Federal Court of Appeal | Cour d'appel fédérale

Date: 20200110

Docket: A-241-18

Citation: 2020 FCA 6

CORAM: **PELLETIER J.A.**
WOODS J.A.
LASKIN J.A.

BETWEEN:

MILOMIR STOJANOVIC

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Toronto, Ontario, on September 17, 2019.

Judgment delivered at Ottawa, Ontario, on January 10, 2020.

REASONS FOR JUDGMENT BY: PELLETIER J.A.

CONCURRED IN BY: WOODS J.A.
LASKIN J.A.

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REASONS FOR JUDGMENT

PELLETIER J.A.

I. Introduction

[1] This is an application for judicial review of a decision from the Appeal Division of the Social Security Tribunal, reported as *M. S. v. Canada Employment Insurance Commission*, 2018 SST 695 (Appeal Decision).

[2] After having initially established a benefit period and paid benefits to Mr. Stojanovic, the Canada Employment Insurance Commission (the Commission) reconsidered his claim pursuant to subsection 52(1) of the *Employment Insurance Act*, S.C. 1996, c. 23 (the Act) some four and one-half years after he stopped receiving benefits. This had two consequences. First, the Commission found that Mr. Stojanovic was not entitled to receive employment insurance benefits because he was considered to have worked a full working week during certain weeks of the benefit period when he was self-employed: see *Employment Insurance Regulations*, S.O.R./96-332, s. 30 (the Regulations). Second, the Commission decided that Mr. Stojanovic had knowingly made a false or misleading representation and issued a warning under subsection 41.1(1) of the Act. Mr. Stojanovic requested a reconsideration of both decisions pursuant to subsection 112(1) of the Act. The Commission reconsidered and affirmed its initial decisions.

[3] Mr. Stojanovic appealed to the Social Security Tribunal. He was successful at the General Division on both issues, but the Appeal Division allowed the Commission's appeal on grounds that the General Division erred in law and breached the parties' rights to natural justice: *Canada Employment Insurance Commission v. M. S.*, 2017 SSTADEI 270 at para. 15, 2017 CanLII 55644. The parties returned to the General Division. It upheld the Commission's decision in an unreported decision: *M. S. v. Canada Employment Insurance Commission* (7 February 2018), GE-17-2485 (Decision).

[4] The General Division found for the Commission on both issues. On the first issue, it concluded that Mr. Stojanovic was self-employed and therefore the Commission properly found that he was disentitled from receiving employment insurance benefits. On the second issue, the

General Division concluded that the warning was properly issued because Mr. Stojanovic knowingly provided false or misleading information. On appeal, the Appeal Division found no reason to interfere with the Decision. Mr. Stojanovic now applies to this Court for judicial review.

[5] For the reasons that follow, I would dismiss the application for judicial review.

II. Background

A. *Facts*

[6] Mr. Stojanovic applied for employment insurance benefits in November 2009. A benefit period was established and he received benefits until March 2011. In April 2010, he incorporated a business corporation. From April to September, he engaged in preliminary work to set up his business. By September 2010, the business was sufficiently established to issue its first invoice. The portion of the benefit period in issue is therefore from the date of incorporation in April 2010 until Mr. Stojanovic stopped receiving benefits in March 2011 (the Relevant Period).

[7] Mr. Stojanovic speaks and understands limited English. There was an interpreter present at the hearing before the General Division.

[8] During the Relevant Period, Mr. Stojanovic submitted 25 e-reports to the Commission. On each of the reports he answered “No” to the questions: “Are you self-employed?” and “Did you work or receive any earnings during the period of this report? This includes work for which

you will be paid later, unpaid work or self-employment". These responses are the basis for the Commission's finding that Mr. Stojanovic knowingly made a false representation.

[9] In early 2015, the Commission received information from the Canada Revenue Agency that Mr. Stojanovic had applied for a business registration number while he was receiving employment insurance benefits. The Commission notified Mr. Stojanovic that it was aware that he had started a business and asked him to complete a questionnaire detailing his self-employment. Mr. Stojanovic's answers showed that:

- He signed a two year lease of business premises on March 30, 2010;
- The business was incorporated on April 16, 2010;
- He owned 50% of the shares of the corporation and financed $50,000 of it from his home equity line of credit and his credit cards. He also took on a $60,000 private loan. The only other shareholder's contribution was to finance the necessary equipment;
- In 2010, he spent 1,568 hours setting up the business. His typical hours were Monday to Friday, 9 a.m. to 5 p.m., 22 days per month; and
- The business' revenue from September to the end of 2010 was $6,748.91.

[10] In October 2015, the Commission notified Mr. Stojanovic that he was not entitled to the benefits he received from April 2010 onward and, as a result, he was liable for an overpayment of $21,635. The Commission's letter also contained a warning pursuant to subsection 41.1(1) of the Act.

