Federal Court Cour fédérale

Date: 20240502

Docket: T-1537-23

Citation: 2024 FC 679

Toronto, Ontario, May 2, 2024

PRESENT: Madam Justice Whyte Nowak

BETWEEN:

KERRY MAYHEAD

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Kerry Mayhead, has applied for judicial review of a decision of the Social Security Tribunal [SST] Appeal Division [Appeal Division] dated May 24, 2023. The Appeal Division denied the Applicant leave to appeal a decision of the SST General Division [General Division Decision] that upheld a denial of the Applicant's claim for employment insurance benefits [EI Benefits].

[2] The Appeal Division was of the view that the Applicant's appeal had no reasonable chance of success as the Applicant had not raised a reviewable error with the General Division's Decision that fell within any of the statutory grounds for the granting of leave.

[3] I have considered the record, the relevant legislation and applicable law as well as the submissions of the parties. As the Applicant is a self-represented litigant, I have also given due regard to the Canadian Judicial Council's *Statement of Principles on Self-represented Litigants and Accused Persons* (2006) [CJC Statement].

[4] Based on my review, I consider the Appeal Decision to be reasonable and the process by which the Appeal Division arrived at its decision to have been procedurally fair. Accordingly, this application for judicial review is dismissed.

[5] At the heart of this judicial review is the Applicant's frustration with the unwillingness of various levels of administrative tribunals (and no doubt this Court) to make its own determination on the merits of her benefits claim and to base their decisions on the fairness of her situation.

[6] This is, however, not a choice. Rather, it is a reflection of the obligation of each tribunal and this Court to act within the boundaries of their statutory authority, to apply the law and not rewrite it, and to respect the proper role of appellate review. While the Applicant considers this a failure of justice, it is actually quite the opposite: tribunals that exercise only those powers

given to them by statute and interpret the law as written, are exercising their public power in accordance with the rule of law.

I. Background

A. *Rejection of the Applicant's claim for EI benefits*

[7] The Applicant applied for regular EI Benefits on January 7, 2022. Under the *Employment Insurance Act*, SC 1996, c 23 [the *EI Act*] EI Benefits are payable to claimants who meet the statutory requirements. Claimants must first qualify to receive benefits by demonstrating that they have suffered an interruption of earnings from employment and that they have had a minimum number of hours of insurable employment in a period preceding the claim (referred to as a "qualifying period") (*EI Act*, ss. 6(1), 7, 8).

[8] In a decision dated January 10, 2022, the Employment Insurance Commission [the Commission] considered the Applicant's qualifying period to be January 3, 2021 to January 1, 2022 (i.e., 52 weeks before January 7, 2021), during which she had accumulated 151 hours of the required 420 hours of insurable employment. The Commission therefore rejected the claim on the basis that the Applicant did not have enough hours to qualify for EI Benefits [the Commission Decision].

B. *Reconsideration and Administrative Review*

[9] The Applicant filed a request for reconsideration. She argued that the school closures during the COVID emergency decreased her pay weeks and she argued in various ways that her hours should be considered sufficient, or that the required hours should be lowered.

[10] On March 4, 2022, she received a call from a Commission officer followed by a letter advising that the Commission had maintained its decision on the basis that the Applicant had not worked enough qualifying hours and it had no authority or discretion under the *EI Act* to alter the qualifying conditions [the Reconsideration Decision].

C. *The Applicant's new arguments*

[11] The Applicant appealed the Reconsideration Decision to the General Division. She argued that the Reconsideration Decision contained errors and was not legal. She argued that she was entitled to the benefit of two provisions, which would provide her with an additional 300 hours in her qualifying period.

[12] The first provision was subsection 153.17(1) of the *EI Act*, which was a temporary COVID measure that applied to a claimant who made an initial claim for benefits "*on or after September 27, 2020 or in relation to an interruption of earnings that occurs on or after that date*." The provision had the effect of deeming a claimant to have an additional 300 hours of insurable employment in their qualifying period. This temporary COVID EI benefits measure

came into force on September 26, 2020 and was repealed and ceased to apply on September 25, 2021 in accordance with subsection 153.196(1) of the *EI Act*.

