Federal Court  Cour fédérale

Date: 20250127

Docket: T-1836-24

Citation: 2025 FC 169

Ottawa, Ontario, January 27, 2025

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

FAN YANG

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review of a decision by the Social Security Tribunal of Canada [SST], Appeal Division [the Appeal Division] dated March 26, 2024 [the Decision]. In the Decision, the Appeal Division refused the Applicant leave to appeal a decision of the SST, General Division, Employment Insurance Section [the General Division], which found that the Applicant was disqualified from receiving Employment Insurance [EI] benefits because he had voluntarily left his employment without just cause. Pursuant to subsection 58(2) of the

Department of Employment and Social Development Act, SC 2005, c 34 [DESDA], the Appeal Division refused the Applicant leave to appeal because the Appeal Division was not satisfied the Applicant's appeal had a reasonable chance of success.

[2] As explained in further detail below, this application for judicial review is dismissed, because the Applicant's arguments have not established that the Decision is unreasonable, that there is a basis to find a reasonable apprehension of bias on the part of either the Appeal Division or the General Division, or that the Applicant was otherwise deprived of procedural fairness by either the Appeal Division or the General Division.

II. **Background**

[3] The Applicant worked as a research associate for a lab at McGill University until his contract ended on February 13, 2023. The Applicant's employer offered to renew the Applicant's contract immediately prior to its expiration. However, both prior to and in response to that offer, the Applicant raised with his employer concerns about his working conditions, including excessive overtime hours and a heavy workload. The Applicant refused to renew his contract because he was not satisfied with its terms, including his salary and terms related to concerns about his working conditions.

[4] On April 27, 2023, the Applicant applied for EI benefits. By letter dated May 19, 2023, the Canada Employment Insurance Commission [the Commission] found that the Applicant had voluntarily left his employment and therefore was not entitled to EI benefits. After the Applicant

requested reconsideration, the Commission maintained its decision by letter dated September 15, 2023 [the Reconsideration Decision].

[5] The Applicant appealed the Reconsideration Decision to the General Division, and a hearing with a member of the General Division took place on November 7, 2023.

[6] The General Division dismissed the Applicant's appeal of the Reconsideration Decision in a decision dated November 9, 2023. The General Division found that the Applicant had voluntarily left his job, given that he had received an offer of employment that would have allowed him to continue working. Taking into account considerations prescribed by paragraph 29(c) of the *Employment Insurance Act*, SC 1996, c 23 [EIA], the General Division then found that the Applicant did not have just cause to voluntarily leave his job, because he had not exhausted all reasonable alternatives prior to refusing to renew his contract. As such, applying section 30 of the EIA, the General Division concluded that the Applicant was ineligible for EI benefits.

[7] On December 6, 2023, the Applicant filed an application with the Appeal Division, seeking leave to appeal the General Division's decision. On March 26, 2024, the Appeal Division issued the Decision, denying such leave, which is the subject of this application for judicial review.

III. **Legislative Framework**

A. *Appealing a decision of the General Division*

[8] A decision of the General Division may be appealed to the Appeal Division only if leave to appeal is granted by the Appeal Division (DESDA, s 56(1)).

[9] The grounds to appeal a decision of the General Division are as follows:

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.

[10] If the Appeal Division is satisfied that the appeal has no reasonable chance of success, then leave to appeal is refused (DESDA, s 58(2)).

B. *Disqualification from EI benefits*

[11] A claimant is disqualified from receiving EI benefits if they voluntarily left their employment without just cause (EIA, s 30(1)). Voluntarily leaving employment includes the refusal of employment offered as an alternative to an anticipated loss of employment (EIA, s 29(b.1)(i)).

[12] For purposes of section 30 of the EIA, just cause exists if the claimant had no reasonable alternative to leaving their employment, having regard to all the circumstances (EIA, s 29(c)), including those circumstances enumerated in subparagraphs 29(c)(i)–(xiv) of the EIA.

IV. **Decision under Review**

[13] In the Decision, the Appeal Division found that the Applicant's appeal lacked a reasonable chance of success in relation to any of the grounds for appeal falling under subsection 58(1) of the DESDA. As such, the Appeal Division refused the Applicant leave to appeal.

