Date: 20230726

Docket: T-1621-21

Citation: 2023 FC 1019

[ENGLISH TRANSLATION]

Toronto, Ontario, July 26, 2023

PRESENT: Mr. Justice Gascon

BETWEEN:

SAMUEL D. VERREAULT

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review of a decision rendered on September 23, 2021 [Decision], by the Appeal Division, Social Security Tribunal of Canada [Tribunal], denying a request by Samuel D. Verreault for more time to file an application for permission to appeal. The Appeal Division of the Tribunal determined that the request should be denied because it was

excessively late and because Mr. Verreault had failed to establish any special circumstances to explain the delay. The Tribunal also found that the appeal had no reasonable chance of success.

[2] Mr. Verreault claims that the Decision fails to meet the standards of procedural fairness because it violates the *audi alteram partem* rule and is arbitrary.

[3] For the reasons that follow, Mr. Verreault's application for judicial review will be dismissed. Having reviewed the Tribunal's reasons, the evidence in the record and the law, I am of the opinion that the process followed by the Tribunal satisfies the rules of procedural fairness that apply in this case. There is no reason for the Court to intervene.

II. Background

A. *Facts*

[4] Mr. Verreault was working as a carpenter for Construction PLV inc. [Construction PLV], a company in which he also owned shares. Between assignments, Mr. Verreault filed claims for employment insurance benefits, covering periods starting on November 22, 2015, November 20, 2016, December 10, 2017 and December 9, 2018.

[5] On January 4, 2019, the Integrity Services Branch, Service Canada [Service Canada], wrote to Mr. Verreault regarding discrepancies between the information he had provided and the information provided by his employer, Construction PLV, with respect to earnings for the weeks of January 3 to 9, 2016, March 19 to 25, 2017, March 26 to April 1, 2017, and May 6 to 12, 2018.

[6] Service Canada contacted Mr. Verreault on January 31, 2019, and Construction PLV on June 17, 2019, regarding the request for information it had sent earlier. From this investigation, Service Canada learned that the employer had been paying Mr. Verreault's mobile phone bills and providing him with a vehicle for which insurance, vehicle and fuel costs were also paid by the employer on an ongoing basis.

[7] On February 12, 2020, Service Canada concluded that the benefits received by Mr. Verreault from his employer throughout the year were a form of remuneration. As a result, Service Canada determined that Mr. Verreault was not entitled to the employment insurance benefits he had received because there had not been an interruption of earnings of at least seven consecutive days.

[8] On October 16, 2020, in response to Mr. Verreault's request for reconsideration, Service Canada stated that it was upholding its decision of February 12, 2020.

B. ***Procedural history***

[9] On November 11, 2020, Mr. Verreault filed a number of notices of appeal with the General Division of the Tribunal. The Tribunal joined the appeals into a single appeal on November 26, 2020.

[10] On December 12, 2020, the General Division of the Tribunal dismissed the appeal, concluding that Mr. Verreault had failed to declare part of his earnings received in the form of benefits. In the opinion of the General Division of the Tribunal, because Mr. Verreault had a vehicle and a mobile phone paid for by his employer, there was no interruption of earnings of at least seven consecutive days. Therefore, the General Division of the Tribunal concluded that the

employment insurance benefit periods beginning on December 20, 2016, December 10, 2017, and December 9, 2018, should be cancelled and the benefits, returned.

[11] On January 8, 2021, Mr. Verreault appealed this decision to the Appeal Division of the Tribunal.

[12] On March 25, 2021, the Appeal Division of the Tribunal allowed the appeal and rescinded the decision of the General Division. The Appeal Division of the Tribunal determined that Mr. Verreault was denied his right to be heard because of a lack of diligence on the part of his counsel, resulting in a breach of natural justice. The Appeal Division found that this breach required that the General Division reconsider Mr. Verreault's case.

[13] The case was referred back to the General Division of the Tribunal, which reconsidered Mr. Verreault's appeal on June 2, 2021, but dismissed it again for reasons similar to those given in its decision of December 12, 2020.