[13] The second provision is subsection 10(4) of the *EI Act*, which allows a claimant to request that the Commission antedate an EI application. The effect of this provision is that an application is deemed to have been made on an earlier date than it actually was. In order to obtain the benefit of this provision, a claimant must satisfy two requirements: (i) they must establish that they are qualified to receive benefits in the earlier period; and (ii) they must show good cause for their delay throughout the specified period.

D. *The General Division Decision*

[14] The General Division reviewed the Reconsideration Decision and addressed the Applicant's arguments as to why the Reconsideration Decision was wrongly decided on the issue of the number of qualifying hours: (i) her January 2022 application is antedated to September 2021; (ii) the Reconsideration Decision is not legal because the Commission made its decision before the deadline it set for the Applicant to contact the Commission; and (iii) she had enough hours to qualify once the 300 COVID credits were applied. The General Division rejected all of these arguments.

[15] On the antedate issue, the General Division held that since there was no reconsideration *decision* on the antedate issue (only a decision on qualifying hours for the benefits claimed by the Applicant), it considered that it did not have the authority to consider the antedate issue. The

General Division relied on sections 112 and 113 of the *EI Act*, which grant the General Division the power of administrative review of *decisions* of the Commission.

[16] On the legality of the Reconsideration Decision, the General Division reviewed the timeline of the events leading to the date on which the Commission issued its decision. On February 25, 2022, the Commission wrote to the Applicant requesting that she contact them within 10 days and if the Commission did not hear from her, it would proceed with its review and render a decision. The Applicant contacted the Commission on March 4, 2022, at which time she was advised of the Reconsideration Decision. The General Division found no illegality in the Commission issuing its decision on March 4, 2022, rather than waiting until March 11, 2022.

[17] On the issue of the sufficiency of the Applicant's qualifying hours, the General Division found that the Applicant did not have enough hours in her qualifying period to qualify for the benefits she had claimed. The General Division considered that:

- The Applicant applied for EI benefits on January 7, 2022;
- The Applicant stopped working before her application was made on January 7, 2022 with the result that the relevant date for determining her qualifying period is her application date;
- Based on the Applicant's application date, her benefit period would have started on January 2, 2022 and her qualifying period is the 52 weeks before January 3, 2022 (i.e., January 3, 2021 to January 1, 2022); and
- The Applicant had fewer than 288 hours of the 420 hours she needed to qualify.

[18] The Applicant applied for leave to appeal the General Division's Decision on the basis that the General Division erred in fact and law in not allowing her antedate claim and breached her rights of procedural fairness.

E. *The Appeal Division Decision*

[19] The Appeal Division refused the Applicant leave to appeal as it could not identify a reviewable error that fell within the grounds listed in subsection 58(1) of the *Department of Employment and Social Development Act*, SC 2005, c 34 [*DESDA*] upon which an appeal might succeed. It concluded that the Applicant's appeal had no reasonable chance of success.

[20] The Appeal Division reviewed both the General Division's analysis of the Applicant's qualifying hours and the issue related to the General Division's determination of its ability to address the antedate claim. The Appeal Division concluded that there were no identifiable errors in the General Division's consideration of these issues.

[21] The Appeal Division concluded by suggesting that it was in the "interests of justice" that the Commission render a formal decision on the Applicant's antedate claim.

II. The Parties' Submissions

A. *The Applicant's Submissions*

[22] The Applicant has raised a number of factual, legal and jurisdictional errors made by the Appeal Division.

[23] The Applicant's main argument on the merits of the Appeal Decision is that the Appeal Division should have found that the General Division erred in its interpretation of section 153 of the *EI Act* alone, and in combination with sections 6-10 of the *EI Act*, which resulted in the General Division's erroneous determination that she had insufficient hours to qualify for the EI Benefits she claimed.