A. *Procedural fairness*

[14] The Applicant argued that the General Division member made several procedural errors. These included the member failing to arrive in time for the oral hearing, failing to record the hearing in its entirety, failing to ensure a full documentary record, failing to consider all the evidence in advance of the hearing, failing to let the Applicant present his case in full, and failing to accept a particular document that the Applicant provided following the hearing.

[15] In relation to many of these arguments, including the member arriving less than thirty minutes prior to the scheduled hearing time and failing to record a pre-hearing conversation, the Appeal Division found that the requirements of procedural fairness did not impose such obligations upon the member. The Appeal Division canvassed each of the Applicant's arguments surrounding the fairness of the process before the General Division and concluded that the Applicant did not have an arguable case that the General Division had made a procedural error or deprived the Applicant of natural justice.

B. *Delay*

[16] The Applicant also argued that he had been prejudiced by an unreasonable delay in the progress of his case. However, the Appeal Division noted that the Applicant's arguments focused upon delay by Service Canada (i.e., related to the process before the Commission). As the submission regarding unreasonable delay did not relate to the General Division, the Appeal Division concluded that it did not give rise to an arguable case under subsection 58(1) of the DESDA.

C. *Bias*

[17] The Applicant further argued that the General Division exhibited bias by refusing to consider important issues and relying on evidence that was false and inaccurate. The Applicant based these allegations on notes prepared by the Commission in the course of its investigation of his EI claim, which the Applicant asserted contained false information.

[18] The Appeal Division found that the General Division did not rely on these notes in arriving at its decision. Applying the test in *Committee for Justice and Liberty v National Energy Board* (1976), [1978] 1 SCR 369, 1976 CanLII 2 (SCC) [*Committee for Justice*], the Appeal Division found that there was no evidentiary support for the Applicant's allegations of bias.

D. *Factual errors*

[19] Again, in relation to the Commission's notes of its conversations with the Applicant and with his employer, he argued that the General Division overlooked or misunderstood this evidence and made factual errors by relying on false and fabricated information therein.

[20] The Appeal Division rejected these arguments, finding that the General Division did not overlook certain notes but also did not base its decision thereon. The Appeal Division also commented upon the seriousness of the Applicant's allegations of fabrication by the Commission and found that the General Division was within its rights to reject those allegations in the absence of any evidentiary support provided by the Applicant.

[21] In summary, the Appeal Division was not satisfied that the General Division had made a factual error by relying on what the Applicant considered to be false and fabricated information.

E. *Conclusion*

[22] In conclusion, the Appeal Division found that the Applicant's appeal did not have a reasonable chance of success and therefore did not grant permission to appeal.

V. **Issues and Standard of Review**

[23] The Applicant's arguments raise the following issues for the Court's determination:

A. Did the Appeal Division or the General Division deny the Applicant procedural fairness?

B. Has the Applicant established a reasonable apprehension of bias on the part of the Appeal Division or the General Division?

C. Is the Decision reasonable?

D. What is the appropriate relief, if any?

[24] Consistent with the articulation of the third issue above, to the extent the Applicant's arguments in this application challenge the Appeal Division's treatment of factual determinations, or otherwise relate to the merits of the Decision under review, the standard of reasonableness applies (*Cecchetto v Canada (Attorney General)*, 2023 FC 102 at paras 20–21, aff'd 2024 FCA 102, leave to appeal to SCC requested; *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at paras 16–17).

[25] In relation to the first issue, matters of procedural fairness are typically subject to the correctness standard of review (*Canadian Association of Refugee Lawyers v Canada (Immigration, Refugees and Citizenship)*, 2020 FCA 196 at para 35, leave to appeal to SCC refused, 39522 (5 August 2021)). Put otherwise, the Court is required to assess whether the procedure followed was fair having regard to all the circumstances (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54).

[26] However, to the extent the Applicant is challenging findings by the Appeal Division as to whether the General Division afforded the Applicant the requisite procedural fairness, the applicable standard of review does not appear to be settled (see, e.g., *Papouchine v Canada (Attorney General)*, 2018 FC 1138 [*Papouchine*] at paras 15–20). The Respondent takes the position that the reasonableness standard applies. This position is consistent with *Milner v Canada (Attorney General)*, 2024 FCA 4 at paragraph 24. On the other hand, *Sjogren v Canada (Attorney General)*, 2019 FCA 157 adopted the standard of correctness at paragraphs 5–7, 10.

