) Mr. Otoman had not, in fact, taken steps to find employment.

[12] On December 12, 2022, Mr. Otoman applied to the Appeal Division for leave to appeal the decision of the General Division.

[13] Mr. Otoman argued that the General Division had (1) failed to observe procedural fairness for several reasons, including administrative errors (such as document numbering errors), delays, an allegation that the General Division had changed reasons and an allegation of prejudice because of his vaccination status; (2) exceeded its jurisdiction; (3) refused to exercise its jurisdiction in not determining whether he had met the three eligibility conditions; (4) erred in

law because, he argued, the wrong sections of the Act and the wrong case law were considered; and (5) made material errors of fact.

[14] On January 25, 2023, the Appeal Division refused Mr. Otoman leave to appeal, finding that none of the reasons raised had a reasonable chance of success on appeal.

[15] The Appeal Division summarized Mr. Otoman's arguments and grounds for appeal. The Appeal Division concluded that (1) on the issue of leave, contrary to Mr. Otoman's contention, the General Division did not make a decision on the misconduct issue and did in fact find in his favour on the issue of leave, so the application for leave to appeal should not be considered in respect of this issue; and (2) on the issue of availability for work, the preponderance of evidence supported the General Division's conclusion, since Mr. Otoman was not actively seeking employment and his availability for work was unduly limited by his choice to wait until the interim order was lifted to return to work.

[16] The Appeal Division noted in particular that Mr. Ottoman had stated to the Commission that he was not seeking employment and was waiting for the interim order to be lifted. The Appeal Division also stated that remaining available to his employer while waiting to be called back to work may be suitable for the claimant but was insufficient to demonstrate his availability for work within the meaning of the Act.

[17] The issue of availability for work is the only issue in this application for judicial review.

III. Discussion

A. *Preliminary issue: admissibility of new evidence*

[18] The Attorney General of Canada [AGC], the respondent, first argues that the Court should not consider the new factual statements contained in paragraph 18 of Mr. Otoman's affidavit dated March 22, 2023, or Exhibit B attached to Mr. Otoman's affidavit dated June 2, 2023, which were not before the Appeal Division. The new evidence includes a transcript of fragments of a telephone conversation with a Commission representative dated April 13, 2022.

[19] In *Bernard v Canada (Canada Revenue Agency)*, 2015 FCA 263 at para 13 [*Bernard*], the Federal Court of Appeal reminds us that "[t]he general rule is that evidence that could have been placed before the administrative decision-maker, here the Board, is not admissible before the reviewing court". The Federal Court of Appeal then refers to paragraph 7 of *Connolly v Canada (Attorney General)*, 2014 FCA 294, and paragraph 20 of *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22.

[20] The Federal Court of Appeal notes that three exceptions are recognized (*Bernard* at para 19); these exceptions apply to documents that (1) provide general background in circumstances where that information might assist it in understanding the issues relevant to the judicial review; (2) bring to the reviewing court's attention procedural defects that cannot be found in the evidentiary record of the administrative decision-maker; or (3) highlight the complete absence of evidence before the administrative decision-maker (*Tsleil-Waututh Nation v Canada (Attorney General)*, 2017 FCA 128 at para 98; *Bernard* at paras 20–25; *Nshogoza v Canada (Citizenship and Immigration)*, 2015 FC 1211 at paras 16–18).

[21] Mr. Otoman has not demonstrated that any of these exceptions apply in this case, given the issue at hand. Thus, evidence that was not before the Appeal Division will not be considered in this application for judicial review.

B. *Standard of review*

[22] The decision of the Appeal Division to refuse leave to appeal must be reviewed on the standard of reasonableness (*Langlois v Canada (Attorney General)*, 2018 FC 1108 at para 4; *Lazure v Canada (Attorney General)*, 2018 FC 467 at para 18; *Tracey v Canada (Attorney General)*, 2015 FC 1300 at paras 17–22). None of the situations that rebut this presumption apply in this case (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]). Where the applicable standard of review is reasonableness, the role of a reviewing court is to examine the reasons given by the administrative decision-maker and determine whether the decision is based on "an internally coherent and rational chain of analysis" and is "justified in relation to the facts and law that constrain the decision maker" (*Vavilov* at para 85; *Canada Post Corp. v Canadian Union of Postal Workers*, 2019 SCC 67 [*Canada Post Corp.*] at paras 2, 31). The Court must consider the "outcome of the administrative decision in light of its underlying rationale in order to ensure that the decision as a whole is transparent, intelligible and justified" (*Vavilov* at para 15).