[24] The Applicant also argues that there were breaches of natural law and procedural fairness in the manner in which she has been treated not just by the Appeal Division, but throughout the various levels of administrative review. These include: (i) the Appeal Division Decision lacks any explanation for its decision; (ii) she was denied basic procedures like the ability to cross-examine a representative of the Attorney General and she was denied the ability to make oral submissions to the General Division; (iii) the Commission Decision did not give effect to the proper legislative intent of section 153 and the fact that the temporary COVID legislation was meant to benefit employees like her; (iv) she did not have access to records going to her previous March 12, 2020 claim; and (v) the Applicant has been harmed by the time delays associated with the payout of her claim. The Applicant argues that both the General Division and Appeal Division failed to exercise their jurisdiction to correct these errors.

[25] Amongst various other types of relief sought, the Applicant seeks an order quashing the decision of the Appeal Division and asks the Court not to remit the matter back to it, but to convert the application into an action instead.

B. *The Respondent's Submissions*

[26] The Respondent's submissions were directed exclusively to the reasonableness of the Appeal Division Decision. The Respondent is of the view that there are no "live issues" going to procedural fairness.

[27] On the merits of the Appeal Division Decision, the Respondent argued that the Appeal Division correctly reviewed the General Division's analysis, which looked at two issues: (i) whether the Applicant had sufficient qualifying hours based on her application date of January 7, 2022; and (ii) whether it had jurisdiction to give a decision on the antedate issue.

[28] On the first issue, the Respondent was of the view that based on the record, the General Division's analysis was reasonable: based on the January 7, 2021 application date, the Applicant did not have enough qualifying hours in the relevant qualifying period.

[29] On the second issue, the Respondent noted that the General Division rightly found that there has never been a decision on antedating the Applicant's claim, which flows from the fact that the Applicant has not in fact made an application to antedate her claim.

[30] The Respondent argues that the Appeal Division Decision rightly denied the Applicant leave to appeal the General Division Decision since the Applicant had no reasonable chance of success in showing any error in the General Division's analysis.

III. Issues and Standard of Review

[31] This Court's only task is to determine whether the Appeal Division Decision was reasonable and made in accordance with procedural fairness.

[32] In determining whether the Appeal Decision is reasonable, the Court must consider whether it is justified, transparent and intelligible to those who are subject to it (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 86 and 95 [*Vavilov*]). Both the rationale and the outcome must be justified in relation to the relevant factual and legal constraints that bear on the decision (*Vavilov* at para 99). The Court must engage in a robust review while showing deference to the expertise of the administrative tribunal below.

[33] Issues raising a breach of procedural fairness, are reviewable on a standard of correctness (*Mission Institution v Khela*, 2014 SCC 24 at para 79). The Court must assess whether the procedure employed by the Appeal Division was "fair having regard to all the circumstances" (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54).

IV. Analysis

A. *The law related to leave to appeal to the Appeal Division*

[34] In order to obtain leave to appeal a decision of the General Division to the Appeal Division under section 55 and subsection 56(1) of the *DESDA*, an applicant is required to demonstrate at least one of the enumerated grounds of appeal. The grounds of appeal in

subsection 58(1) of the *DESDA* are that the Employment Insurance Section: (1) failed to observe a principle of natural justice or made an error of jurisdiction; (2) made an error of law in making its decision; or (3) based its decision on an erroneous finding of fact that it made perversely or capriciously or without regard for the material before it.

[35] Where the Appeal Division is satisfied that the appeal has no reasonable chance of success, leave to appeal is refused (*DESDA*, s. 58(2)). A "reasonable chance of success" means that the Applicant has "some arguable ground upon which the proposed appeal might succeed" (*Osaj v Canada (Attorney General)*, 2016 FC 115 at para 12).

B. *The Appeal Division Decision was reasonable*

[36] I agree with the Respondent that the Appeal Division Decision bears the hallmarks of a reasonable decision. While the Appeal Division Decision is admittedly brief, it was reasonable for the Appeal Division to frame the Applicant's appeal as limited to a consideration of whether any grounds of permitted appeal arose on the issues relating to the calculation of the Applicant's qualifying hours and the General Division's jurisdiction to consider the antedate issue. The Appeal Division was not required to address and refer to each of the arguments made by the Applicant (*Vavilov* at para 128).