[27] Regarding the second issue identified above, to the extent the Applicant is arguing that the Appeal Division erred in assessing his allegation of a reasonable apprehension of bias on the part of the General Division, arguably the same uncertainty arises as to the applicable standard of review, as an allegation of bias can be characterized as a matter of procedural fairness (*Benga Mining Limited v Canada (Environment and Climate Change)*, 2024 FC 231 at para 137, citing *Baker v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 [*Baker*] at para 45 (SCC))

[28] However, as was the case in *Papouchine* (see para 20), it is not necessary for the Court to resolve this uncertainty as to the standard of review applicable to the allegations of bias and other procedural fairness arguments. As will be explained later in these Reasons, either standard of review produces the same result in the case at hand.

VI. **Analysis**

A. *Preliminary Issue*

[29] Before turning to the substantive issues in this application, I wish to note that, at the hearing of this application, the Applicant referenced a letter to the Respondent dated and filed on October 25, 2024, which served his Requisition for Hearing but also referred to his intention to file a motion under Rule 317 of the *Federal Courts Rules*, SOR/98-106 [*Rules*] to request an order from the Court requiring the Respondent to provide categories of materials in their possession. Indeed, the Applicant's letter requested that the Court issue such an order.

[30] The Applicant's letter does not represent a properly constituted motion, and it does not appear from the Court file that the Applicant pursued the filing of a motion in a manner contemplated by the *Rules*. Moreover, the categories of material referenced in the Applicant's letter are described as being in the possession of the agents of Service Canada or in the possession of the Applicant's employer. Rule 317 applies to material that is in the possession of a tribunal whose order is the subject of the application.

[31] The record before the Court in this matter includes a Certified Tribunal Record [CTR] filed by the SST on August 8, 2024, a supplementary CTR filed by the SST on August 14, 2024, and an affidavit affirmed by a paralegal with the Legal Services Unit of the Department of Employment and Social Development Canada on September 11, 2024, which attaches copies of the documents that formed the appeal records before the General Division and the Appeal

Division. I am therefore satisfied that the Court has been presented with the appropriate record on which to base its consideration of this application for judicial review.

B. *Did the Appeal Division or the General Division deny the Applicant procedural fairness?*

[32] The Applicant asserts that he was deprived of procedural fairness by both the General Division and the Appeal Division. However, his arguments relate principally to the process before the General Division and how those arguments were addressed by the Appeal Division. As previously noted, the Applicant submitted that the General Division member breached procedural fairness by failing to arrive in time for the oral hearing, failing to record the hearing in its entirety, failing to ensure a full documentary record, failing to consider all the evidence in advance of the hearing, failing to let the Applicant present his case in full, and failing to accept a particular document that the Applicant provided following the hearing.

[33] At the hearing of this application, the Applicant emphasized in particular his argument that the General Division member failed to review all the evidence before the hearing. He cited the example of the member having to ask him at the hearing the name of his supervisor, even though that name was in the file.

[34] However, the Appeal Division considered this argument but observed that the fact that the member did not remember every detail of the file did not mean that they had not reviewed the file in advance of the hearing. The Appeal Division referenced portions of the hearing that demonstrated the member had reviewed the file and was familiar with the issues and facts. The Appeal Division also commented that, even if the member had not read any portion of or all the

file materials before the hearing, that would not result in a breach of the principles of natural justice. Rather, what is important is that the member was familiar with all the material evidence and the parties' arguments when making the decision.

[35] Other than being dissatisfied with the Appeal Division's rejection of his argument, the Applicant has not identified a basis for the Court to conclude that this portion of the Decision is either unreasonable or incorrect. As contemplated by *Vavilov*, it is intelligible and therefore withstands reasonableness review. I also agree with the Appeal Division's analysis that the Applicant's argument does not identify a lack of fairness in the General Division's process.

