Federal Court Cour fédérale

Date: 20250220

Docket: T-921-24

Citation: 2025 FC 328

Vancouver, British Columbia, February 20, 2025

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

DMYTRO PONOMAROV

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Dmytro Ponomarov, seeks judicial review of a March 26, 2024, decision by the Social Security Tribunal Appeal Division [Appeal Division] denying leave to appeal a General Division [General Division] decision. The General Division found that the Applicant voluntarily left his employment without just cause, and upheld, albeit on a different ground, the decision of the Canada Employment Insurance Commission [Commission] to deny him employment insurance [EI] benefits.

I. Facts

[2] The Applicant worked as a Financial Officer for the Ministry of Children and Family Development of British Columbia. His employer was the BC Public Service Agency [the Employer], and he was represented by the BC Government and Service Employees' Union.

[3] On October 5, 2021, in response to the COVID-19 pandemic, the Employer introduced the COVID-19 vaccination policy [Policy], which required all employees to provide proof of vaccination by November 22, 2021. Non-compliant employees would face a three-month unpaid leave, followed by termination.

[4] The Applicant was on sick leave from November 9, 2021until May 9, 2022, when the Policy was implemented. The Applicant refused to comply with the Policy on the basis that it was not in place when he was hired and was not part of his collective agreement. Upon his planned return to work, the Applicant did not provide proof of vaccination or seek medical or religious accommodation.

[5] On May 5, 2022, during a Skype call, the Applicant informed his manager that while he respected the Employer's right to implement workplace policies, he could not accept this change in employment requirements. On May 6, 2022, the Employer informed the Applicant he would be placed on three months' unpaid leave. The Applicant responded the same day by email, stating he would not accept the unpaid leave and requested a "clear Letter of Termination."

[6] On May 9, 2022, the Employer placed the Applicant on unpaid leave and terminated his benefits. After 4.5 months without pay, the Applicant's employment was formally terminated on September 22, 2022. On December 5, 2022, the Applicant submitted a formal EI application, explicitly alleging constructive dismissal.

[7] On February 3, 2023, the Commission spoke with the Employer but did not contact the Applicant directly. The Commission denied benefits on February 22, 2023, finding the Applicant was terminated for misconduct related to his non-compliance with the Policy. This decision was upheld on reconsideration on April 27, 2023.

[8] The Applicant appealed to the General Division. During the hearing on September 20, 2023, the General Division Member advised the Applicant that she was making a finding of voluntary departure rather than misconduct. The General Division's decision of October 27, 2023, found that the Applicant had voluntarily left his employment without just cause. The Applicant then sought leave to appeal, arguing that the General Division erred in its finding of voluntary departure and improperly converted a misconduct-based denial into a voluntary departure determination.

II. Decision Below

[9] On March 26, 2024, the Appeal Division denied leave, concluding that there was no reasonable chance of success on any ground of appeal pursuant to section 58 of the *Department of Employment and Social Development Act*, SC 2005, c 34 [*DESDA*]. The Appeal Division emphasized that its role was not to reassess the evidence but to identify reviewable errors on three very limited statutory grounds, of which it found none.

[10] First, on the issue of the General Division's conversion of misconduct finding to voluntary departure, the Appeal Division found no error. It determined that, under subsection 30(1) of the *Employment Insurance Act*, SC 1996, c 23 [*EIA*], disqualification from benefits may be based on either misconduct or voluntary departure. As a result, the General Division was within its jurisdiction to fully examine the circumstances of the case, rather than being constrained by the Commission's initial characterization of the employment termination. The Appeal Division supported its reasoning by citing established case law, which confirms that tribunals are not bound by the Commission's characterization of how an employment relationship ended.

[11] Second, regarding the General Division's finding of voluntary departure, the Appeal Division found no reviewable error in the General Division's assessment of the evidence. It noted that the General Division properly relied on specific documentary evidence, including the Applicant's request during a Skype call to terminate his employment, a follow-up email exchange where the Applicant refused leave without pay and acknowledged the letter sent by the Employer as a "Letter of Termination." He made it clear that it was his expressed intention not to return to the workplace after sick leave due to the Policy.