[37] The Appeal Division reasonably concluded that the Applicant's arguments on the issue of whether she qualified for the EI Benefits had no reasonable chance of success. I am not persuaded that the Appeal Division reached its decision based on an erroneous finding of fact or law. The record indicated that the Applicant simply did not have sufficient qualifying hours in

the qualifying period. At the oral hearing the Applicant acknowledged that without the 300 additional hours provided by s. 153, she did not have sufficient qualifying hours. The General Division was of the view that the only way to credit the additional 300 COVID hours was by way of an antedate, which it could not assess as there was no antedate decision before it to review. Importantly, this Court is not tasked with determining the "correctness" of the General Division's calculations of the Applicant's qualifying hours (*Vavilov* at para 116). Rather, when reviewing whether the decision was reasonable, the Court is tasked with ensuring the decision is justified with respect to its legal and factual constraints (*Vavilov* at para 99).

[38] I do not consider the General Division's analysis to have been flawed by its reference to an "application date," as the Applicant argues. While the term "application date" does not appear in subsections 8(1) ("Qualifying period") or 10(1) ("Beginning of benefit period") of the *EI Act*, the General Division's analysis properly distinguished between these two terms and was consistent with each of these subsections. The Applicant has not shown an error in its interpretation of the *EI Act* that is inconsistent with the text, context and purpose of the provisions in question (*Vavilov* para 120).

[39] Nor has the Applicant shown any error in the exercise of the Appeal Division and General Division's jurisdiction, both of which were constrained by statute. The Applicant's jurisdictional arguments more accurately take aim at a general failure of the various tribunals and the Government to lessen the impact of COVID lockdowns on employees who were unable to earn the hours necessary to qualify for EI benefits. These issues were not before either the General Division or the Appeal Division.

C. *The Applicant was not denied procedural fairness*

[40] The Applicant has not identified any breaches of procedural fairness by either the General Division or the Appeal Division that would justify this Court's intervention.

[41] I have reviewed the record and note that the only issues of procedural fairness that were raised by the Applicant before the General Division was the "legality" of its decision (which was addressed), and an issue relating to the disclosure of records that went to the antedating issue which the General Division considered was not properly before it.

[42] As to the Applicant's complaint that she was denied the ability to make oral submissions and cross-examine representatives from the Attorney General's office at the General and Appeal Divisions, these limits simply flow from the procedures set by the *Social Security Tribunal Rules of Procedure,* SOR/2022-256.

[43] The various new issues of procedural fairness now raised by the Applicant relating to the procedure of the General Division and the Appeal Division are far reaching and go beyond this Court's limited review. For example, the Applicant has raised the undue delay in the processing of her claim caused by multiple levels of appeal over many years. The only delay that this Court is entitled to consider is that relating to the time that it took the Appeal Division to render its decision. The Applicant has not taken issue with this.

[44] Based on my review of the record and the parties' submissions, I find no basis to suggest that the process by which the General and Appeal Divisions arrived at their decisions was unfair.

V. Conclusion

[45] The Applicant has not raised a reviewable error with the Appeal Division's Decision that would warrant this Court's intervention and there is no basis for this Court to grant any remedy other than to dismiss this application.

[46] The Respondent has not sought costs and there will be no order as to costs.

JUDGMENT in T-1537-23

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed; and

2. There is no order as to costs.

"Allyson Whyte Nowak"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1537-23
STYLE OF CAUSE:	KERRY MAYHEAD v THE ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	HELD BY WAY OF ZOOM VIDEOCONFERENCE
DATE OF HEARING:	APRIL 25, 2024
JUDGMENT AND REASONS:	WHYTE NOWAK J.
DATED:	MAY 2, 2024

APPEARANCES:

Kerry Mayhead	FOR THE APPLICANT (ON HIS OWN BEHALF)
Ian McRobbie	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Attorney General of Canada Gatineau, Quebec	FOR THE RESPONDENT