Federal Court Cour fédérale

Date: 20211104

Docket: T-685-20

Citation: 2021 FC 1182

Ottawa, Ontario, November 4, 2021

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

RITA CONTE

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review of a decision [the Decision] by the Appeal Division of the Social Security Tribunal [the Appeal Division] dated February 7, 2020, refusing a request made by the Applicant for an extension of time to apply for leave to appeal a decision of the General Division of the Social Security Tribunal [the General Division]. The Appeal Division refused the extension request, because it was over three years late and was therefore

statute barred by the one year limitation period set out in s 57(2) of the *Department of Employment and Social Development Act*, SC 2005, c 34 [the Act].

[2] As explained in more detail below, this application is dismissed, because the operation of s 57(2) of the Act deprived of the Appeal Division of any power to provide an extension of time beyond the one year limitation period prescribed by statute. The Decision is therefore reasonable and cannot be disturbed by the Court on judicial review.

II. **Background**

[3] The Applicant, Rita Conte, made a claim for Employment Insurance [EI] benefits in February 2009, following departure from her employment with Well Being Seniors Services Ltd. These benefits were initially paid. However, in 2013, the Canada Employment Insurance Commission [the Commission] imposed a retroactive disqualification for benefits, based on a finding that the Applicant had not shown just cause for leaving her employment. This decision resulted in an overpayment of over $19,000 and a debt to the Crown in that amount.

[4] In May 2014, the Applicant appealed the Commission's decision to the General Division. In September 2014, the General Division issued a decision on the allocation of earnings and the imposition by the Commission of a warning letter to the Applicant for making false or misleading statements to the Commission. However, it did not make a decision on the Applicant's disqualification for benefits.

[5] The Applicant appealed the General Division decision to the Appeal Division on the basis that it had not decided the issue of her disqualification for benefits. The Appeal Division initially issued a decision refusing the Applicant's leave to appeal. However, in June 2015, it amended its leave to appeal decision to allow the Applicant's appeal, because the General Division had not decided the issue of her disqualification for benefits for voluntarily leaving her employment without just cause.

[6] The Applicant's successful appeal resulted in a hearing process before the General Division, which concluded in August 2016. On September 12, 2016, the General Division issued a decision, finding that the Applicant had not shown just cause for voluntarily leaving her employment and confirming that she was therefore disqualified from receiving benefits. The record before the Court includes a letter dated September 14, 2016, from the General Division to the Applicant, enclosing its decision and informing her that she could request permission to appeal the decision by submitting an application for leave to appeal to the Appeal Division within 30 days of the decision being communicated.

[7] In 2017 and 2018, the Applicant made three requests to Employment and Social Development Canada [ESDC] to have her EI overpayment written off for reasons of undue hardship pursuant to s 56(1)(f)(ii) of the *Employment Insurance Regulations*, SOR/96-332. Her payment was deferred on two occasions, but her requests to have her overpayment written off were all denied on the basis of an apparent ability to repay the debt.

[8] In July 2019, the Applicant brought a motion in the Federal Court, seeking an extension of time for bringing an application for judicial review of the General Division's decision. In a decision dated August 30, 2019, Justice Grammond dismissed the motion, on the basis that the Applicant's appropriate recourse against the General Division's decision was to file an application for leave to appeal to the Appeal Division, not an application for judicial review in the Federal Court (see *Rita Conte v Canada (Attorney General*) (August 30, 2019), Vancouver, BC FC 19-T-43 (motion seeking extension of time).

[9] Then, on December 31, 2019, the Applicant sought leave to appeal the General Division decision of September 12, 2016 to the Appeal Division.

III. **Decision Under Review**

[10] In the Decision that is the subject of this application for judicial review, the Appeal Division found that the application for leave to appeal the General Division decision was late and refused the Applicant's request for an extension of time.