[36] The Applicant also referenced his argument before the General Division that the member would not allow him at the oral hearing to go through all the facts and evidence in his written submissions. The Appeal Division found that the evidence did not support this argument. Rather, the General Division had asked questions inviting further oral submissions, and the Applicant responded that he would not have anything to say if the member was going to read everything in his written submissions. Moreover, the Appeal Division commented that it was unnecessary for the Applicant to read his written submissions in their entirety, as the member had access to the document and could review it after the hearing.

[37] Again, the Applicant has not identified any reviewable error in the Decision. The Appeal Division's analysis is intelligible, and I agree that there was nothing unfair in the General Division making its decision without the Applicant reading the entirety of his written submissions at the hearing.

[38] For the sake of good order, I note that I have considered the Appeal Division's analysis and conclusions with respect to each of the alleged breaches of procedural fairness by the General Division. In each case, I find the analysis both reasonable and correct.

[39] Finally, the Applicant asserts that the Appeal Division itself breached procedural fairness through an unreasonable delay in making the Decision. He submits that over 110 days elapsed between the filing of his appeal and the release of the Decision. In support of his argument, the Applicant references an extract from the SST website, which describes the Appeal Division's service standards as including issuance of a decision on permission to appeal within 45 days from the filing of the appeal.

[40] However, the Applicant has not identified any prejudice or other unfairness to which he was subjected as a result of the timing of the Decision. Moreover, I note that the relevant extract refers to issuing a decision within this timeframe 80% of the time. Particularly in light of this qualification in the service standard, and as the Applicant has not cited any statutory basis for the Appeal Division to be legally committed to rendering its decisions within a particular period, I agree with the Respondent's position that the Applicant's argument does not support a finding of reviewable error on the part of the Appeal Division.

C. *Has the Applicant established a reasonable apprehension of bias on the part of the Appeal Division or the General Division?*

[41] While the Applicant asserts bias by both the Appeal Division and the General Division, his submissions focus upon the Appeal Division's consideration of his arguments that the General Division demonstrated bias by relying on what he characterizes as false information.

[42] As the Appeal Division noted in the Decision, the test for a reasonable apprehension of bias requires assessment whether a reasonable and informed person, viewing the matter realistically and practically—and having thought the matter through—would conclude that it is more likely than not that the decision-maker, whether consciously or not, would not decide the matter fairly (*Committee for Justice* at 394, as cited in *Baker* at para 46). I also agree with the Appeal Division's comments that the threshold for meeting this test is high, that allegations of bias are serious and should not be made lightly, and that an allegation of bias requires material evidence in support and cannot be made on mere suspicion, conjecture, or impression of an applicant.

[43] The Applicant argued before the Appeal Division that the General Division exhibited bias by relying on false information in the Commission's notes. The Appeal Division first considered the Commission's notes regarding unsuccessful efforts to contact the Applicant. However, the Appeal Division concluded that nothing turned on these notes, as the General Division did not rely on these notes in arriving at its decision.

[44] The Applicant also argued that the General Division erred in relying on the Commission's notes of a phone call with the Applicant's employer, in which the Commission recorded the employer's statement that it offered the Applicant another contract but he declined the offer. The Applicant submitted that this information was incomplete, as it did not capture why he refused to renew the contract. However, the Appeal Division disagreed with the Applicant's position that the information recorded was inaccurate or misleading, observing that there was no dispute that the Applicant did not renew his contract.

[45] The Applicant also made submissions on notes made by the Commission related to a call with him on September 14, 2023. He argued that the notes are inaccurate, as they record him raising concerns with his employer about working conditions only after he had already left his employment. The Applicant asserted that he raised such concerns frequently with his employer throughout the period of his employment. However, the Appeal Division observed that the General Division did not rely on the Commission's notes on this point. Rather, the General Division expressly stated that it believed the Applicant's evidence.

[46] As such, the Appeal Division found that there was no evidentiary support for the Applicant's allegation of bias on the part of the General Division.

[47] Reviewing these analyses on the reasonableness standard, they are intelligible and there is no basis for the Court to intervene. Even applying a correctness standard of review, I agree with the Appeal Division that the Applicant has simply offered no evidence consistent with a conclusion that the General Division was biased towards him. The Applicant's arguments rely on

evidence emanating from the Commission that was of no consequence to the General Division's analysis. Rather, the General Division accepted the Applicant's evidence on the facts in dispute. However, it remained undisputed that the Applicant had declined his employer's offer to renew his contract, and the General Division considered the relevant factors and concluded that the Applicant's reasons for declining to renew did not amount to just cause. As such, the Applicant's arguments do not support a finding of reviewable error, much less a finding of a reasonable apprehension of bias.

