Federal Court of Appeal | Cour d'appel fédérale

Date: 20240318

Docket: A-84-23

Citation: 2024 FCA 48

CORAM: **STRATAS J.A.**
LASKIN J.A.
ROUSSEL J.A.

BETWEEN:

GUILLEM VALLES PUIG

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Vancouver, British Columbia, on October 4, 2023.

Judgment delivered at Ottawa, Ontario, on March 18, 2024.

REASONS FOR JUDGMENT BY: ROUSSEL J.A.

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

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REASONS FOR JUDGMENT

ROUSSEL J.A.

I. Overview

[1] The applicant, Mr. Puig, seeks judicial review of a decision of the Appeal Division of the Social Security Tribunal dated February 22, 2023 (2023 SST 192).

[2] In September 2020, Mr. Puig resided in Canada as an international student registered in a one-year program. Following the advice of Service Canada agents, Mr. Puig applied for regular employment insurance (EI) benefits on October 7, 2020 after his previous employment was terminated. His application for benefits stated that he was a student and provided information about his program, including the fact that it was a full-time course, the number of days he was required to attend classes and the number of hours he spent in class. It also stated that he had not previously worked while taking a course or program (Applicant's record at 58-66).

[3] Mr. Puig also provided copies of his previous work permit valid from June 2019 to June 2020 and of his study and work permits valid from June 2020 to November 2021. His study permit allowed him to work up to 20 hours per week while in school and his work permit was restricted to working for his school in the second phase of his training (Applicant's record at 67-73). His application was approved, and Mr. Puig collected EI benefits from October 5, 2020 to February 26, 2021.

[4] On March 16 and 17, 2021, a Commission agent called Mr. Puig to discuss his studies and his entitlement to benefits. He was notified both verbally and in writing that he was disentitled from benefits from October 5, 2020 to February 26, 2021 for non-availability for work given the restrictions on his study permit, thereby creating an overpayment (Applicant's record at 74-78). Mr. Puig sought reconsideration, but the Commission upheld its decision (Applicant's record at 83-84).

[5] Mr. Puig appealed the Commission's decision to the General Division of the Social Security Tribunal. In its decision (2021 SST 792), the General Division found that Mr. Puig wanted to work and that he had made reasonable efforts to find employment, but that his study permit and course schedule unduly affected his chances of returning to the labour market. It concluded that, except for the period from December 25, 2020 to January 3, 2021, Mr. Puig was not available for work until March 1, 2021 (Applicant's record at 145-155). The General Division expressed concern about how the Commission had handled the claim, but determined that it did not have the power to assist Mr. Puig. Dissatisfied, Mr. Puig appealed the decision to the Appeal Division.

[6] The Appeal Division allowed the appeal and returned the matter to the General Division for reconsideration after finding that the General Division had not addressed the question of whether the Commission had the power to retroactively disentitle Mr. Puig and, if so, whether the Commission had acted judicially in doing so. On appeal, Mr. Puig did not dispute the General Division's decision on the issue of availability (*GP v. Canada Employment Insurance Commission*, 2021 SST 791 at para. 12).

[7] In July 2022, the General Division concluded that section 153.161 of the *Employment Insurance Act*, S.C. 1996, c. 23 (EIA) gives the Commission the authority to disentitle Mr. Puig after benefits were paid (2022 SST 872). It accepted the Commission's argument that benefits were paid on the basis of qualification and that first-time entitlement decisions were made after benefits were paid. The General Division also concluded that the Commission had exercised its discretion judicially. It held that, even though Mr. Puig provided the Commission true and

accurate information from the time he applied for benefits, once the Commission undertook to verify his entitlement to EI benefits, Mr. Puig had to prove he was capable of and available for work. The General Division found that the Commission had considered relevant factors to make its decision on availability, including details of his studies, the efforts he made to find work, and any limitations to working. It concluded that, except for the period between December 25, 2020 and January 3, 2021 and after March 1, 2021, Mr. Puig had not demonstrated his availability for work. Mr. Puig appealed a second time to the Appeal Division.

[8] On February 22, 2023, the Appeal Division found that the General Division had misinterpreted section 153.161 of the EIA when it concluded that the provision allows for a delayed entitlement decision. It found that section 153.161 gives the Commission the discretionary authority to seek verification of entitlement after an initial entitlement decision has already been made, based on statements made in the claimant's application and ongoing reports, and after benefits were paid (AD Decision at paras. 70-71, 81, 89). If verification is sought and the Commission determines that the claimant has not demonstrated their availability for work, the Commission then has the discretion to decide, under subsection 52(1) of the EIA, whether it is going to reconsider the claim. In doing so, it must exercise its discretion judicially (AD Decision at paras. 78, 88-89).