[11] The Appeal Division found that the leave application was late because, under s 57(1)(a) of the Act, it was due within 30 days of when the Applicant received the General Division decision. Based on the date of the cover letter sent to the Applicant with the General Division decision, the Appeal Division found that the decision was mailed to the Applicant on September 14, 2016. The Appeal Division stated that, pursuant to s 19(1)(a) of the *Social Security Tribunal Regulations*, SOR/2013-60 [the Regulations], it could assume that the Applicant received the decision 10 days later. Therefore, the Appeal Division concluded that the Applicant's application

for leave was due on October 26, 2016, which meant that the application received on December 31, 2019 was over three years late.

[12] The Appeal Division determined that it did not have the power to grant an extension of time to the Applicant to file her application for leave to appeal, because its powers are limited to those given by the Act, and s 57(2) of the Act is clear that the Appeal Division can only extend the time for filing an application to the Appeal Division when the application is less than a year late. The Appeal Division therefore refused the Applicant's request for an extension of time.

IV. **Issue and Standard of Review**

[13] The issue for the Court to decide in this application for judicial review is whether the Decision by the Appeal Division was reasonable. Decisions of the Appeal Division on whether to grant leave to appeal are reviewable on the standard of reasonableness (see, e.g., *Andrews v Canada (Attorney General)*, 2018 FC 606 at para 17). As subsequently explained by the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], reasonableness review is concerned with examination of administrative decision-making to assess whether it demonstrates reasoning that is rational and logical and provides justification in relation to the constellation of law and facts relevant to the decision (at paras 102 and 105).

V. **Analysis**

[14] It is apparent from review of the relatively brief Decision that the Appeal Division's refusal of the Applicant's request for an extension of time turned on the operation of s 57(2) of the Act. Section 57 provides in full as follows:

Appeal — time limit	**Modalités de présentation**
57 (1) An application for leave to appeal must be made to the Appeal Division in the prescribed form and manner and within,	**57 (1)** La demande de permission d'en appeler est présentée à la division d'appel selon les modalités prévues par règlement et dans le délai suivant :
(a) in the case of a decision made by the Employment Insurance Section, 30 days after the day on which it is communicated to the appellant; and	**a)** dans le cas d'une décision rendue par la section de l'assurance-emploi, dans les trente jours suivant la date où l'appelant reçoit communication de la décision;
(b) in the case of a decision made by the Income Security Section, 90 days after the day on which the decision is communicated to the appellant.	**b)** dans le cas d'une décision rendue par la section de la sécurité du revenu, dans les quatre-vingt-dix jours suivant la date où l'appelant reçoit communication de la décision.
Extension	**Délai supplémentaire**
(2) The Appeal Division may allow further time within which an application for leave to appeal is to be made, but in no case may an application be made more than one year after the day on which the decision is communicated to the appellant.	**(2)** La division d'appel peut proroger d'au plus un an le délai pour présenter la demande de permission d'en appeler.

[15] As noted earlier in these Reasons, the Appeal Division reasoned based on s 57(2) that, while it had the statutory power to extend the time for filing an application for leave to appeal to the Appeal Division, that power did not permit it to provide an extension beyond one year after the date on which the decision under appeal was communicated to the appellant. As the Applicant's application was over three years late, the Appeal Division dismissed the request for an extension of time.

[16] As an initial point, I note the Applicant's submission at the hearing before the Court that she had no record or recollection of having received the General Division's covering letter to her dated September 14, 2016, enclosing its decision. This letter figures in the reasoning of the Appeal Division. As noted above, the Appeal Division relied on s 19(1)(a) of the Regulations in adopting the assumption that the General Division's decision had been communicated to the Applicant 10 days after the date of its letter, i.e. by Monday, September 26, 2016, at which time the limitation period began to run. Section 19 provides as follows:

When decisions deemed communicated	**Décision présumée communiquée**
19 (1) A decision made under subsection 53(1), 54(1), 58(3), 59(1) or 66(1) of the Act is deemed to have been communicated to a party	**19 (1)** La décision rendue au titre des paragraphes 53(1), 54(1), 58(3), 59(1) ou 66(1) de la Loi est présumée avoir été communiquée à la partie :
(a) if sent by ordinary mail, 10 days after the day on which it is mailed to the party;	**a)** si elle est transmise par la poste ordinaire, le dixième jour suivant celui de sa mise à la poste;
(b) if sent by registered mail or courier, on	**b)** si elle est transmise par courrier recommandé ou messagerie :

