Federal Court  Cour fédérale

Date: 20211216

Docket: T-1129-20

Citation: 2021 FC 1426

Ottawa, Ontario, December 16, 2021

PRESENT: The Honourable Madam Justice McVeigh

BETWEEN:

SALVATORE VITALE

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review of a decision by the Appeal Division ("AD") of the Social Security Tribunal ("SST"). The AD did not grant the Applicant leave to appeal the decision of the General Division ("GD"). The GD decision held that the Applicant was disqualified from being paid Employment Insurance ("EI") benefits due to losing his job for misconduct. This GD decision was a reconsideration, occurring after multiple previous

proceedings before the SST. These included his EI benefits being initially allowed and paid, as well as a successful application before the AD for his application to be antedated.

II. Background

[2] The Applicant worked for Groupe Robert Inc. from March 2019 to May 2019, and Alliance Magnesium Inc. ("Alliance") from August 2017 to January 2019. After this employment ended, he applied for EI benefits in September 2019. He sought for this application to be antedated to May 2019, which was refused by the Commission of Employment Insurance Canada ("Commission") and the GD of the SST, but granted by the AD. The AD antedated the application by 4 months, to May 2019 and paid him benefits.

[3] Upon being informed that the Applicant qualified for EI benefits, Alliance informed the Commission that he had been dismissed for misconduct. The Commission approved the Application nonetheless, finding that there was insufficient information to conclude that the employment relationship had ended due to the Applicant's misconduct.

[4] Alliance requested a reconsideration of this decision. As part of this process, they explained that the Applicant was employed as Chief Financial Officer ("CFO"), and that it was within his mandate to find potential investors. Yet, the Applicant had requested a commission prior to disclosing the names of potential investors to their broker. This caused Alliance to question the Applicant's loyalty, and worry that he was putting his personal interests ahead of those of his employer. Resultantly, Alliance said they dismissed the Applicant for cause. Alliance explained to the Commission that the Applicant, as CFO, knew or ought to have known

that requesting a commission to disclose the names of potential investors runs afoul of established business practices and the code of conduct of a CFO given that his employment contract stated that he was expected to seek investors. Based on this, in August 2020, the Commission informed the Applicant and Alliance of their conclusion that the Applicant had been dismissed as a result of his misconduct, and was thus disqualified from EI benefits pursuant to s. 30 of the *Employment Insurance Act, SC 1996, c 23* [*EIA*].

[5] The Applicant appealed this reconsideration decision to the GD of the SST. The GD dismissed this appeal, finding that the Commission had proven that he lost his job because of misconduct, and was thus disqualified from EI benefits pursuant to s. 30 of the *EIA*. In reaching this conclusion, they considered emails between the Applicant and Alliance's broker, whether he was acting on behalf of his employer when emailing the broker, and examined the Applicant's employment agreement with Alliance. Ultimately, they concluded that the employment relationship was terminated for breach of trust, and that the breach of trust constituted misconduct for the purposes of the *EIA*, and thus, the Applicant was disqualified from EI benefits pursuant to s. 30.

[6] The Applicant sought leave to appeal the GD's decision to the AD. The AD concluded that the Applicant was asking for the opportunity to represent his case to a different outcome. They noted that this was not the role of the AD. The Applicant failed to identify any reviewable errors, errors in law, or errors of fact. As such, they concluded that the appeal would have no reasonable chance of success, and declined to grant leave to appeal to the AD.

[7] The Applicant now seeks judicial review of this decision by the AD. The Applicant very ably represented himself.

III. Issue

[8] The issue is whether the AD's decision to deny leave to appeal was reasonable.

IV. Standard of Review

[9] On the merits of the AD's decision, the standard of review is reasonableness. As set out by the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at paragraph 23, "where a court reviews the merits of an administrative decision … the starting point for the analysis is a presumption that the legislature intended the standard of review to be reasonableness." Specifically, pre-*Vavilov* case law indicates that a decision of the AD denying leave is to be reviewed against a standard of reasonableness (*Griffin v Canada (AG)*, 2016 FC 874 at paras 13-14; *Marcia v Canada (AG)*, 2016 FC 1367 at para 23). I see no reason that post-*Vavilov* this standard of review would differ. As such, the standard of review in this case is reasonableness.

[10] Reasonableness review begins with the principle of judicial restraint and respect for the distinct role of administrative decision-makers, and the Court does not conduct a *de novo* analysis or attempt to decide the issue itself (*Vavilov* at paras 13, 83). Rather, it starts with the reasons of the administrative decision-maker and assesses whether the decision is reasonable in

outcome and process, considered in relation to the factual and legal constraints that bear on the decision (*Vavilov* at paras 81, 83, 87, 99).