B. *The General Division*

[11] The General Division framed the issues before it as: (i) whether during the Relevant Period, Mr. Stojanovic failed to establish that he was unemployed under sections 9 and 11 of the Act and section 30 of the Regulations and (ii) whether the Commission properly issued a warning under subsection 41.1(1) of the Act.

[12] On the first issue, the General Division found that Mr. Stojanovic was engaged in the operation of a business, based on his ownership of a business and the activities he undertook in starting up the business. As a result, he was considered to have worked a full working week pursuant to subsection 30(1) of the Regulations each week of the Relevant Period that he was engaged in the operation of that business. The next question was whether Mr. Stojanovic could avail himself of the exception in subsection 30(2) of the Regulations:

Where a claimant is employed or engaged in the operation of a business as described in subsection (1) to such a minor extent that a person would not normally rely on that employment or engagement as a principal means of livelihood, the claimant is, in respect of that employment or engagement, not regarded as working a full working week.	Lorsque le prestataire exerce un emploi ou exploite une entreprise selon le paragraphe (1) dans une mesure si limitée que cet emploi ou cette activité ne constituerait pas normalement le principal moyen de subsistance d'une personne, il n'est pas considéré, à l'égard de cet emploi ou de cette activité, comme ayant effectué une semaine entière de travail.

[13] In order to decide if Mr. Stojanovic's engagement in his business came within the exception, the General Division turned to the factors enumerated in subsection 30(3) of the Regulations:

The circumstances to be considered in	Les circonstances qui permettent de

determining whether the claimant's employment or engagement in the operation of a business is of the minor extent described in subsection (2) are	déterminer si le prestataire exerce un emploi ou exploite une entreprise dans la mesure décrite au paragraphe (2) sont les suivantes :
(a) the time spent;	a) le temps qu'il y consacre;
(b) the nature and amount of the capital and resources invested;	b) la nature et le montant du capital et des autres ressources investis;
(c) the financial success or failure of the employment or business;	c) la réussite ou l'échec financiers de l'emploi ou de l'entreprise;
(d) the continuity of the employment or business;	d) le maintien de l'emploi ou de l'entreprise;
(e) the nature of the employment or business; and	e) la nature de l'emploi ou de l'entreprise;
(f) the claimant's intention and willingness to seek and immediately accept alternate employment.	f) l'intention et la volonté du prestataire de chercher et d'accepter sans tarder un autre emploi.

[14] The General Division examined the facts relevant to each factor.

Paragraph 30(3)(a) – Time spent

[15] The General Division found that Mr. Stojanovic spent a significant amount of time setting up the business but that he spent as much time looking for work. However, it found that the time spent looking for work did not minimize the significance of the time spent setting up the business.

Paragraph 30(3)(b) – Nature and amount of invested capital and resources

[16] The nature and amount of capital invested were found to be significant because of the liabilities which Mr. Stojanovic took on to start the business. This factor, too, weighed against a conclusion that Mr. Stojanovic was engaged in the business to a minor extent.

Paragraph 30(3)(c) – Financial success or failure of the business

[17] When considering the financial success or failure of the business, the General Division accepted Mr. Stojanovic's submission that the business generated little to no net income during the Relevant Period. It also noted that Mr. Stojanovic considered the business to be successful since it had been open for five years and that he considered it to be his principal means of livelihood.

Paragraph 30(3)(d) – Continuity of the business

[18] The General Division found that the business continued to operate until it became Mr. Stojanovic's principal means of livelihood. The General Division found that he made a continuous effort to advance the business from the time he signed the lease. This finding, then, weighed against a conclusion that Mr. Stojanovic was engaged in a business to a minor extent.

Paragraph 30(3)(e) – Nature of the business

[19] The General Division found that the nature of the business was within Mr. Stojanovic's area of expertise and that he had a strong desire to stay in his specialized industry.

Paragraph 30(3)(f) – Intention and willingness to seek and accept alternate employment

[20] The General Division accepted Mr. Stojanovic's submissions that the machines involved in his business operate unsupervised for 12 to 14 hours at a time, and that his intention was to find full-time employment and, for a time, operate his business on a part-time basis.

[21] The General Division concluded that Mr. Stojanovic had not rebutted the presumption that he worked a full working week during each week of the Relevant Period. It found that he was not engaged in the business to such a minor extent that a person would not normally rely on that employment or engagement as a principal means of livelihood as provided in subsection 30(2) of the Regulations. The General Division noted, in particular, the substantial amount of time spent and capital invested in the business. Therefore, the Commission's conclusion as to Mr. Stojanovic's disentitlement was upheld.