[14] On September 14, 2021, more than three months after the General Division's second decision, Mr. Verreault made a request to the Appeal Division of the Tribunal for more time to file an application for permission to appeal the decision of June 2, 2021. At that point, Mr. Verreault was more than two months late in filing his application, since the usual time limit for filing an application for leave to appeal is 30 days after the day on which the decision is communicated to the appellant (*Department of Employment and Social Development Act*, SC 2005, c 34, s 57(1)(a) [DESDA]).

C. *Decision of Tribunal's Appeal Division*

[15] On September 23, 2021, the Appeal Division of the Tribunal denied the request for more time to file an application for permission to appeal.

[16] The Appeal Division of the Tribunal determined that the three and a half months that had elapsed before Mr. Verreault filed his application for permission to appeal was an excessive delay. Mr. Verreault explained that he could not file his application earlier because his counsel's office was closed for summer vacation, from July 27 to August 26. In his submissions to the Court, counsel for Mr. Verreault emphasized at length that this was an error on the part of counsel, not Mr. Verreault. However, the Appeal Division of the Tribunal found that Mr. Verreault had had enough time to file his appeal in a timely manner, since the General Division's decision had been communicated to Mr. Verreault and his counsel on June 3, 2021, almost two months before the counsel's office closed for summer vacation.

[17] Next, having analyzed the General Division's decision, the Appeal Division of the Tribunal concluded that, even if the delay had not been excessive or there had in fact been exceptional circumstances justifying the delay, the application for permission to appeal would still have been dismissed because Mr. Verreault had not raised any reviewable error that would have given the appeal any reasonable chance of success. The Appeal Division of the Tribunal held that the General Division was entitled to find that the initial statements of Mr. Verreault and his mother, who was the administrator of Construction PLV at the time, regarding the benefits received were more persuasive than Mr. Verreault's contradictory testimony at the hearing. The Appeal Division of the Tribunal also pointed out its limited role under subsection 58(1) of the DESDA.

D. *Relevant legislation*

[18] The relevant legislation reads as follows:

(1) *Department of Employment and Social Development Act*, SC 2005, c 34

Grounds of appeal — Employment Insurance Section	**Moyens d'appel — section de l'assurance-emploi**
58 (1) The only grounds of appeal of a decision made by the Employment Insurance Section are that the Section	**58 (1)** Les seuls moyens d'appel d'une décision rendue par la section de l'assurance-emploi sont les suivants :
(a) failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;	**a)** la section n'a pas observé un principe de justice naturelle ou a autrement excédé ou refusé d'exercer sa compétence;
(b) erred in law in making its decision, whether or not the error appears on the face of the record; or	**b)** elle a rendu une décision entachée d'une erreur de droit, que l'erreur ressorte ou non à la lecture du dossier;
(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.	**c)** elle a fondé sa décision sur une conclusion de fait erronée, tirée de façon abusive ou arbitraire ou sans tenir compte des éléments portés à sa connaissance.
Criteria	**Critère**
(2) Leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success.	**(2)** La division d'appel rejette la demande de permission d'en appeler si elle est convaincue que l'appel n'a aucune chance raisonnable de succès.

