Federal Court of Appeal | Cour d'appel fédérale

Date: 20210225

Docket: A-422-19

Citation: 2021 FCA 36

[ENGLISH TRANSLATION]

CORAM: **BOIVIN J.A.**
LOCKE J.A.
LEBLANC J.A.

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

JORGE MENDOZA

Respondent

Application for judicial review decided without appearance of the parties.

Judgment delivered at Ottawa, Ontario, on February 25, 2021.

REASONS FOR JUDGMENT BY: LEBLANC J.A.

CONCURRED IN BY: BOIVIN J.A.
LOCKE J.A.

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REASONS FOR JUDGMENT

LEBLANC J.A.

[1] The Attorney General is seeking by way of judicial review to have a decision of the Appeal Division of the Social Security Tribunal (the Appeal Division), the citation of which is 2019 SST 992 and the date of which is October 8, 2019, set aside. It allowed the appeal of a decision of the Tribunal's General Division (the General Division) rendered on June 29, 2018 (reference number GE-18-431) regarding a claim for employment insurance benefits and a

renewal claim for those benefits, both filed late by the respondent in May 2016 and in October 2017, respectively. The General Division affirmed the refusal of the Canada Employment Insurance Commission (the Commission) to antedate those two claims on the ground that the respondent had not shown good cause for the delay.

[2] The Appeal Division deemed it necessary to intervene, finding that the General Division had based its decision on antedating the initial claim for benefits on an erroneous finding of fact that it made without regard for the material before it. However, it found that the General Division had not erred in affirming the Commission's refusal to antedate the respondent's renewal claim for benefits filed in October 2017, that is, more than one year after he would have been entitled to the renewal.

[3] The respondent, who was represented by counsel before both divisions of the Social Security Tribunal, did not respond to the Attorney General's application in this case, nor did he file an appearance.

[4] The facts in this case can be summarized as follows. In September 2016, the respondent lost his job after 32 years of service for the same employer. His dismissal was preceded, in February of the same year, by a one-month suspension. In May 2016, the respondent filed a claim for employment insurance benefits with the Commission in connection with that suspension. His benefit period was therefore established on May 1, 2016. On September 6 of that year, the respondent was dismissed. It was not until October 27, 2017, that he applied for renewal of his benefits, this time in connection with the dismissal. At the same time, he asked the

Commission to antedate both his initial benefits claim and his claim for renewal to February 7, 2016, and September 6, 2016, respectively.

[5] The respondent is of the opinion that he is entitled to have these benefits claims antedated because he was very emotionally affected by his suspension and dismissal, was already disputing the two decisions before a provincial authority, namely the Commission des normes, de l'équité, de la santé et de la sécurité du travail (the CNESST), and also believed, according to advice from a third party, that he was not entitled to employment insurance benefits because he had been receiving a pension for a number of years.

[6] Although it did not doubt his sincerity, the General Division, before which the respondent had the opportunity to testify, found it difficult to believe that he, even affected by his suspension, could not have taken a few minutes to file his claim for benefits within the time limit, noting in this regard that the respondent had taken the time during that same period to consult a lawyer and submit a complaint to the CNESST regarding the suspension, which he felt was unjustified. The General Division also found, on the basis of this Court's case law, that the fact that the respondent may have believed in good faith that he was not entitled to employment insurance benefits did not constitute good cause for the delay.

[7] According to the General Division, a reasonable person in the same circumstances as the respondent would have promptly, as required by the case law, sought information from the Commission or from reliable sources about his or her rights and obligations under the

employment insurance program. Satisfied that there were no exceptional circumstances that justified the respondent's inaction in this case, the General Division dismissed his appeal.

[8] As noted above, the Appeal Division intervened only in the issue of the respondent's delay in filing his initial benefits claim, being satisfied that the respondent had failed to justify his delay in filing his claim to renew his benefits in connection with his dismissal. After reiterating the facts of the case, explaining the respondent's criticisms of the General Division's decision and providing a brief overview of that decision, the Appeal Division concluded that the General Division had committed a reviewable error by failing to note that the respondent had needed help from his children to consult a lawyer and a psychologist and that his belief that he was not entitled to receive employment insurance benefits was based on more than the advice of a friend. That finding is stated in a single paragraph, at paragraph 22 of the decision.