[22] The General Division then turned to the second issue: whether the Commission properly issued a warning. Subsection 41.1(1) of the Act empowers the Commission to issue a warning for conduct described in subsection 38(1), reproduced below:

The Commission may impose on a claimant, or any other person acting for a claimant, a penalty for each of the following acts or omissions if the Commission becomes aware of facts that in its opinion establish that the claimant or other person has	Lorsqu'elle prend connaissance de faits qui, à son avis, démontrent que le prestataire ou une personne agissant pour son compte a perpétré l'un des actes délictueux suivants, la Commission peut lui infliger une pénalité pour chacun de ces actes :
[…]	[…]
(b) being required under this Act or the regulations to provide	b) étant requis en vertu de la présente loi ou des règlements de fournir des

information, provided information or made a representation that the claimant or other person knew was false or misleading;	renseignements, faire une déclaration ou fournir un renseignement qu'on sait être faux ou trompeurs;

[23] The General Division noted this Court's jurisprudence according to which the question of whether an applicant subjectively knew that a statement was false or misleading is determined on a balance of probabilities. The General Division then turned to the e-reports on which Mr. Stojanovic responded "No" to the questions about work and self-employment. Despite Mr. Stojanovic's evidence that he did not consider himself to be self-employed, the General Division found that he knew subjectively that he was self-employed based on his acknowledgement in earlier proceedings that he decided to start a business and his investment of time and money in setting up his business. As a result, he must also have subjectively known that the information he provided was false and misleading.

[24] Finally, the General Division turned to the Commission's exercise of discretion in issuing a warning. It noted that the Commission took Mr. Stojanovic's poor command of English into account but noted that he reported that he did not work during the relevant period which, as noted above, he subjectively knew was false. However, since this was a first misrepresentation, and accepting Mr. Stojanovic's limited English as a mitigating factor, the Commission decided to issue a warning. The General Division found that the Commission had considered all the relevant factors so that there was no reason to intervene.

C. *The Appeal Division*

[25] The grounds upon which the Appeal Division can review decisions of the General Division are set out in subsection 58(1) of the *Department of Employment and Social Development Act*, S.C. 2005, c. 34 (*DESDA*):

The only grounds of appeal are that	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 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.

[26] The Appeal Division found that on both issues the Decision was free of any of the errors specified in subsection 58(1) of the *DESDA*.

[27] At paragraphs 13 to 28 of its decision, the Appeal Division considered the General Division's analysis of the subsection 30(3) factors to be taken into account in determining whether a claimant's employment or engagement in the operation of a business is of such a minor extent that a person would not normally rely on that employment or engagement as a principal means of livelihood. Relying on this Court's jurisprudence, the Appeal Division noted

that no one factor is decisive and that each case must be decided on its own merits. It commented that while the time spent in seeking employment is an important consideration in determining whether a claimant's engagement in a business is minor in extent, it is not an overriding element any more than the time spent on the business or the failure of the business to generate sufficient income.

[28] After having summarized the General Division's analysis of each factor in turn, the Appeal Division then quoted the General Division's conclusion as to the extent of Mr. Stojanovic's engagement in his business, which I reproduce below:

> Based on the findings concerning the six circumstances referred to in subsection 30(3) of the Regulations, the Tribunal finds that the [Claimant] has not rebutted the presumption that he was working full working weeks, pursuant to subsection 30(1) of the Regulations. The Tribunal does not find that the [Claimant] has demonstrated, based on his involvement and efforts in the set-up and operation of his business, that his engagement was to such a minor extent that a person would not normally rely on that engagement as a principal means of livelihood. In coming to this conclusion, the Tribunal notes in particular the time the [Claimant] spent on the business and the investment made in it. The Tribunal commends the [Claimant] for the risk that he took to expand his employment opportunities through self-employment, in part in an attempt to minimize his receipt of employment insurance benefits. However, the Tribunal concludes that from time [*sic*] the [Claimant] signed the lease for his business on March 30, 2010, he was engaged in the operation of a business and is therefore considered to have worked full working weeks.
>
> (Appeal Decision at para. 29)

[29] The Appeal Division concluded as follows:

> Based upon the evidence, the application of the objective test contained in subsection 30(2) to the Claimant's circumstances in accordance with subsection 30(3) revealed that at least four of the relevant factors point to the conclusion that the Claimant's engagement in his business was not minor in extent after April 1, 2010.
>
> (Appeal Decision at para. 32)

[30] Accordingly, the Appeal Division found that it was not in a position to intervene as the General Division's conclusion was based on the evidence before it and that it complied with the law and the jurisprudence.

[31] On the issue of the warning issued to Mr. Stojanovic, the Appeal Division noted that the General Division had found that Mr. Stojanovic did not provide a reasonable or credible explanation for the misrepresentation as to self-employment and that the Commission had shown, on a balance of probabilities that he had the requisite degree of subjective knowledge at the time the representations were made.