[11] A reasonable decision is one that is justified, transparent, and intelligible to the individuals subject to it, reflecting "an internally coherent and rational chain of analysis" when read as a whole and taking into account the administrative setting, the record before the decision-maker, and the submissions of the parties (*Vavilov* at paras 81, 85, 91, 94-96, 99, 127-128).

V. The Framework

[12] As correctly applied by the AD of the SST, leave to appeal to the AD is "refused if the AD is satisfied that the appeal has no reasonable chance of success" (*Department of Employment and Social Development Act*, SC 2005, c 34 [*DESDA*] at s. 58(2)). Reasonable chance of success, according to the jurisprudence, occurs when there is some arguable ground upon which the proposed appeal might succeed (*Osaj v Canada (Attorney General)*, 2016 FC 115 at para 12). As noted by the AD, in particular, leave to appeal a decision of the GD may only be granted when the appeal has a "reasonable chance of success" on one of the three grounds of appeal identified in subsection 58(1) of the *DESDA*: (a) a breach of natural justice; (b) an error of law; or (c) an erroneous finding of fact made in a perverse or capricious manner or without regard for the material before it.

VI. Analysis

A. *Submissions*

[13] The Applicant made a tenable argument related to his dismissal from Alliance. He feels it was unfair how the matter progressed through the system, without providing him sufficient opportunity to deal with the finding that he was dismissed for breach of trust, a finding that he argues was based solely on one misinterpreted email. The determination was made after he had been paid EI benefits, and after the AD found in his favour that his claim should be antedated.

[14] As we will see, however, on judicial review, it is not my role to step into the decision-maker's shoes and make determinations of the same questions they did – for instance, I am not determining if on the evidence, he was dismissed for breach of trust. Rather, I am only reviewing the reasonableness of the AD's decision; that is, whether it was reasonable for the AD to not grant leave, in consideration of the limited grounds set out in s. 58(2) of the *DESDA*. This is frustrating to an applicant, but serves as a reminder of the critical importance of presenting evidence and argument about your dismissal at the very beginning of such proceedings, given the limited legislated grounds to do so at a later stage.

[15] The Applicant's arguments on this judicial review focus on the facts related to the finding that he was dismissed for breach of trust and was thus not eligible for EI, even though he had been successful in his antedate claim and had received the EI funds. He made three such arguments.

[16] First, he argues that the GD failed to apply its own rules and guidelines in evaluating the Applicant's EI claim when originally filed. He asserts that the claim was made in September 2019, challenged by the GD as being too late, and ultimately antedated in April 2020. He alleges that it is an error for the GD have these 8 months to assess the validity of the claim, and then fail to do so. He points to the GD's rules, which state, "often … at the time you file your claim for benefits, you provide this information as to the reason for being fired." Resultantly, it is the Applicant's position that the GD failed in its duty to properly assess the validity of the claim, by virtue of not bringing up the issue of misconduct until after they lost their challenge on antedating. He cites the mission statement of Service Canada, which sets out that the EI Program is to "provide temporary income support to workers who have lost their job, while they look for new employment." Based on this, the Applicant argues that EI recipients apply during their time of need, and that holding up a claim for 8 months, ultimately paying it out, and then asking for its repayment over a misconduct issue raised later, deviates from this mission statement. Further, he notes that the EI system – as it presently functions – is not conducive to meeting its goals.

[17] Second, he submits that the GD made an error of law. He argues that there cannot legally be a breach of trust committed by the Applicant, given that the employer's request to "find" or "solicit" potential investors would be a breach of Quebec securities law, and a conflict of interest due to the terms of his employment contract. The Applicant contends that the relevant laws of Quebec, as governed by the Autorité des marchés financiers, require that only registered securities brokers solicit capital. As such, given the Applicant is not a registered securities broker, he cannot solicit capital in the province of Quebec. The Applicant further stated that with

his years of experience, he would not solicit capital, as it is not legal for him to do so, pointing to the fact that the company hired two independent brokers to do this very task.

[18] The Applicant submits that the GD's statement that "part of the Applicant's job as CFO was to find people who may be interested in investing in the Company," and the resultant conclusion – that he was terminated as a result of a breach of trust resulting from requesting commission to do so – is an error of law. He concedes that his employment contract includes in the job description that he is responsible for "seeking financing opportunities for Alliance," but he says that he is only to support the raising of capital in his role and fulfilling his due diligence role, and is not to solicit capital. He provides that his employment contract show he was paid a base salary and bonus, but nowhere was the payment of commission provided for.