[23] It is not the role of this Court on judicial review to reweigh the evidence in the record or to interfere with the decision-maker's findings of fact and substitute its own (*Canada Post Corp.* at para 61; *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2018 SCC 31 at para 55). Rather, it must consider the tribunal's decision as a whole, in conjunction

with the record (*Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 53), and limit itself to whether the findings are irrational or arbitrary.

[24] The Court must determine whether the Appeal Division's conclusion that Mr. Otoman had no reasonable chance of success is reasonable.

C. *The decision of the Appeal Division is reasonable*

[25] The Court notes that the Social Security Tribunal is established under the *Department of Employment and Social Development Act*, SC 2005, c 34 [Department of Employment Act]. It consists of a General Division and an Appeal Division (subsection 44(1) of the Department of Employment Act). An appeal to the Appeal Division may only be brought if leave to appeal is granted (subsection 56(1) of the Department of Employment Act).

[26] Subsection 58 (1) of the Department of Employment Act sets out the only grounds of appeal that can be raised with the Appeal Division in Employment Insurance-related cases. Thus, the only grounds of appeal are that the Employment Insurance Section

> (a) failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;
>
> (b) erred in law in making its decision, whether or not the error appears on the face of the record; or
>
> (c) 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.

[27] Finally, subsection 58(2) of the Department of Employment Act provides that leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success.

[28] This Court has determined that "having a 'reasonable chance of success' means having some arguable ground upon which the proposed appeal might succeed" (*Osaj v Canada (Attorney General)*, 2016 FC 115 at para 12). Leave to appeal is granted where, among other things, important evidence has been arguably overlooked or possibly misconstrued (*Griffin v Canada (Attorney General)*, 2016 FC 874 at para 20, citing *Karadeolian v Canada (Attorney General)*, 2016 FC 615 at para 10).

[29] The Court also notes that the objective of the Act is to provide unemployed workers with economic security, thus assisting them in returning to the labour market.

[30] Section 18 of the Act sets out the reasons for disentitlement to benefits:

> **Availability for work, etc.**
>
> **18 (1)** A claimant is not entitled to be paid benefits for a working day in a benefit period for which the claimant fails to prove that on that day the claimant was
>
> **(a)** capable of and available for work and unable to obtain suitable employment;
>
> **(b)** unable to work because of a prescribed illness, injury or quarantine, and that the claimant would otherwise be available for work; or
>
> **(c)** engaged in jury service.
>
> **Exception**
>
> **(2)** A claimant to whom benefits are payable under any of sections 23 to 23.3 is not disentitled under paragraph (1)(b) for failing to prove that he or she would have been available for work were it not for the illness, injury or quarantine.

[31] Thus, according to paragraph 18(1)(a) of the Act, the person claiming benefits bears the burden of proving, in this case, that he is capable of and available for work and, if so, unable to obtain suitable employment.

[32] As explained by the AGC, the Federal Court of Appeal in *Faucher v Canada (Employment and Immigration)*, 1997 CanLII 4856 (FCA), A-56-96 at page 3 [*Faucher*] confirms that availability must be determined by analyzing the following three factors:

- the desire to return to the labour market as soon as a suitable job is offered;
- the expression of that desire through efforts to find a suitable job; and
- not setting personal conditions that might unduly limit the chances of returning to the labour market.

[33] Under subsection 50(8) of the Act, the Commission may require the claimant to prove that the claimant is making reasonable and customary efforts to obtain suitable employment. Section 9.001 of the Regulations sets out the criteria for determining whether the efforts that the claimant is making constitute reasonable and customary efforts, and section 9.002 lists the criteria for what constitutes suitable employment.

[34] Mr. Otoman argues that the Appeal Division and the General Division failed to analyze his availability according to the criteria set out in the case law. Mr. Otoman cites the definition of unsuitable employment in paragraph 6(4)(c) of the Act. He argues that because of COVID-19 restrictions and the vaccine requirement, labour market conditions before and after this period are different. He states that these jobs are included in the definition of unsuitable employment in the Act. He also argues that despite the restrictions imposed during the pandemic, he was required to change his trade from deckhand and actively seek work in another job, which in his

view means he had to [TRANSLATION] “go back to school” to “train in another trade to meet the requirement”.