[9] The Appeal Division then considered whether the Commission had exercised its discretion judicially when it decided to verify Mr. Puig's entitlement and to reconsider his claim.

[10] The Appeal Division first noted that there was no evidence that the Commission had acted in bad faith, considered irrelevant factors or ignored relevant ones, or acted in a discriminatory manner when it decided to verify Mr. Puig's entitlement to benefits. The Commission had not previously verified his availability for work and acted on relevant information that called into question his availability, namely that he was attending non-referred training (AD Decision at para. 102).

[11] The Appeal Division then considered the Commission's exercise of discretion under section 52 of the EIA, including Mr. Puig's submissions that the Commission could not retroactively reconsider a decision about availability without new facts or information and that the Commission had ignored other relevant factors. Despite noting that Mr. Puig had honestly reported his attendance in school throughout his claim period and that his debt was created through no fault of his own, the Appeal Division held that the Commission was not bound to apply its reconsideration policy given the particular circumstances under which section 153.161 was adopted (AD Decision at paras. 107-113). The Appeal Division further noted that there was no evidence demonstrating that the Commission had acted in bad faith or for an improper purpose, adding that claimants are obligated to repay benefits to which they are not entitled. The Appeal Division indicated that reconsidering a claim where it appears that a claimant may not be entitled to benefits is a proper purpose for reconsideration. The Appeal Division concluded that the Commission had exercised its discretion judicially as it had considered all the relevant information in deciding to reconsider the claim. While sympathetic to Mr. Puig's situation, the Appeal Division dismissed the appeal.

[12] Before this Court, Mr. Puig submits that the Appeal Division unreasonably concluded that the Commission could retroactively reconsider his claim. In particular, he first challenges the Appeal Division's conclusion that the Commission does not have to follow its own reconsideration policy. Second, he argues that the Appeal Division erred in concluding that the word "verify" in subsection 153.161(2) of the EIA allows the Commission to retroactively reconsider his claim in the absence of any new information. Finally, he claims that the Appeal Division erred in finding that the Commission had not already verified his claim by interviewing him in October 2020, five months before imposing the overpayment.

[13] Mr. Puig further submits, in the alternative, that the Commission did not judicially exercise its discretion in retroactively reconsidering the claim.

II. Analysis

[14] It is important to state at the outset that the present application for judicial review was heard at the same time as two other applications raising substantially similar issues (*T-Giorgis v. Canada (Attorney General of Canada)*, 2024 FCA 47 and *Molchan v. Canada (Attorney General of Canada)*, 2024 FCA 46). The same panel of judges heard the three applications on the same day and the same counsel represented the applicants and the Attorney General of Canada. The reasons in *T-Giorgis* and *Molchan* are being issued concurrently with these reasons. Where appropriate, I will rely on those reasons.

A. *Standard of Review*

[15] The parties agree that the Appeal Division's decision is reviewable on the deferential standard of reasonableness (*Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65; *T-Giorgis* at para. 15; *Molchan* at para. 10; *Page v. Canada (Attorney General)*, 2023 FCA 169 at para. 48; *Canada (Attorney General) v. Hull*, 2022 FCA 82 at paras. 12-13; *Hillier v. Canada (Attorney General)*, 2019 FCA 44 at para. 12).

[16] The framework for determining whether a decision of the Appeal Division is reasonable is set out in *T-Giorgis* at paragraphs 16-18 and in *Molchan* at paragraphs 11-13. Generally speaking, a reasonable decision is "one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker" (*Vavilov* at para. 85).

B. *Relevant Framework*

[17] For the purposes of this application, it is not necessary to provide a full account of the relevant statutory and policy framework, as it is well set out in *T-Giorgis* at paragraphs 20-29.

C. *Reconsideration of Mr. Puig's Claim*

(1) Application of the Commission's Reconsideration Policy

[18] Mr. Puig submits that it is unreasonable to find that reconsideration occurred under section 52 of the EIA and then conclude that the policy on reconsideration does not apply. He

adds that the underlying purpose of the reconsideration policy is to prevent creating debt when the claimant has been overpaid through no fault of their own. He contends that his situation should be distinguished from the situation of claimants who were automatically transitioned from EI-ERB to regular EI benefits since the Commission had all the relevant information from the beginning of his application.

[19] I do not find this argument persuasive.