[12] Third, although the Applicant did not raise procedural fairness concerns, the Appeal Division nevertheless reviewed the record for any potential procedural fairness violations. It found no evidence of procedural unfairness based on the record.

[13] Ultimately, the Appeal Division concluded that the appeal had no reasonable chance of success. It determined that the General Division had properly considered the evidence and

arguments, acted within its jurisdiction in characterizing the nature of the employment termination, breached no procedural fairness, and made no legal errors. It explained that the Applicant was, in effect, asking it to reassess the evidence to reach a different conclusion, which fell outside of its jurisdiction.

III. Issue

[14] At issues on this judicial review is whether the Appeal Division reasonably concluded that the Applicant's proposed appeal had no reasonable chance of success pursuant to section 58 of the *DESDA*. The Applicant has raised many concerns about the overall decision-making process, which, when examined specifically in relation to the Appeal Division's decision to deny leave, can be distilled into three key issues:

1) Whether the Appeal Division failed to recognize that the General Division exceeded its jurisdiction by converting a misconduct-based denial into a voluntary departure one;
2) Whether the Appeal Division erred in concluding that the General Division properly determined the Applicant's communications constituted voluntary departure rather than an attempt to negotiate termination terms; and
3) Whether the Appeal Division failed to properly assess whether the Commission and General Division adequately analyzed the evidence of constructive dismissal.

[15] The Applicant also alleges breaches of procedural fairness, specifically regarding the Commission's failure to consider evidence of constructive dismissal and the General Division's shift from a misconduct-based analysis to one of voluntary departure. However, these arguments

relate to how the Appeal Division assessed procedural fairness issues arising from the Commission's and General Division's decisions, not to any procedural fairness concerns of the Appeal Division's decision. Accordingly, they form no part of the reasonableness inquiry on this judicial review.

IV. Standard of Review

[16] For substantive review, the decision is reviewable on the standard of reasonableness, as articulated by the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]. Indeed, case law has established that reasonableness governs judicial review of the Appeal Division's decision denying leave to appeal: *Bhamra v Canada (Attorney General)*, 2023 FCA 121 at para 3; *Kuk v Canada (Attorney General)*, 2023 FC 1134 at para 13.

[17] Not all errors or concerns about a decision will warrant intervention. Absent exceptional circumstances, reviewing courts must not interfere with the decision maker's factual findings and cannot reweigh and reassess evidence considered by the decision-maker: *Vavilov* at para 125.

V. Legal Framework

[18] Under the *DESDA*, the Appeal Division has limited jurisdiction to interfere with the General Division's findings. Subsection 58(1) of *DESDA* clearly defines the three grounds for appellate review by the Appeal Division:

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.

[19] The law on both the first and third grounds, the two most pertinent to this judicial review, is well established. For the first ground under paragraph 58(1)(a) of *DESDA*, the jurisdiction of the General Division is defined by section 113 of the *EIA*, which grants it the authority to review appeals of reconsideration decisions made by the Commission. However, section 112.1 imposes limits on this authority, restricting the General Division's review powers to exclude decisions made by the Commission under section 56 of the *Employment Insurance Regulations*, SOR/96-332. In terms of case law, the Federal Court of Appeal has consistently held for over three decades that the General Division has jurisdiction and discretion to assess both misconduct

and voluntary departure when determining disqualification from EI benefits. These two concepts are inherently linked, as both involve situations where an employee's deliberate actions result in a loss of employment: *Canada (Attorney General) v Easson*, 1994 FCA 232 [*Easson*]; *Canada (Attorney General) v Borden*, 2004 FCA 176 [*Borden*] at para 6; *Stavropoulos v Canada (Attorney General)*, 2020 FCA 109 [*Stavropoulos*] at para 29.