[9] Rather than referring the case back to the General Division for reconsideration, the Appeal Division opted to "give the decision that the General Division should have given." In so doing, it reconsidered the circumstances surrounding the respondent's delay. That reconsideration and the Appeal Division's resulting conclusion are stated in two paragraphs, which read as follows:

> [31] The evidence shows that [the respondent] was emotionally affected by his suspension and that he had been able to seek help through his children. The evidence also shows that the Appellant returned to work on March 14, 2016, in a negative work environment and in a state of constant stress. He filed a complaint with the labour standards commission regarding his suspension in April 2016, and an application for benefits in May 2016.
>
> [32] The Appeal Division found that [the respondent] demonstrated that, between February 13, 2016, and May 3, 2016, he did what a reasonable and prudent person would have done in similar circumstances. He returned to work despite the constant stress and difficult environment. He accepted help to consult

> a lawyer and a psychologist. His belief that he was not entitled to benefits was only one factor. The [respondent's] psychological condition, the measures taken against him by his employer, and the negative environment on his return to work after his suspension constitute exceptional circumstances exempting him from the requirement that a claimant take reasonably prompt steps to determine their eligibility for [employment insurance] benefits.

[10] The Attorney General criticizes the Appeal Division for having disregarded the presumption that the General Division considered all of the evidence before it and for failing to explain how that presumption could be rebutted in this case. The Attorney General also criticizes the Appeal Division for having acted beyond its powers by substituting its own assessment of the evidence for that of the General Division.

[11] To intervene in this case, I must be satisfied that the Appeal Division's decision is unreasonable. To do this, I must consider both the Appeal Division's reasoning process and the outcome of its decision. To avoid a finding of unreasonableness, the decision must be based on an internally coherent and rational chain of analysis and must be justified in relation to the facts and law that constrained the Appeal Division in this case (*Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, 441 D.L.R. (4th) 1 at paragraphs 83, 85 and 99). If that analysis or justification contains serious flaws, there are grounds to intervene. In my view, that is the case here.

[12] Pursuant to subsection 26(1) of the *Employment Insurance Regulations*, SOR/96-332, a claim for employment insurance benefits must be made within three weeks after the period of unemployment for which benefits are claimed. However, subsection 10(4) of the *Employment Insurance Act*, S.C. 1996, c. 23 (the Act) allows the late filing of such a claim, with retroactive

effect, if the claimant shows that on the earlier day to which he or she is seeking to have his or her claim antedated, "the claimant qualified to receive benefits on the earlier day and that there was good cause for the delay throughout the period beginning on the earlier day and ending on the day when the initial claim was made."

[13] It is settled law that in order to be able to successfully establish "good cause" for the delay, claimants must show that they did what a reasonable person in the same situation would have done to satisfy themselves as to their rights and obligations under the Act, namely that they took "reasonably prompt steps" to determine their entitlement to benefits (*Canada (Attorney General) v. Kaler*, 2011 FCA 266, [2011] F.C.J. No. 1350 (QL/Lexis) at paragraph 4 (*Kaler*)). That obligation applies "throughout the entire period for which the antedate is required" and "imports a duty of care that is both demanding and strict" (*Kaler* at paragraph 4). It is a matter of the sound and efficient administration of the Act and the efficient processing of benefits claims, which requires the Commission "to review constantly the continuing eligibility of a claimant to whom benefits are being paid" (*Canada (Attorney General) v. Beaudin*, 2005 FCA 123, 339 N.R. 122 at paragraph 5).

[14] Moreover, according to the Court's case law, ignorance of the Act, even if coupled with good faith, is not sufficient to establish good cause for delay (*Canada (Attorney General) v. Carry*, 2005 FCA 367, 344 N.R. 142 at paragraph 5; *Kaler* at paragraph 4).

[15] Pursuant to section 58 of the *Department of Employment and Social Development Act*, S.C. 2005, c. 34, the Appeal Division has the power to intervene in a decision of the General

Division only if the General Division failed to observe a principle of natural justice, erred in law, or 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.