(2) ***Employment Insurance Regulations*, SOR/96-332**

Interruption of Earnings	**Arrêt de rémunération**
14 (1) Subject to subsections (2) to (7), an interruption of earnings occurs where, following a period of employment with an employer, an insured person is laid off or separated from that employment and has a period of seven or more consecutive days during which no work is performed for that employer and in respect of which no earnings that arise from that employment, other than earnings described in subsection 36(13), are payable or allocated.	**14 (1)** Sous réserve des paragraphes (2) à (7), un arrêt de rémunération se produit lorsque, après une période d'emploi, l'assuré est licencié ou cesse d'être au service de son employeur et se trouve à ne pas travailler pour cet employeur durant une période d'au moins sept jours consécutifs à l'égard de laquelle aucune rémunération provenant de cet emploi, autre que celle visée au paragraphe 36(13), ne lui est payable ni attribuée.
. . .	[…]
Determination of Earnings for Benefit Purposes	**Détermination de la rémunération aux fins du bénéfice des prestations**
35 (2) Subject to the other provisions of this section, the earnings to be taken into account for the purpose of determining whether an interruption of earnings under section 14 has occurred and the amount to be deducted from benefits payable under section 19, subsection 21(3), 22(5), 152.03(3) or 152.04(4) or section 152.18 of the Act, and to be taken into account for the purposes of sections 45 and 46 of the Act, are the entire income of a claimant	**35 (2)** Sous réserve des autres dispositions du présent article, la rémunération qu'il faut prendre en compte pour vérifier s'il y a eu l'arrêt de rémunération visé à l'article 14 et fixer le montant à déduire des prestations à payer en vertu de l'article 19, des paragraphes 21(3), 22(5), 152.03(3) ou 152.04(4), ou de l'article 152.18 de la Loi, ainsi que pour l'application des articles 45 et 46 de la Loi, est le revenu intégral du prestataire provenant de tout emploi, notamment :

arising out of any employment, including	
. . .	[…]
(10) For the purposes of subsection (2), ***income*** includes	**(10)** Pour l'application du paragraphe (2), ***revenu*** vise notamment :
. . .	[…]
(d) in the case of any claimant, the value of board, living quarters and other benefits received by the claimant from or on behalf of the claimant's employer in respect of the claimant's employment.	**d)** dans tous les cas, la valeur de la pension, du logement et des autres avantages accordés au prestataire à l'égard de son emploi par son employeur ou au nom de celui-ci.

E. *Standard of review*

[19] The Attorney General of Canada [AGC] submits that the reasonableness standard of review applies to the Decision. However, in this case, Mr. Verreault alleges that the Appeal Division of the Tribunal breached its procedural fairness obligations.

[20] On questions involving procedural fairness, the Federal Court of Appeal has repeatedly held that procedural fairness does not require the application of the usual standards of judicial review (*Canadian Association of Refugee Lawyers v Canada (Immigration, Refugees and Citizenship)*, 2020 FCA 196 at para 35; *Lipskaia v Canada (Attorney General)*, 2019 FCA 267 at para 14; *Canadian Airport Workers Union v International Association of Machinists and Aerospace Workers*, 2019 FCA 263 at paras 24–25; *Perez v Hull*, 2019 FCA 238 at para 18; *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54 [*CPR*]). Rather, it is a legal question to be assessed in light of the circumstances to determine

whether the procedure followed by the decision maker met the standards of fairness and natural justice (*CPR* at para 56; *Huang v Canada (Citizenship and Immigration)*, 2018 FC 940 at paras 51–54). An applicant has the right to know the case to meet and to have a full and fair chance to respond.

III. Analysis

A. *Context of judicial review*

[21] It should be noted at the outset that Mr. Verreault filed a rather terse memorandum of fact and law in support of his application for judicial review. His submissions consist of only four short sentences:

> [TRANSLATION]
>
> 1. On November 11, 2020, the applicant appealed to the General Division.
> 2. On December 19, 2020, the applicant received a decision with respect to the appeal.
> 3. This occurred without the applicant receiving any notice of hearing or opportunity to be heard.
> 4. The decision was made in breach of the most fundamental rule of procedural fairness, *audi alteram partem*, and is arbitrary.

[22] In addition to being terse, Mr. Verreault's memorandum is unclear.

[23] First, the dates indicated refer to the initial decision of the General Division of the Tribunal. However, that is not the Decision that is the subject of this judicial review. Therefore, the Court cannot review that decision. This is particularly true since the Appeal Division of the

Tribunal already dealt with the procedural fairness problem posed by this decision on March 25, 2021, when it ordered the case to be referred back to the General Division for reconsideration.

[24] Second, even if Mr. Verreault had written the wrong date in his memorandum and was in fact referring to the Decision that is the subject of this application for judicial review, there is nothing to support his claim that his procedural fairness rights were breached because he did not receive a notice of hearing or an opportunity [TRANSLATION] "to be heard".