[20] For the third ground under paragraph 58(1)(c), what counts as a "finding of fact… made in a perverse or capricious manner" is clearly explained by the Federal Court of Appeal in *Garvey v Canada (Attorney General)*, 2018 FCA 118 [*Garvey*] at paras 4-10. The Court of Appeal emphasized that the Appeal Division may only intervene in factual or mixed fact-and-law findings under subsection 58(1)(c) where the General Division made determinations that were unreasonable. Specifically, intervention is justified where findings "squarely contradict or are unsupported by the evidence": *Garvey* at para 6. This standard is distinct from mere disagreement with how the General Division assessed the evidence. Instead, it requires showing that the findings were fundamentally irrational or disregarded the evidentiary record. For example, the Appeal Division may intervene if the General Division "overlooked or misconstrued key evidence," as such omissions could render the decision "perverse or capricious" or indicate a failure to consider material facts: *Garvey* at paras 4 and 6. Ultimately, *Garvey* confirms that the Appeal Division's appellate authority under subsection 58(1)(c) is narrowly confined to correcting decisions that are unreasonably detached from the evidence, rather than conducting a *de novo* reassessment of how the General Division weighed facts or applied legal principles.

VI. Analysis

[21] After carefully reviewing the record and considering both the written and oral submissions of the parties, I conclude that this application must be dismissed. Although the Applicant clearly invested significant effort in researching the law and preparing his submissions, much of his oral argument is an attempt to have this Court reweigh evidence, not only from the Appeal Division but also from the General Division and even the Commission. I cannot override the factual findings made by those administrative decision-makers: *Vavilov* at para 125. Those arguments that do not invite reweighing of evidence rest on fundamental misunderstandings of the jurisprudence, the jurisdiction of the Appeal Division, and an incomplete reading of the reasons provided by both the Appeal Division and the General Division.

[22] With respect to General Division's jurisdiction under paragraph 58(1)(a), the Applicant contends that the Appeal Division erred by failing to recognize that the General Division exceeded its jurisdiction when it recharacterized a misconduct-based denial as a voluntary departure finding. He argues that the General Division was obligated to review the Commission's misconduct determination rather than independently alter the nature of the employment termination. To support his position, the Applicant asserts that the case law cited by both Divisions is distinguishable. He argues that those "cases are related to the situation where the employer and employee are stating different causes for termination of employment," whereas in his case "there exists only one cause for termination of employment, the termination by employer." During oral submissions, the Applicant further asserts that the General Division lacks jurisdiction to determine whether an employment relationship has ended.

[23] With respect, the Applicant's jurisdictional argument misinterprets the established jurisprudence governing the General Division's authority under the *EIA*. Section 64 of the *DESDA* explicitly states that the General Division, as a tribunal established by the statute, "may decide any question of law or fact that is necessary for the disposition of any application made or appeal brought under this Act." In my view, determining whether an employment relationship has ended is a question of fact that the General Division must assess to resolve the Applicant's case. Indeed, as the Federal Court of Appeal explained in paragraph 29 of *Stavropoulos*, it is "for the General Division to determine whether the matter before it concerned a dismissal for 'misconduct' or whether the applicant had voluntarily left his employment without just cause," even if they are "addressed differently under the EIA." A close examination of the relevant jurisprudence further clarifies the basis for the General Division's discretion to make factual determinations regarding employment termination.

[24] First, the Federal Court of Appeal has consistently held that "dismissal for misconduct" and "voluntary leaving without just cause" are closely linked within the statutory framework. As explained in *Easson*, although these concepts may be distinct in theory, Parliament deliberately addressed them together in the *EIA* because both involve situations where employment loss results from the employee's deliberate actions. This structure reflects Parliament's intent to exclude individuals who voluntarily leave employment or lose it due to their own actions from receiving EI benefits.

[25] Second, there are practical reasons for linking these concepts. In *Borden*, the Federal Court of Appeal recognized that employment termination cases often present evidentiary ambiguities as to whether an individual's unemployment resulted from misconduct or voluntary

departure. This is a distinction that can be particularly challenging for the Commission to assess. Therefore, by linking these concepts, Parliament has provided the Social Security Tribunal with a flexible framework to evaluate the true nature of employment termination based on the complete evidentiary record rather than being bound by the Commission's initial, and often not the clearest, characterization.