[32] The Appeal Division also noted that the General Division relied on the following facts to conclude that Mr. Stojanovic had knowingly provided false or misleading information: he decided to start his own business, he invested considerable time and money to set up the business and that the business became operational during his benefit period. The Appeal Division observed that the General Division did not accept Mr. Stojanovic's explanation that he did not think he was self-employed because he was not making money from his business.

[33] As a result, the Appeal Division found that the General Division's conclusion on the issue of the warning was based on the evidence and complied with the law. Since it found that the General Division's decision on both issues before it were not based on an error of fact or law, the Appeal Division dismissed Mr. Stojanovic's appeal.

III. Standard of review

[34] On judicial review, the issue before this Court is whether the Appeal Division could reasonably conclude that the General Division did not err in law in making its decision or did not base its decision on an erroneous finding of fact: *Canada (Attorney General) v. Bellil*, 2017 FCA 104 at para. 9. It is the Appeal Division's responsibility to assess whether the General Division erred in law or in fact. It is this Court's responsibility to see if that determination is reasonable in terms of both the outcome and the process: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at para. 83 [*Vavilov*]. This approach requires this Court to assess whether the Appeal Division's determination is justified, transparent and intelligible and whether the decision falls within a range of possible, acceptable outcomes that are defensible on the facts and law: *Vavilov* at para. 86; *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 47, [2008] 1 S.C.R. 190. We should not pre-empt the Appeal Division by making our own determination of the merits of the General Division's decision and then assess the Appeal Division's determination against our own view of the matter: *Vavilov* at para. 83, *Canada (Attorney General) v. Hong*, 2017 FCA 46 at para. 4, 2017 C.L.L.C. 240-003.

[35] Keeping in mind the statutory limits on the Appeal Division's reviewing authority and given that there are no live issues of procedural fairness, the question before this Court is whether the Appeal Division's finding that the General Division did not err in law or fact within the meaning of paragraphs 58(1)(b) and (c) of the *DESDA* was reasonable.

IV. Issues

[36] The Appeal Division reviewed two decisions: the decision that Mr. Stojanovic was disentitled from receiving employment insurance benefits, and the decision to issue a warning. Therefore, the issue for this Court is whether it was reasonable for the Appeal Division to dismiss the appeals of each decision.

V. Analysis

A. *The disentitlement decision*

[37] A self-employed claimant's eligibility to receive employment insurance benefits is governed by section 30 of the Regulations. It starts with a presumption that the self-employed claimant is precluded from receiving benefits because he is considered to have worked a full working week for each week he is self-employed: Regulations, s. 30(1). The presumption can be rebutted if the claimant is engaged in the business to such a minor extent that a person would not normally rely on it as a principal means of livelihood: Regulations, s. 30(2). The degree of engagement is assessed by weighing the factors set out in subsection 30(3) of the Regulations. If the presumption is not rebutted, the claimant is ineligible for benefits.

[38] This Court has held that all the factors must be objectively considered together in order to decide if the engagement is to such a minor extent that a person would not normally rely on it as a principal means of livelihood: *Martens v. Canada (Attorney General)*, 2008 FCA 240 at para. 50.

[39] In the present case, the Appeal Division confirmed that the General Division considered all the factors. The latter accepted that Mr. Stojanovic spent as much time looking for work as he did working in the business and that he was willing to accept full-time work at any time. However, when it weighed all the factors, the General Division found that Mr. Stojanovic had not rebutted the presumption that he worked full work weeks in the Relevant Period. The Appeal Division satisfied itself that the General Division's analysis was done properly, and was free of errors of law or errors of fact. The Appeal Division's reasons are transparent and intelligible. The outcome respects the constraints imposed by the Act and the jurisprudence. Therefore, the Appeal Division's decision not to intervene was reasonable.

B. *The decision to issue a warning*

[40] The Appeal Division found that Mr. Stojanovic's explanation for his negative answers on the e-reports—that, at the time, he did not think he was self-employed—was not accepted by the General Division: Appeal Decision at para. 40. The Appeal Division considered that the General Division found that Mr. Stojanovic's explanation for his answers on the e-reports was neither reasonable nor credible. These are determinations uniquely within the General Division's mandate as the finder of fact. As a result, there was no reason for the Appeal Division to interfere with the conclusion that Mr. Stojanovic had subjective knowledge that his answers were false and that a warning was properly issued in accordance with paragraph 38(1)(b) and subsection 41.1(1) of the Act.

[41] The Appeal Division's decision was reasonable. Its reasons are intelligible and transparent and they adequately justify its conclusion. The outcome is defensible based on the law and the facts that were before the Appeal Division.

[42] I would dismiss the application for judicial review, without costs.

"J.D. Denis Pelletier"
J.A.

"I agree.
Judith Woods J.A."

"I agree.
J.B. Laskin J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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