[16] There is no doubt that the General Division applied the proper analytical framework to the facts before it and that the Appeal Division could not intervene in this regard. Furthermore, to intervene on the grounds that the General Division failed to note that the respondent's children had helped him in finding a lawyer and a psychologist and that the respondent's belief that he was not entitled to receive employment insurance benefits was based on more than the advice of a friend, the Appeal Division had to demonstrate how that was fatal to the General Division's decision. More specifically, it had to rebut the presumption that the General Division considered all of the evidence before it (*Simpson v. Canada (Attorney General)*, 2012 FCA 82, [2012] F.C.J. No. 334 (QL/Lexis) at paragraph 10).

[17] This was not demonstrated, and what is absent from the Appeal Division's decision is how those elements were determinative. The General Division had accepted the respondent's evidence that he had been very emotionally affected by his suspension from his job. I reiterate that the General Division noted that the respondent had nevertheless been able to file a complaint with the CNESST regarding his suspension between the time of his suspension and the date on which he filed his benefits claim and that it found it difficult to understand how, under the circumstances, the respondent's emotional state could have prevented him from applying to the Commission sooner than he did. As to this apparent inconsistency, the Appeal Division was

silent, just as it was silent as to the impact that the fact that the respondent was helped by his children may have had on this finding.

[18] What is also absent from the Appeal Division's decision is how there were grounds to intervene because of the fact that the General Division had failed to consider that the respondent's belief that he was not entitled to receive employment insurance benefits was based on more than the advice of a friend. As the General Division noted, unless the respondent was exempt based on exceptional circumstances, which it did not consider to be the case in spite of his emotional difficulties, the respondent was obligated to be prompt in determining, with the Commission or reliable sources, whether he was entitled to such benefits and could not cite ignorance of the law as an excuse for having failed to do so, regardless of the cause or source of that ignorance. Once the General Division found it inconceivable that the respondent had been unable to make that determination, given that he had been able to file a complaint with the CNESST during the period in which he was allegedly very emotionally affected, the General Division's decision became difficult to challenge.

[19] In my view, the lack of explanations as to the possible impact of the two omissions for which the General Division is criticized with regard to the findings it made fatally undermines the intelligibility and transparency of the Appeal Division's decision. This is a serious flaw in the internal coherence of the Appeal Division's decision.

[20] But there is more. By stating that it was authorized to give the decision that the General Division should have given, the Appeal Division indirectly did what it was not directly permitted

to do in this case, which was to reassess the case on the merits and substitute its own findings for those of the General Division. In a case like this one, where the dispute essentially concerns the application of a well-established legal analytical framework to the facts before the General Division, the Appeal Division, as the Attorney General correctly argues, could not assume such a role without acting beyond its powers and thereby committing a second reviewable error (*Cameron v. Canada (Attorney General)*, 2018 FCA 100, [2018] F.C.J. No. 582 (QL/Lexis) at paragraph 6).

[21] For all of these reasons, I would allow this application for judicial review and set aside the Appeal Division's decision. I would do this without costs because the Attorney General is not seeking costs. Furthermore, I, being satisfied that there were no grounds to intervene in the General Division's decision, and given that the respondent failed to appear in this proceeding, find that the appropriate remedy under the circumstances would be to render the decision that the Appeal Division should have rendered and thus dismiss the appeal from the General Division's decision.

"René LeBlanc"

J.A.

"I agree.
Richard Boivin J.A."

"I agree.
George R. Locke J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-422-19
STYLE OF CAUSE:	ATTORNEY GENERAL OF CANADA v. JORGE MENDOZA

APPLICATION FOR JUDICIAL REVIEW DECIDED WITHOUT APPEARANCE OF THE PARTIES

REASONS FOR JUDGMENT BY:	LEBLANC J.A.
CONCURRED IN BY:	BOIVIN J.A. LOCKE J.A.
DATED:	FEBRUARY 25, 2021

WRITTEN REPRESENTATIONS BY:

Marcus Dirnberger	FOR THE APPLICANT

SOLICITORS OF RECORD:

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