[35] The AGC reiterates that the onus is on claimants to show their availability for work in order to meet the requirements of section 18 of the Act. As for availability, the question is whether the claimant is sufficiently available for suitable employment to be entitled to Employment Insurance benefits (*Canada (Attorney General) v Bertrand*, [1982] FCJ No 423, 136 DLR (3d) 710 (FCA) at 7–8). The AGC notes that the Court states that no matter how little chance of success a claimant may feel a job search would have, the Act is designed so that only those who are genuinely unemployed and actively seeking work will receive benefits (*Canada (Attorney General) v Cornelissen-O’Neill*, [1994] FCJ No 975, [1994] FCJ No 975 [1994] (FCA) FCJ No 975 at 2).

[36] The AGC therefore responds that the General Division made no error of law or fact and instead applied the correct objective framework established by the case law. The AGC adds that the General Division’s conclusion, confirmed by the Appeal Division, is reasonable because Mr. Otoman testified that he did not look for work five months after he stopped working for his employer and limited his availability to a deckhand or helmsman job. Finally, he argues that remaining available to his employer until it calls him back, or waiting for the vaccination policy to be lifted, is not sufficient to meet his obligation under the Act.

[37] With respect to Mr. Otoman’s argument that the General Division failed to consider that his inability to obtain reasonable employment was due to the unprecedented impact of the COVID-19 pandemic; the AGC argues that the pandemic did not excuse him from showing his

availability for work and that the pandemic is not factored into the availability test (*Nikhat v Canada (Attorney General)*, 2023 FC 372 at para 16).

[38] I agree with the AGC's position. A review of the record shows that Mr. Otoman did not present any evidence intended to demonstrate that he made efforts to seek suitable employment as required by the Act and the case law.

[39] Moreover, I note that on April 13, 2022, a representative of the Commission spoke with Mr. Otoman. According to the notes in the Additional Information sheet, when asked about the job search efforts he had made since November 12, 2021, Mr. Otoman answered that he had not made any and that he was waiting for the interim order to be lifted. According to the notes on the record, Mr. Otoman also stated that he understood that he could meet the requirements by seeking employment as a deckhand, but that no employer would hire him because he was not vaccinated. The notes indicate that Mr. Otoman was informed that limiting his efforts to only one type of employment for which he does not meet an essential condition of employment is a significant restriction that negates any chance of finding employment and that if he maintained this restriction, he would be considered disentitled to regular benefits. Finally, it was also noted that Mr. Otoman declared that he understood but refused to comply with the Commission's requirements and stated that he had studied at the Institut Maritime and would not work in any other field.

[40] I also note that as part of the Commission's reconsideration process, Mr. Otoman spoke with a Commission representative. According to the notes in the Additional Information sheet dated June 27, 2022, Mr. Otoman confirmed that he does not normally work in the winter and

referred to the conversation of April 13, above. In his submissions in support of his request for reconsideration, Mr. Otoman states that he had made efforts but provides no details.

[41] At the hearing before the General Division on November 8, 2022, Mr. Otoman refused to comment or provide details about his availability for work during the period in question.

[42] Finally, before the Court, Mr. Otoman confirmed that there is no evidence on the record that he made efforts to seek employment during the relevant period.

[43] Thus, what evidence there is on the record confirms that Mr. Otoman did not make any efforts to look for work during the period in question and that he was waiting for the lifting of the interim order. Vaccination issues are not relevant in this case.

[44] Therefore, the decision of the Appeal Division is reasonable. Mr. Otoman had to demonstrate that he met the criteria for entitlement to benefits and, more specifically in this case, that he was not disentitled to benefits on the basis of what is properly called availability for work. He did not discharge this burden and did not provide this evidence.

IV. Conclusion

[45] Mr. Otoman has not demonstrated that the decision of the Appeal Division is unreasonable. On the contrary, I conclude that the decision has the qualities of intelligibility, transparency and justification required under the reasonableness standard and that there is no reason for the Court to intervene, given the evidence before the decision-maker.

[46] Mr. Ottoman raises other arguments, according to which the Appeal Division exceeded its jurisdiction and the General Division breached a principle of natural justice. These arguments are unfounded in view of the record. I agree with the AGC's arguments in this regard.

JUDGMENT in T-366-23

THIS COURT'S JUDGMENT is as follows:

1. The application for judicial review is dismissed.

2. Without costs.

"Martine St-Louis"
Judge

Certified true translation
Michael Palles

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-366-23
STYLE OF CAUSE:	NECULAI OTOMAN v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	DECEMBER 14, 2023
JUDGMENT AND REASONS:	ST-LOUIS J
DATED:	DECEMBER 29, 2023

APPEARANCES:

Neculai Otoman	FOR THE APPLICANT (ON HIS OWN BEHALF)
Jessica Grant Dani Grandmaître	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Department of Justice Canada Ottawa, Ontario	FOR THE RESPONDENT