[19] The Applicant also pointed out that the termination letter does not mention the reason for termination, which he notes is highly unusual, as is the termination of an executive for breach of trust with no written warning or statement of why he was terminated. In oral arguments, the Applicant stated that he believed the company, as a start-up, was not raising the amount of capital they needed, and used his email as a reason to fire him to save the company the cost of an executive's salary, while also avoiding paying him his severance.

[20] In reviewing his arguments, I note that while the termination letter does not make reference to any previous warnings and does not make a direct statement as to why he was terminated. The letter does reference "exchanges of this date" (the date of termination), and

"serious reasons given to you during said exchanges." There was no other evidence filed by the employer, or mention of breach of trust in the evidence.

[21] Third, he contends that the GD made an important error of fact by applying a narrow view of the information provided to it and failing to consider the broader facts, context, and what information may have been omitted, when determining the reason for the Applicant's loss of employment. The Applicant's position is that he never asked his employer for a commission. Rather, the Applicant submits that this email – where he appears to ask for a commission – is being used by his former employer to mask the true reason for his dismissal. He pointed out that the email was a response to a securities broker, and followed one of the employer's attempts to pressure the Applicant to solicit capital from family and his connections. The Applicant, in oral argument, argued that while his email might have been "cheeky" and in bad taste, it was a simple recitation of the broker's own commission rates for raising capital. He said that the purpose of the email was to indicate that it was the role of the broker, not the Applicant, to raise capital.

[22] In the Applicant's view, the purpose of the email he was responding to was to taunt him into providing a response that his employer could use to fire him. He stated that the employer was doing this in order to terminate him for cause, to avoid paying 6 months severance, which he would have been owed had the termination been for no cause, as per his employment contract. In his view, the short timeline (of approximately 6 days) between the email and the termination is further evidence of this intention.

B. *Analysis*

[23] The purpose of this judicial review is to review the AD decision. If this judicial review were granted, the outcome would not be to substitute my decision for the GD decision, but to send the matter back to the AD for redetermination.

[24] While, as noted by Justice Gleeson in *Sherwood v Attorney General of Canada*, 2017 FC 998 at paragraph 14 [*Sherwood*], it is necessary to review and consider the decision of the GD in determining whether the AD's decision was reasonable, the reviewable error itself must stem from the AD. That is, I am to engage with the AD's reasons to determine whether they are reasonable, based on the *Vavilov* framework.

[25] Despite my expressed comments, I am not convinced that the AD's decision was unreasonable.

(1) Timing and Procedure

[26] First, I note that none of the Applicant's arguments pertains to the AD's decision. Indeed, the first sentence of every issue – as identified by the Applicant – pertains to the decision of the GD. This is not the decision being judicially reviewed. I am mindful of Justice Gleeson in *Sherwood*, who – as mentioned earlier- correctly noted that it is necessary to review and consider the decision of the GD in determining whether the AD's decision was reasonable. However, in a case such as this, where the very decision subject to judicial review is the AD's decision to not grant leave, the reviewable error itself must stem from the AD's decision. An example of an

issue that is subject to judicial review is, for instance, whether the AD erred in its choice of the test for leave (*Bellefeuille v Canada (Attorney General)*, 2014 FC 963 at para 26 [*Bellefeuille*]) or, simply, whether the decision of the AD was reasonable (*Bellefeuille* at para 30). These issues were not raised regarding the AD's decision (see also para 12 above regarding the three grounds of appeal identified in s.58(1) of the *DESDA*: (a) a breach of natural justice; (b) an error of law; or (c) an erroneous finding of fact made in a perverse or capricious manner or without regard for the material before it.)

[27] The Respondent points out that the Applicant's argument regarding timing and delay, discussed at paragraph 16 of this decision, were not before the GD nor the AD, and is thus being raised for the first time on judicial review. It is settled law that an Applicant is not permitted to raise new arguments on judicial review (see, e.g. *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 at paras 22 to 26) that were not before the decision-maker. The AD, in their refusal of leave to appeal, did not consider the timeliness or procedure of the GD in not determining eligibility at the same time as the antedated decision because it was not raised before them or the GD. Even if this argument was made before them, in my view it would have been unsuccessful, as it was all done within the legislated timelines.

[28] When the matter is looked at with the benefit of hindsight, I agree with the Applicant that it does not seem sensible to not deal with the eligibility of the claim before determining the antedate claim. The process used – dealing with the antedated claim first and then the eligibility – is provided for in the Act and all the decisions were made within the timelines that Parliament

legislated. Again, this is not my role on judicial review, as I am reviewing the AD's decision to not grant leave and this argument was not before them so I cannot find it unreasonable their treatment of it.