(i) the date recorded on the acknowledgement of receipt, or	**(i)** soit à la date indiquée sur l'accusé de réception,
(ii) the date it is delivered to the last known address of the party; and	**(ii)** soit à la date à laquelle elle a été livrée à la dernière adresse connue de la partie;
(c) if sent by facsimile, email or other electronic means, the next business day after the day on which it is transmitted.	**c)** si elle est transmise par un moyen électronique, notamment le courriel et le télécopieur, le premier jour ouvrable suivant sa transmission.
Other documents sent by Tribunal	**Autres documents**
(2) Subsection (1) also applies to any other document sent by the Tribunal to a party.	**(2)** Le paragraphe (1) s'applique également à tout autre document que fait parvenir le Tribunal à une partie.

[17] While the Applicant raises doubt that she received the September 14, 2016 letter, this submission is not her principal argument in challenging the reasonableness of the Decision. Regardless, she has referred to no evidence presented to the Appeal Division disputing receipt of the letter or the effect of operation of s 19(1)(a). Indeed, the Decision notes that the Applicant did not dispute that she was late filing her application to the Appeal Division. Rather, her request for an extension of time focused on providing reasons explaining her delay. I consider this to be an accurate characterization of the Applicant's submissions to the Appeal Division. As judicial review is based on the evidence and arguments before the decision-maker, I find nothing unreasonable in the Appeal Division's analysis and conclusions surrounding the time when the limitation period began to run.

[18] The Applicant's principal argument, in challenging the reasonableness of the Decision, is that notwithstanding s 57(2) the Appeal Division was obliged to consider the likelihood that she could be successful in appealing the General Division's decision on its merits, if she were afforded an opportunity to bring the appeal. She makes submissions based on evidence surrounding the circumstances of her employment with Well Being Seniors Services Ltd. and her resulting departure from that employment, which she argues support a conclusion that she should not have been disqualified from entitlement to EI benefits. That is, the Applicant submits that her appeal has merit and that the Appeal Division failed to take this into account in deciding to refuse her extension request.

[19] The Applicant also makes submissions based on evidence that, through the period of her delay in bringing her application for leave to appeal to the Appeal Division, she was engaged in processes of seeking administrative relief from her debt and seeking access to documentation that would support the merits of her appeal. She argues that this evidence supports a conclusion that she was acting reasonably in pursuing these avenues and had a continuing intention to challenge the General Division's decision. The Applicant also relies on her efforts in 2019 to challenge that decision through Federal Court judicial review. She explains that she is self-represented, that she and her legal matters do not fit a profile that make her eligible for legal aid, and that she therefore did not understand the procedure that the law mandated to challenge the General Division decision.

[20] In support of her arguments, the Applicant relies on authorities involving requests for extensions of time in proceedings before the General Division and Appeal Division. These

authorities refer to the following criteria to be considered, in deciding whether to grant an extension of time: (a) a continuing intention to pursue the application or appeal; (b) the matter disclosing an arguable case; (c) there being a reasonable explanation for the delay; (d) there being no prejudice to the other party in allowing the extension; and (e) whether granting the extension would be in the interest of justice (see *Canada (Attorney General) v O'Keefe*, 2016 FC 503 at para 8; *Minister of Employment and Social Development v SD,* 2016 SSTADIS 226 at paras 27-32; *MC v Canada Employment Insurance Commission,* 2015 SSTAD 237 at para 6).

[21] The Applicant's arguments are potentially relevant to these criteria. However, as the Respondent submits, these criteria guide a decision whether to grant an extension of time in a circumstance where the authority to grant an extension exists. If the Applicant had brought her request for an extension of time to pursue her application for leave to appeal to the Appeal Division outside the 30 day limitation period prescribed by s 57(1) of the Act, but within the one year limitation prescribed by s 57(2), these criteria would have served to guide the Appeal Division in considering her request.