[48] Finally, to the extent that the Applicant is also alleging bias on the part of the Appeal Division (as his Memorandum of Fact and Law suggests such bias based on the Appeal Division having incorporated biased conclusions of the General Division into the Decision), this argument has no merit. Applying the standard of correctness, it is clear that the Appeal Division considered the Applicant's arguments and rejected those arguments based on sound analysis. The fact that the Appeal Division found no evidentiary support for the Applicant's allegations of bias against the General Division does not give rise to a reasonable apprehension of bias on the part of the Appeal Division.

D. *Is the Decision reasonable?*

[49] In arguing that the General Division based its decision on erroneous findings of fact, the Applicant again focused upon the Commission's notes of its phone call with him on September 14, 2023. The Applicant took issue with the General Division's conclusion that the Commission had misunderstood what the Applicant attempted to say on the phone. He argued that, if the General Division had not overlooked this document, it would have accepted that the Commission

was biased and therefore would have rejected the Commission's position that the Applicant had voluntarily left his employment without just cause.

[50] The Appeal Division concluded that while, as noted above, the General Division preferred the Applicant's evidence as to what was said during the call, the General Division also did not believe that the Commission was biased. Rather, the General Division found that the Commission simply misunderstood the Applicant. The Appeal Division was not satisfied that the Applicant had an arguable case that the General Division overlooked this evidence. Moreover, the Appeal Division noted that whether or not the Commission was biased had no bearing on the issue as to whether the Applicant had just cause for having voluntarily left his employment.

[51] This aspect of the Decision is subject to the reasonableness standard of review. The Applicant disputes the Appeal Division's conclusion that bias on the part of the Commission would be irrelevant to the outcome of his application for EI benefits. Clearly, if the evidence established bias by the Commission, this would be a matter of concern. However, the General Division found no bias, and the Appeal Division found no basis to disturb that finding, as it was clear that the General Division had not overlooked the evidence upon which the Applicant based his argument. This analysis is intelligible, supported by the evidence, and therefore reasonable.

[52] The Appeal Division's further comment about the irrelevance of the issue represents an explanation that the General Division's mandate was to examine whether the Applicant had just cause to leave his employment, not to examine the Commission's conduct after the Applicant had already left his employment. While this comment is not determinative of the outcome of this

aspect of the Decision, the Applicant has provided no argument or authority that undermines the Appeal Division's logic.

[53] Finally, the Applicant argued that the General Division made factual errors by relying on the Commission's notes of the phone conversations with his employer. The Applicant again took the position that the Commission had fabricated information and those notes. The Appeal Division found it reasonable for the General Division to have rejected this allegation, as the Applicant had not adduced any credible evidence to support it.

[54] Again, the reasonableness standard of review applies. The Applicant has not pointed to any evidence overlooked by either the General Division or the Appeal Division that would support his assertion that the Commission distorted or fabricated evidence surrounding its calls with his employer. To the extent that the Applicant is relying on evidence as to the length of the phone call between the Commission and his employer, in comparison to the Commission's brief notes of that call, the General Division considered that evidence and argument and rejected it. The Appeal Division found that this conclusion was consistent the General Division's mandate to assess and weigh the evidence. Similarly, there is no basis for the Court to interfere with this aspect of the Decision.

E. *What is the appropriate relief, if any?*

[55] In summary, the Applicant has not established any reviewable error by the Appeal Division in finding that the Applicant's appeal did not have a reasonable chance of success and therefore declining to grant permission to appeal.

[56] As such, this application will be dismissed, and it is unnecessary to consider the categories of relief claimed by the Applicant.

VII. **Costs**

[57] Although the Respondent has prevailed in this application, it does not seek costs against the Applicant. My Judgment will therefore award no costs.

JUDGMENT IN T-1836-24

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is dismissed.

2. There is no order as to costs.

"Richard F. Southcott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

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