[25] Procedural fairness does not require that an applicant be entitled to a hearing in every circumstance. The degree of procedural fairness to be conferred and compliance with the *audi alteram partem* rule depend on the five factors identified by the Supreme Court of Canada in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 [*Baker*]: (1) the nature of the decision being made and the decision-making process followed by the public body in making it; (2) the nature of the statutory scheme and the terms of the statute pursuant to which the public body operates; (3) the importance of the decision to the individual or individuals affected; (4) the legitimate expectations of the person challenging the decision; and (5) the choices of procedure made by the public body itself, and the nature of the deference accorded to it (*Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v Lafontaine (Village)*, 2004 SCC 48 at para 5; *Baker* at paras 23–28; *Laramée v Bénard*, 2022 FC 1653 at para 28).

[26] In this case, the public body's choice of procedure favours not holding a hearing, except when the circumstances require it. The Appeal Division of the Tribunal is entitled to decide matters without a hearing, that is, only on a written record and written submissions (*Robbins v Canada (Attorney General)*, 2017 FCA 24 [*Robbins*] at para 21). This is provided for in section 43 of the *Social Security Tribunal Regulations*, SOR/2013-60 [Tribunal Regulations]:

Decision or further hearing	**Décision ou avis d'audience**
43 After every party has filed a notice that they have no submissions to file — or at the end of the period set out in section 42, whichever comes first — the Appeal Division must without delay	**43** Une fois que toutes les parties ont déposé l'avis selon lequel elles n'ont pas d'observations à déposer ou à l'expiration de la période prévue à l'article 42, selon le premier de ces événements à survenir, la division d'appel doit sans délai :
(a) make a decision on the appeal; or	**a)** soit rendre sa décision;
(b) if it determines that further hearing is required, send a notice of hearing to the parties.	**b)** soit, si elle estime qu'elle doit entendre davantage les parties, leur faire parvenir un avis d'audience.

[27] On December 5, 2022, the Tribunal Regulations were replaced by the *Social Security Tribunal Regulations, 2022*, SOR/2022-255, which do not have any similar provision. However, since the Decision was rendered in September 2021, the version of the Tribunal Rules that applied when the Appeal Division of the Tribunal rendered the Decision is the one that should be considered.

[28] In *Robbins*, the Federal Court of Appeal noted that the Appeal Division of the Tribunal has some leeway in making this sort of procedural choice, "in part because its choice is often based upon its assessment of the issues, the evidence before it and the circumstances of the case" (*Robbins* at para 21, citing *Baker* at para 27).

[29] Moreover, although Mr. Verreault did not have the opportunity to be heard orally, he nevertheless had the opportunity to file written submissions regarding his request for more time,

as shown by the appeal form his counsel completed and submitted on September 14, 2021 (Respondent's Record, vol 2 at 481–84). Therefore, there is no clear and convincing evidence that the Appeal Division of the Tribunal breached its procedural fairness obligations and the *audi alteram partem* rule, contrary to Mr. Verreault's allegation.

B. *Decision reasonable*

[30] Mr. Verreault's written submissions do not deal with the issue of whether the Decision is reasonable. However, since the AGC does deal with this issue at length in the AGC's memorandum of fact and law, and since counsel for Mr. Verreault also made several remarks in this regard at the hearing before the Court, it is appropriate to deal with this issue.

[31] The reasonableness of a decision is assessed in light of the reasons given to support it, while taking into account the facts and law that constrain the decision maker (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 84–86 [*Vavilov*]). These reasons enable the reviewing court to ensure that the decision is justified, intelligible and transparent (*Vavilov* at paras 95, 99). The burden is on the party challenging a decision to show that it is unreasonable. A decision will not be set aside on the basis of merely superficial or peripheral errors. Rather, it must contain serious flaws, such as internally incoherent reasoning (*Vavilov* at paras 100–101).