[26] Turning to the Applicant's argument regarding perverse findings of fact under paragraph 58(1)(c), he contends that the Appeal Division erred in finding no reviewable error in the General Division's conclusion that his communications amounted to voluntary departure rather than an attempt to negotiate termination terms. The Applicant points to the context of his May 5 Skype conversation and May 6 email, arguing that, when properly understood, these communications were intended to preserve his legal rights and negotiate termination terms rather than signalling any intention for resignation. He further notes that neither he nor his employer treated these communications as a resignation.

[27] I find that the Applicant has not demonstrated that the Appeal Division unreasonably evaluated the General Division's factual findings regarding voluntary departure. As I have explained in the Legal Framework section, the Federal Court of Appeal in *Garvey* has established a high threshold for the Appeal Division to intervene in factual determinations under paragraph 58(1)(c). The Applicant has not presented evidence that directly contradicts or materially undermines the General Division's chain of factual findings. The record includes the Applicant's explicit request during the May 5 Skype call to terminate employment, the May 6 email explicitly refusing leave without pay, the immediate termination of benefits, and his expressed intention not to return to work. The Applicant, therefore, has not shown to either the

Appeal Division or this Court that the General Division overlooked or misinterpreted evidence to the extent that its findings would be "perverse or capricious" as defined in *Garvey*.

[28] The Applicant's attempt to fault the Appeal Division for not entertaining his alternative characterization of these communications as mere negotiation attempts, rather than voluntary departure, misapprehends the nature of the appellate review provided by paragraph 58(1)(c). As established in *Garvey*, the Appeal Division is not required to conduct a *de novo* assessment of competing reasonable interpretations based on the facts but is limited to identifying findings that are unreasonably detached from the evidentiary record. The Applicant's submission effectively invites precisely the kind of impermissible reweighing of evidence that *Garvey* prohibits. Offering a mere alternative interpretation does not satisfy the high threshold for intervention.

[29] As for his argument regarding failure to grapple with key materials also under paragraph 58(1)(c), the Applicant submits that the Appeal Division failed to consider whether the Commission and General Division adequately analyzed evidence on constructive dismissal. He asserts that the unilateral imposition of the vaccination policy, followed by unpaid leave and the termination of benefits, constituted constructive dismissal. According to the Applicant, both levels of the Social Security Tribunal overlooked this key evidence by characterizing his response as voluntary departure rather than as a reaction to fundamental changes in employment terms.

[30] I find this argument misconstrues the relationship between the common law concept of constructive dismissal and the statutory EI regime. As the Federal Court of Appeal clarified in *Canada (Attorney General) v Peace*, 2004 FCA 56 [*Peace*] at paragraph 15, the common law

concept of constructive dismissal is not applicable to the concept of voluntarily leaving employment under the *EIA*. Hence, even if constructive dismissal were established at common law, it would not automatically justify a finding of just cause for leaving employment for EI purposes. This jurisprudential principle confirms that the Appeal Division's careful approach to the constructive dismissal allegation is entirely reasonable.

[31] As for the Applicant's arguments going to the two Divisions' assessment of the Policy, the record clearly shows that both the General Division and the Appeal Division have, contrary to the Applicant's assertion, engaged with the evidence regarding the Policy and its impact on the workplace. The two levels of decision-makers acknowledged that, while the Applicant respected the Employer's right to implement new workplace policies, the policy did not apply to him because he refused to accept it as a new condition of employment. They concluded that requesting dismissal rather than complying with a new policy was not equivalent to being pressured to quit. Moreover, the General Division referenced collective agreement provisions permitting policy changes, noting that the union recognized the Employer's authority to manage and direct employees, except where explicitly limited by the agreement.

[32] Furthermore, the Applicant's arguments risk circumventing the established principle that the Social Security Tribunal does not have jurisdiction to decide whether such policies breach employment contracts. This limitation has been repeatedly affirmed in recent jurisprudence from the Federal Courts concerning vaccination policies: *Boskovic v Canada*, 2024 FC 841 at para 57; *Khodykin v Canada (Attorney General)*, 2024 FCA 96 at para 8; *Palozzi v Canada (Attorney General)*, 2024 FCA 81 at para 6; *Lalancette v Canada (Attorney General)*, 2024 FCA 58 at

para 2; and *Zhelkov v Canada (Attorney General)*, 2023 FCA 240 at para 5. Such grievances are more appropriately pursued through wrongful dismissal claims or human rights complaints.

