Federal Court Cour fédérale

Date: 20190430

Docket: T-909-18

Citation: 2019 FC 544

Ottawa, Ontario, April 30, 2019

PRESENT: The Honourable Madam Justice Kane

BETWEEN:

HRANT (GRANT) ZADOYAN

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Mr. Hrant (Grant) Zadoyan, seeks judicial review of the decision of the Appeal Division of the Social Security Tribunal [Appeal Division], dated November 17, 2017.

[2] The Appeal Division refused leave to appeal the March 2017 decision of the General Division of the Social Security Tribunal [General Division] pursuant to section 58 of the *Department of Employment and Social Development Act,* SC 2005, c 34 [the DESDA]. The General Division had found that Mr. Zadoyan's appeal of the Canada Employment Insurance

Commission's [the Commission] decision with respect to the determination that severance pay received by Mr. Zadoyan was income that was required to be allocated against his Employment Insurance [EI] benefits had no reasonable chance of success.

I. Background

[3] The facts are not in dispute. Mr. Zadoyan applied for EI benefits in August 2014 as a result of being laid off by his employer. At the time he applied, he advised Service Canada that he had received a severance package from his employer. It appears that the Service Canada agent did not address this issue or put this information in the file for the appropriate action.
Mr. Zadoyan began to receive EI benefits on August 22, 2014. Over a year later, in September 2015, the Commission notified Mr. Zadoyan that his severance payments from his employer were earnings (i.e., income) and that such earnings must be allocated across the EI benefit payment period. The Commission advised that it had calculated this allocation and that as a result, Mr. Zadoyan had been overpaid in EI and was required to repay $11, 822.

[4] Mr. Zadoyan requested that this decision be reconsidered, noting that he had advised Service Canada of his severance package when he applied, he had provided all the necessary documents, and Service Canada had delayed in notifying him of its mistake. He also noted, as he noted before the Court, that his severance payments were largely placed directly into an RRSP and that withdrawing amounts from the RRSP would result in penalties and tax consequences. He added that if he had been advised that the severance payments would impact his EI claim, he would not have applied for EI in the first place.

[5] The Commission reconsidered the decision and reviewed the allocation of earnings. However, the decision remained the same.

[6] Mr. Zadoyan then appealed the reconsideration decision to the General Division. The General Division addressed whether the amounts received as severance were earnings and whether the earnings had been correctly allocated to the weeks of the EI benefit period. The General Division considered the relevant provisions of the *Employment Insurance Act*, SC 1996, c 23 [EI Act] and *Employment Insurance Regulations*, SOR/96-332 [Regulations], found that there had been no error and confirmed the decision of the Commission. With respect to the Applicant's submission that the mistake and the delay in discovering the mistake was the fault of the Commission, the General Division noted that there had been delays seeking information from the Applicant's employer. The General Division also noted that a decision regarding whether to write off the amount payable was not within its jurisdiction.

[7] Mr. Zadoyan appealed the General Division's decision to the Appeal Division pursuant to section 55 of the DESDA.

II. The Appeal Division Decision under Review

[8] The Appeal Division noted that an appeal is not automatic and requires leave to appeal. The Appeal Division refused to grant leave based on finding that the appeal had no reasonable chance of success.

[9] The Appeal Division noted that the DESDA provides only three narrow grounds for appeal and that none of the grounds were present.

[10] The Appeal Division addressed the Applicant's submission that the General Division misstated the fact that delays were caused by the time needed to gather information from the Applicant's employer. The Appeal Division noted that even if this was misstated, it would not have any bearing on the issues of whether the severance amounts were earnings and how these earnings should be allocated.

[11] The Appeal Division also addressed the Applicant's argument that the General Division had ignored his submissions regarding the impact of the Commission's mistake and of the requirement to repay the amount of overpayment. The Appeal Division noted that the impact may be relevant to a request for relief from payment of the debt, but was not relevant to the issues which were within the General Division's jurisdiction.

[12] The Appeal Division noted that the issue was not the fairness of the Commission's actions or the enforcement of the debt. The only issue was the allocation of the earnings across the benefit period, which was not in dispute. The Appeal Division found that there is no reasonable chance of success on appeal and refused leave to appeal.

III. The Standard of Review

[13] In *Bose v Canada (Attorney General)*, 2018 FCA 220, [2018] FCJ No 1215 (QL), the Federal Court of Appeal explained the nature of an appeal to the Appeal Division and the nature of a judicial review to the Court, stating at para 6:

> Under subsection 58(1) of the *Department of Employment and Social Development Act*, S.C. 2005, c. 34 (DESDA), the Appeal Division can only intervene in a decision of the General Division where it failed to observe a principle of natural justice, erred in law, or based its decision on an erroneous finding of fact made in a perverse or capricious manner. The role of this Court, sitting in review of a decision of the Appeal Division, is to determine whether the Appeal Division's consideration and disposition of the factors set forth in subsection 58(1) was reasonable (*Quadir v. Canada (Attorney General)*, 2018 FCA 21; *Cameron v. Canada (Attorney General)*, 2018 FCA 100 at para. 6; *Garvey v. Canada (Attorney General)*, 2018 FCA 118, at paras. 7-8).

[14] The issue in this judicial review is whether the Appeal Division's refusal to grant leave, which in effect is a dismissal of Mr. Zadoyan's appeal, is reasonable as that term has been defined in the jurisprudence.

[15] To determine whether a decision is reasonable, the Court looks for "the existence of justification, transparency and intelligibility within the decision-making process" and considers "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190).