[32] The AGC submits that it is entirely reasonable for the Appeal Division of the Tribunal to refuse to give more time. The AGC relies on the test for an extension of time set out in *Canada (Minister of Human Resources Development) v Gattellaro*, 2005 FC 883 [*Gattellaro*]. According

to *Gattellaro*, an application for an extension of time requires that the court observe the following factors:

1. A continuing intention to pursue the application or appeal.
2. An arguable case.
3. A reasonable explanation for the delay.
4. No prejudice to the other party in allowing the extension.

(*Gattellaro* at para 9.)

[33] I pause briefly to point out that the test applicable under *Gattellaro* has the same basis as that referred to by the Federal Court of Appeal in *Thompson v Canada (Attorney General)*, 2018 FCA 212 [*Thompson*] at paragraph 5 and *Canada (Attorney General) v Larkman*, 2012 FCA 204 [*Larkman*] at paragraph 61. In fact, both in *Gattellaro* and in *Larkman* and *Thompson*, the Court relied on *Grewal v Canada (Minister of Employment and Immigration)*, [1985] 2 FC 263 (CA) to determine the applicable test for an extension of time. The only difference is that, in the *Thompson*/*Larkman* test, the second factor requires that there be "some potential merit" to the application. In practice, however, the "some potential merit" and "arguable case" factors seem to be used interchangeably. For example, in *Horton v Canada (Attorney General)*, 2020 FC 743, the administrative decision maker cited *Larkman* while applying the "arguable case" test. It should be noted, however, that the interests of justice are the Court's primary consideration. Therefore, it is not necessary that each of the four factors be met (*Thompson* at para 6).

[34] For the reasons that follow, I find that the Appeal Division of the Tribunal reasonably justified its refusal to give more time in the circumstances and that the interests of justice did not warrant an extension.

(1) Refusal to grant request for more time

[35] In this case, the Appeal Division of the Tribunal clearly explained its reasons for refusing to give more time, namely, that Mr. Verreault had not presented any grounds that made his case arguable and that there was no reasonable explanation for his delay. The determinative issue before the General Division was the absence of an interruption of earnings, and the Appeal Division of the Tribunal determined that this conclusion was not wrong.

[36] In addition, the Appeal Division of the Tribunal found that there was no reasonable explanation for the delay in applying for permission to appeal the decision of the General Division, since the office closure of counsel for Mr. Verreault accounted for only part of the delay. Mr. Verreault and his counsel had nearly two months before the office closed to file the notice of appeal. The Appeal Division of the Tribunal determined that Mr. Verreault had failed to show how the closure of his counsel's office was in fact an exceptional circumstance. Here again, there is nothing to suggest that this conclusion is unreasonable.

[37] I note that no evidence or affidavit was submitted by Mr. Verreault in support of his claim that his counsel had erred.

(2) No reasonable chance of appeal succeeding

[38] In addition to determining that the test for an extension of time had not been met, the Appeal Division of the Tribunal concluded that, even if there had been no delay, the application for permission to appeal would have been dismissed on the grounds that the appeal had no reasonable chance of success. The requirement of an "arguable case" requires that the applicant establish a reasonable chance of success (*Leblanc v Canada (Human Resources and Skills*

Development), 2010 FC 641 at para 24, citing *Canada (Human Resources Development) v Hogervorst*, 2007 FCA 41 at para 37).

[39] In this case, Mr. Verreault did not present any grounds that made his case arguable.

[40] Under subsection 58(1) of the DESDA, the only valid grounds of appeal are a failure to observe a principle of natural justice, an action beyond or refusal to exercise jurisdiction, an error of law, or a decision based on an erroneous finding of fact that was made in a perverse or capricious manner or without regard for the material before it. Subsection 58(2) provides that leave to appeal is refused "if the Appeal Division is satisfied that the appeal has no reasonable chance of success".