[33] I end by addressing the Applicant's complaints relating to procedural fairness. First, I reject the Applicant's assertion that "Tribunal AD did not address the fact that the Tribunal GD breached the duty of procedural fairness." To the contrary, the Appeal Division explicitly stated that it examined procedural fairness issues, despite none being identified by the Applicant. While its comment is brief, it is well established in administrative law that decision-makers are presumed to have considered all relevant evidence without needing to make explicit findings on every individual element: *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16. This presumption applies even more strongly when, as in this case, the Applicant did not raise procedural fairness concerns in his appeal before the Appeal Division.

[34] Upon reviewing the record, I find that the Applicant had ample opportunity to understand the case against him and to respond, which is the core requirement in evaluating procedural fairness: *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at paras 54-56. His two primary allegations of procedural fairness breaches are poorly supported by the evidence.

[35] First, at the Commission level, the Applicant contends that the Commission failed to adequately consider constructive dismissal evidence and denied him a reasonable opportunity to present his case. The record, however, demonstrates that he had multiple opportunities to do so through his initial EI application, the reconsideration process, and documentary submissions.

Furthermore, the Commission offered additional opportunities for discussion, including phone and email contact, but the Applicant remained unresponsive. Lastly, any perceived failure to consider specific evidence pertains to the reasonableness of the Appeal Division's assessment, not a procedural fairness violation. As I explained above, I have identified no such failure when reading the Appeal Division's reasons in the context of the entire record.

[36] Second, at the General Division level, the Applicant argues that the mid-hearing shift from a misconduct analysis to a voluntary departure framework deprived him of the opportunity to understand and address the case against him. This argument is unpersuasive because the General Division clearly informed the Applicant during the hearing that it would consider voluntary departure. This shift was further based on established jurisprudence permitting such recharacterization that I have discussed earlier, and the Applicant had ample opportunity to present and did present his arguments on the matter of disqualification, as reflected in both the General Division's decision and the Applicant's own submissions.

[37] Considering the Appeal Division's reasons in the context of the record, I am of the view that it independently assessed potential procedural fairness issues in the decision-making process even without the Applicant raising them, and then reached a reasonable conclusion that no such concerns exist. This conclusion is rational and defensible based on the materials available to the Appeal Division at the time of its decision.

VII. Conclusion

[38] I conclude that the Appeal Division's decision to deny leave to appeal was reasonable. When viewed holistically, the Appeal Division's reasons show a coherent analytical framework

connecting the evidence, the applicable legal principles, and its conclusion that the appeal had no reasonable chance of success. The decision reflects a rational and defensible outcome that falls within the range of reasonable outcomes contemplated by *Vavilov*.

[39] Specifically, the Appeal Division provided a rational analysis for all three critical respects: (1) it correctly applied the established jurisprudential principles from *Easson*, *Borden*, and *Stavropoulos* regarding the General Division's jurisdiction to recharacterize employment termination, recognizing the intrinsic connection between misconduct and voluntary departure within the Employment Insurance regime; (2) it properly adhered to the stringent standard in *Garvey* for reviewing factual findings, concluding that the Applicant's alternative interpretations of the evidence constituted an impermissible invitation to reweigh evidence rather than uncovering any perverse or capricious findings; and (3) it appropriately recognized, following *Peace*, that common law constructive dismissal principles cannot automatically establish just cause for leaving employment under the distinct statutory EI framework.

[40] As for the Applicant's procedural fairness arguments, the Appeal Division's assessment of those concerns allegedly arising from both the Commission and General Division levels falls well within the bounds of reasonableness. The record demonstrates multiple opportunities for the Applicant to present his case, and the General Division's shift to voluntary departure analysis was grounded in established jurisprudence, with sufficient notice given to the Applicant.

[41] Both parties indicated that they were not seeking costs and thus no cost order shall be made.

JUDGMENT in T-921-24

THIS COURT'S JUDGMENT is that this application is dismissed, and no costs are ordered.

"Russel W. Zinn"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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