(2) Error of Law

[29] Second, as discussed earlier, the Applicant argues that the GD made an error of law. He submits that there cannot legally be such a breach of trust committed, as that would be a breach of Quebec securities law, and a conflict of interest due to the terms of his employment contract. The Applicant submits that the GD's conclusion that "part of the Applicant's job as CFO was to find people who may be interested in investing in the Company," and the resultant conclusion – that he was terminated as a result of a breach of trust because he requested commission to do so – is an error of law.

[30] The GD concluded that the Applicant violated the terms of his employment contract because he as CFO is responsible for seeking financing opportunities for his employer. The GD found a breach of trust when he communicated with the employer's broker, stating that he had two potential investors and then sought to be paid a commission to provide their information to the broker. The GD noted that the Applicant both disputed that he had asked for a commission, and testified multiple times that he was not allowed to solicit investors, but the GD still concluded that the evidence supported that the Applicant had spoken to the potential investors and sought a commission for their information.

[31] I characterise this submission as an error of fact or at most an error of fact and law. This was a factual determination made by the GD that he breached the trust of his employer by soliciting a commission on finding investors.

[32] Contrary to the Applicant's submissions, what is at issue is not whether he was allowed to – under Quebec securities law – solicit investors, but rather, whether it was reasonable for the GD with the evidence they had to make such a finding. It does not matter if I would come to the same decision it is whether it was reasonable. It is settled law that the role of judicial review is not to reweigh evidence that was before the decision-maker (*Vavilov* at para 125).

[33] The evidence before the GD included:

- the Record of Employment;
- the email in question (which I note the Applicant initially said he did not send but later admitted he did);
- the termination letter;
- employment contract;
- the Applicant's oral evidence.

[34] The GD concluded from this evidence that his request for commission led to his dismissal for a breach of trust. The GD, in their reasons, indicated that they preferred the email evidence to the Applicant's testimony. The AD concluded that the evidence supported this conclusion, and that the Applicant was – in his leave to appeal application – simply seeking to re-represent his case to obtain a different outcome, which is not the role of the AD. Ultimately, the AD held that

the Applicant failed to identify any errors upon which his appeal would have a reasonable chance of success. I find this conclusion to be reasonable.

(3) Error of Fact

[35] The Applicant contends that the GD made an important error of fact, by applying a narrow view of the information provided to it and failing to consider the broader facts, context, and what information may have been omitted, when determining the reason for the Applicant's loss of employment. The Applicant's position is that he never asked his employer for a commission. Rather, the Applicant submits that his former employer to mask the true reason for his dismissal is using this email – where he appears to ask for a commission. He points out that the email was a response to a securities broker, and followed one of the employer's attempts to pressure the Applicant to solicit capital. The Applicant argues that his email was a simple recitation of the broker's own commission rates for raising capital, and that the purpose of the email was to indicate that it was the role of the broker, not the Applicant, to raise capital. In the Applicant's view, the purpose of the email he was responding to was to taunt him into providing a response that his employer could use to fire him and avoid paying severance.

[36] On judicial review, I am not to reweigh evidence that was before the decision-maker (*Vavilov* at para 125). Rather, a reviewing court determines if the decision was 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).

[37] Judicial review of this issue, then, encompasses an examination of the AD's conclusion that an appeal of this lacked a reasonable chance of success. The AD's reasons are based heavily on the GD's evidentiary findings. Those findings conclusively found that the Applicant lost his job due to this breach of trust. This conclusion was based on the previously noted email exchange between the Applicant and a broker, which they found indicated that he was asking for commission. The AD noted the Applicant's arguments that the email was mischaracterized, but the GD ultimately afforded greater probative value to the email exchange then the Applicant's oral evidence.

[38] The AD, in denying leave to appeal, concluded that the GD applied the correct test for misconduct to the facts, that the preponderant evidence before the GD supported its conclusion that the Applicant's behavior constituted misconduct within the meaning of the *EIA*, and resultantly, that the Applicant had no reasonable chance of success on appeal before them should leave be granted.

[39] I cannot find that the AD's decision was unreasonable, given the GD's findings and reasons. This case, however, serves as a lesson for all in such employment matters: if there are questions surrounding the reason for dismissal, be sure to deal with or contest these when they first arise and have the evidentiary basis before the decision-maker.

[40] This application is dismissed. The Respondent did not seek costs and none are awarded.

JUDGMENT IN T-1129-20

THIS COURT'S JUDGMENT is that:

1. The Application is dismissed;

2. No costs are awarded.

"Glennys L. McVeigh"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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