[41] I agree with the AGC that Mr. Verreault failed to raise any reviewable error in the General Division's decision. The evidence shows that Mr. Verreault used a cell phone and a vehicle paid for by his employer while claiming employment insurance benefits. However, to be entitled to these benefits, Mr. Verreault had to have had an interruption of earnings of seven consecutive days (subsection 14(1) of the *Employment Insurance Regulations*, SOR/96-332). Subsection 35(2) and paragraph 35(2)(d) of those regulations provide that remuneration includes benefits received from the employer. It was therefore entirely reasonable for the Appeal Division of the Tribunal to conclude that Mr. Verreault had not had an interruption of earnings of seven consecutive days because of ongoing benefits paid by his employer, and that he was therefore not entitled to the employment insurance benefits he had received. Consequently, the Appeal Division of the Tribunal could reasonably conclude that the appeal had no reasonable chance of success and that this factor weighed against giving more time to file the application for permission to appeal.

(3) Counsel's error

[42] At the hearing before the Court, counsel for Mr. Verreault argued for the first time that the delay in filing the application was the result of an error by his office. Therefore, and in accordance with *Heaslip v McDonald*, 2017 QCCA 1273 [*Heaslip*], it would not be fair to hold Mr. Verreault responsible for his counsel's error. I respectfully disagree with Mr. Verreault on this point and am not persuaded by his arguments.

[43] First, the Court of Appeal of Quebec's decision in *Heaslip*, on which Mr. Verreault relies, is in a very different context, since it deals with the inability of a plaintiff to act under article 177 of the *Code of Civil Procedure*, CQLR c C-25.01. Second, even if the principles of that case applied here, there is no indication of how Mr. Verreault himself would have attempted to act diligently, which is an essential consideration in such a review: [TRANSLATION] "A plaintiff cannot validly claim to have been unable to act if, in fact, the plaintiff is not diligent in ensuring compliance with judicial procedure" (*Heaslip* at para 30). Indeed, the record before the Court contains no evidence in this regard, not even an affidavit from Mr. Verreault attesting to any error made by his counsel or attesting to the diligence of his own conduct in dealing with such an error. Lastly, it is generally settled that "an applicant must live with the consequences of the actions of his counsel", and that "[t]here is a high threshold governing the circumstances and evidentiary criteria that must be met before the Court will grant relief under section 18.1 of the Federal Courts Act on the basis of the negligence of counsel" (*Singh v Canada (Citizenship and Immigration)*, 2016 FCA 96 at para 66). Therefore, Mr. Verreault's argument cannot be accepted.

[44] Counsel for Mr. Verreault also relied on section 60 of *the Federal Courts Rules*, SOR/98-106 [Rules] in his oral submissions. He argued that the Tribunal should have pointed out the deficiencies in his application form for an extension of time if the Tribunal was of the opinion that its content was insufficient. In his opinion, it would have made sense for the Tribunal to do this because even the Court has such an obligation to the parties.

[45] I am not persuaded by the Mr. Verreault's argument. First, the Rules apply only to the Federal Court and the Federal Court of Appeal (subsection 1.1(1) of the Rules), not to the Tribunal. Second, in any event, "[r]ule 60 is . . . not a tool available to parties, even those who are self-represented, to obtain free legal advice from the Court or to ask the Court to do work that the parties themselves have failed to do" (*Lessard-Gauvin v Canada (Attorney General)*, 2020 FC 730 at para 118, aff'd 2021 FCA 94). It is not the role of courts to provide legal or tactical advice to litigants (*SNC-Lavalin Group Inc v Canada (Public Prosecution Service)*, 2019 FCA 108 at para 9).

IV. Conclusion

[46] For the reasons above, Mr. Verreault's application for judicial review is dismissed without costs.

JUDGMENT in T-1621-21

THIS COURT'S JUDGMENT is as follows:

1. The application for judicial review is dismissed, without costs.

"Denis Gascon"
Judge

Certified true translation
Vincent Mar

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1621-21
STYLE OF CAUSE:	SAMUEL D. VERREAULT v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	QUÉBEC, QUEBEC
DATE OF HEARING:	APRIL 27, 2023
JUDGMENT AND REASONS:	GASCON J
DATED:	JULY 26, 2023

APPEARANCES:

Stéphane Harvey	FOR THE APPLICANT
Suzanne Bernard	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Stéphane Harvey Counsel Québec, Quebec	FOR THE APPLICANT
Attorney General of Canada Gatineau, Quebec	FOR THE RESPONDENT