[16] As I have noted in similar cases involving judicial review of decisions of the Social Security Tribunal, the standard of reasonableness is a legal concept which has been interpreted in the jurisprudence. It likely does not reflect what an applicant to this Court would regard as reasonable as that term is more commonly used or based on their own particular circumstances. Nor does judicial review get to the heart of the Applicant's concerns regarding why the initial error was made and why the Applicant must bear the brunt of the consequences.

IV. The Applicant's Submissions

[17] On judicial review, Mr. Zadoyan raised the issues that he had raised at the General Division and Appeal Division.

[18] Mr. Zadoyan also submits that he has never received an explanation for why the error was made by the Commission and why it took over a year for the Commission to notify him and seek repayment. He does not dispute the provisions of the EI Act and Regulations except to note that he is at a disadvantage in understanding the interplay between various provisions. He questions whether there is a limit on the time for the Commission to correct its own errors.

V. The Respondent's Submissions

[19] The Respondent submits that the Appeal Division did not err in finding that Mr. Zadoyan's appeal had no reasonable chance of success. The Respondent submits that the General Division properly dismissed Mr. Zadoyan's appeal of the decision that the severance payments were earnings and must be allocated for specific weeks of the EI benefit period. This

determination was based on the application of the EI Act and Regulations. The General Division also did not err in finding that it did not have the jurisdiction to deal with Mr. Zadoyan's request that his debt be written off.

[20] The Respondent submits that given that the General Division did not err, the Appeal Division had no basis to intervene. The Appeal Division reasonably found no errors in the General Division's decision, which applied established legal principles to the undisputed facts. In other words, the appeal did not have a reasonable chance of success.

[21] The Respondent submits that subsection 58(1) of the DESDA limits the Appeal Division's authority to intervene in a decision of the General Division and that none of the grounds for appeal set out in subsection 58(1) were present.

VI. The Appeal Division Did Not Err

[22] Subsection 58(1) of the DESDA provides:

58 (1) The only grounds of appeal are that	58 (1) Les seuls moyens d'appel sont les suivants :
(a) the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;	a) la division générale n'a pas observé un principe de justice naturelle ou a autrement excédé ou refusé d'exercer sa compétence;
(b) the General Division 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) the General Division based	c) elle a fondé sa décision sur

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.	une conclusion de fait erronée, tirée de façon abusive ou arbitraire ou sans tenir compte des éléments portés à sa connaissance.

[23] To simplify the above, the grounds of appeal are limited to: (a) a breach of procedural fairness, which focuses on the process before the decision-maker(s), such as whether an applicant had an opportunity to make submissions; (b) an error of law, such as the application of incorrect statutory provisions or principles of the jurisprudence; and (c) an error of fact, such as ignoring or misunderstanding a relevant fact.

[24] There are no allegations of any breach of procedural fairness or any errors of law, nor do any exist.

[25] In the present case, Mr. Zadoyan submits that there was some mistake regarding the facts. However, the facts that may have been misstated cannot change the finding that his severance payments were income and that according to the EI Act and Regulations, those amounts must be allocated (i.e., applied against) the EI benefits received.

[26] Although there does not appear to be any dispute about the treatment of severance payments, in *Canada (Attorney General) v Dancause*, 2010 FCA 270 at para 2, [2010] FCJ No 1273 (QL), the Federal Court of Appeal confirmed that amounts paid by an employer as severance are the earnings of the employee within the meaning of the Regulations.

[27] The Appeal Division's decision is reasonable. The Appeal Division applied the law to the facts and reached the only conclusion that was open to it.

[28] Mr. Zadoyan's concerns about the decision and its impact cannot be addressed through judicial review. While it is important, to ensure procedural fairness, that decisions of the Social Security Tribunal are subject to judicial review, the suggestion in correspondence from the Tribunal that an applicant may pursue judicial review can offer false hope for a different outcome. The Court's role on judicial review, as described above, is very limited. Where there is no error by the Appeal Division, the Court cannot do more than confirm the decision. The Court cannot change the provisions of the statute to address the circumstances of individuals.

[29] In the present case, some more informal process may have been more helpful for Mr. Zadoyan.

[30] I acknowledge Mr. Zadoyan's frustration with the situation, given that he provided accurate information to Service Canada when he made his claim for EI benefits and that he was not notified of the overpayment until more than one year had passed. It would appear to be a simple matter to provide information to EI claimants at the outset to advise them that any amounts received as severance are earnings and will have an impact on EI benefits and that overpayments will be recovered. It does not appear that this occurred; rather, Mr. Zadoyan assumed that he was entitled to the amounts received.

[31] The comment in the Appeal Division’s decision regarding the “recommendation” that relief from overpayment be considered led the Court to ask about the status of this decision. The Court was advised that relief had been granted to a small extent. This decision is not part of the current application for judicial review, and no further comment is appropriate.

JUDGMENT in T-909-18

THIS COURT'S JUDGMENT is that:

1. The Application for Judicial Review is dismissed.

2. No Costs are awarded.

"Catherine M. Kane"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-909-18
STYLE OF CAUSE:	HRANT (GRANT) ZADOYAN v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	APRIL 15, 2019
REASONS FOR JUDGMENT AND JUDGMENT:	KANE J.
DATED:	APRIL 30, 2019

APPEARANCES:

Mr. Hrant (Grant) Zadoyan	FOR THE APPLICANT
Mr. Matthew Vens	FOR THE RESPONDENT

SOLICITORS OF RECORD:

None	FOR THE APPLICANT
Attorney General of Canada Gatineau, Quebec	FOR THE RESPONDENT