[22] However, as is clear from the text of s 57(2), the Appeal Division has no power to allow an extension of time beyond one year from when the decision was communicated. As the Respondent notes, this interpretation has previously been confirmed by this Court (see, e.g., *Mahmood v Canada (Attorney General)*, 2016 FC 487 at paras 2-3). In relying on s 57(2) in arriving at its Decision, the Appeal Division employed reasoning that is rational and logical and provided justification in relation to the constellation of relevant law and facts, as required by the standard of review prescribed by *Vavilov*. The Appeal Division did not take into account the

facts surrounding the possible merits of the Applicant's proposed appeal, or her efforts to obtain evidence relevant to the appeal or to pursue other avenues of relief. However, it was reasonable for the Appeal Division not to consider these facts, because the absolute one year limitation period prescribed by s 57(2) precluded those facts having any bearing on the outcome of the request for an extension of time.

[23] The Applicant has also adduced evidence in this application related to a complaint she made to the Office of the Information Commissioner of Canada, arising from the Canada Revenue Agency failing to respond to a request for information within the time limits prescribed by the *Access to Information Act*, RSC 1985, c A-1 [the AIA]. The Applicant pursued this request under the AIA as part of her efforts to obtain evidence relevant to her proposed appeal. On October 7, 2020, the Information Commissioner issued a Final Report, finding that the Applicant's complaint is well-founded. She argues that it is unfair that, while a government department can fail to abide by a time limit prescribed by law, she is precluded from obtaining the required extension of time to pursue her appeal.

[24] The Applicant's frustration with these circumstances is understandable. However, these circumstances have no legal bearing on the reasonableness of the Decision under review in this application. The reasonableness of the Decision must be determined based on the record that was before the Appeal Division at the time the Decision was made. Moreover, these circumstances have no impact upon the application of the one year limitation period in s 57(2) of the Act upon which the Decision turns.

[25] I also note the Applicant's submissions concerning the limitation period for recovery of her debt. While there is a six year limitation period applicable to the Crown's recovery of her debt due to the EI overpayment, the limitation period does not run when there is a pending appeal or other review of the decision establishing the liability. This is the effect of ss 47(3) and (4) of the *Employment Insurance Act*, SC 1996, c 23. The Applicant has entered into evidence a letter dated March 18, 2021 from ESDC, responding to her inquiry as to why her debt remains active. ESDC explains that, although the decision establishing her liability for the debt was made over six years ago, the limitation period has been suspended each time she filed an appeal or review. As such, the debt has not yet reached the limitation period.

[26] In the context of these principles, the Applicant argues that she has been ill-served by the Federal Court, as a result of a delay in hearing her application for judicial review, attributable to the transition to largely virtual hearings during the COVID-19 pandemic.

[27] The Court file demonstrates that the hearing of this application was originally scheduled for March 15, 2021. However, at a case management conference held on March 10, 2021, Justice Kane issued an Order dated March 12, 2021, adjourning the hearing to a date to be set by the Court when the hearing could be conducted physically in-person. This Order reflects that the adjournment was granted at the Applicant's request, because she preferred a physical in-person hearing, notwithstanding Justice Kane's explanation at the case management conference that many hearings have been conducted virtually and provide the same opportunity to be heard as a physical in-person hearing. The application was subsequently scheduled for a physical in-person hearing, and was heard, on June 25, 2021.

[28] As with the Applicant's arguments surrounding the complaint to the Information Commissioner, the circumstances surrounding the timing of the hearing of this application have no impact on the matter before the Court, which relates solely to the reasonableness of the Decision under review.

[29] Despite the Applicant's capable advocacy on her own behalf, her arguments do not raise a basis for the Court to interfere with the Decision. As such, this application for judicial review must be dismissed. Appropriately, the Respondent has claimed no costs against the Applicant, and no costs are awarded.

JUDGMENT IN T-685-20

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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APPEARANCES:

Rita Conte	FOR THE APPLICANT (Self-represented litigant)
Andrew Crawford	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Attorney General of Canada Vancouver, British Columbia	FOR THE RESPONDENT