[20] The Appeal Division acknowledged that none of the factors in the Commission's policy justified reconsideration of Mr. Puig's claim. It noted that Mr. Puig had honestly reported his schooling throughout his claim and that the debt was created through no fault of his own. The Appeal Division observed, however, that the reconsideration policy was developed prior to the addition of section 153.161 to the EIA and does not provide any guidance on how section 153.161 should inform the Commission's discretion under section 52 of the EIA (AD Decision at paras. 108, 110). Noting that subsection 153.161(2) does not refer to verifying the accuracy of information, but refers rather to entitlement, the Appeal Division opined that the legislature specifically contemplated the possibility of the Commission reconsidering claims for students in non-referred training, even if accurate information was previously provided, in circumstances where verification is sought and the claimant cannot prove their entitlement. The Appeal Division concluded that the Commission was not obligated to apply the reconsideration policy where section 153.161 of the EIA was in play (AD Decision at paras. 112-113).

[21] For reasons substantially similar to those set out in *T-Giorgis* at paragraphs 53 to 59, I have not been persuaded that the conclusion of the Appeal Division is unreasonable.

(2) Absence of New Information

[22] Mr. Puig argues that section 153.161 of the EIA does not give the Commission the power to retroactively reconsider a claimant's availability absent new information. He contends that the purpose of verification is to confirm or supplement the facts and information upon which the original decision was based, not to render a second decision based on the exact same information that was originally provided.

[23] I disagree.

[24] The Appeal Division considered the text of section 153.161 of the EIA, the context in which it was adopted, and its purpose. As in *T-Giorgis*, the Appeal Division found that section 153.161 of the EIA allows the Commission to make an initial entitlement decision based on statements made by a claimant in the application for benefits and the ongoing claimant reports, but to postpone its verification of entitlement to a later date. It further found that the Commission has the discretionary authority under subsection 153.161(2) to seek verification of entitlement after benefits were paid. If verification is sought and the Commission decides that the claimant has not proven their availability, the Commission then has the discretion under section 52 of the EIA to determine whether it is going to reconsider the claim (AD Decision at paras. 71-90).

[25] The Appeal Division noted that section 153.161 does not refer to verification of the accuracy of information, but rather to verification of entitlement. This means, in the Appeal Division's view, that Parliament had specifically contemplated the possibility of the Commission reconsidering claims for students in non-referred training after benefits were paid, even if the claimant had provided accurate information (AD Decision at paras. 111-112).

[26] A comparable argument was raised and dismissed in *T-Giorgis* at paragraphs 37 to 52. I see no reason to depart from those findings.

(3) The October 2020 Call

[27] Mr. Puig submits that the Commission had already verified his claim in October 2020. He argues that an agent of Service Canada reviewed the file, called him and interviewed him at length. In his view, it would be unreasonable to suggest that the Commission reviewed his application, conducted a full investigation regarding his reasons for separation, but then failed to turn its mind to the issue of training.

[28] The Appeal Division found that there was no evidence of any discussion in that conversation regarding Mr. Puig's availability for work or that his availability had been verified in that conversation (AD Decision at paras. 106, 117).

[29] The burden of demonstrating that a decision is unreasonable is on the party challenging the decision (*Vavilov* at para. 100). Mr. Puig has not pointed to any evidence that would demonstrate that the Appeal Division's finding is unreasonable.

D. *Judicial Exercise of Discretion*

[30] Mr. Puig submits, in the alternative, that the Commission did not exercise its discretion to retroactively reconsider the claim judicially. First, he contends that the Appeal Division unreasonably concluded that the Commission exercised its discretion judicially despite finding that the law had worked a real hardship in his case. Second, he argues that the Appeal Division erred in finding that the Commission had turned its mind to the relevant factors despite maintaining throughout that it was not even exercising a discretion to reconsider. Third, he maintains that the Appeal Division unreasonably concluded that both the misinformation Mr. Puig received from Service Canada and the Commission's delay in acting on information already in its possession are irrelevant to the Commission's exercise of discretion.

[31] Regarding Mr. Puig's first argument, I agree that EI benefits are meant to protect workers from hardship when they experience involuntary loss of employment. However, I do not find that it was inconsistent for the Appeal Division to find that the law has worked a real hardship in this case and to also find that the Commission exercised its discretion judicially. The Appeal Division's statement on hardship must be interpreted in its proper context.

[32] In examining whether the Commission exercised its discretion judicially, the Commission considered Mr. Puig's arguments that he had spoken to Service Canada agents, that he understood that he could apply for benefits and that he had been approved, that he had provided all relevant information in his application, and that the Commission waited several months before acting on the information in its possession. The Appeal Division nonetheless

found that there was no evidence demonstrating that the Commission had acted in bad faith, or for an improper purpose. The Appeal Division also noted that the Commission had considered all relevant information in deciding to reconsider the claim and concluded that, since the Commission had exercised its discretion judicially, it could not intervene in that decision (AD Decision at paras. 106, 109, 114-121).

[33] The Appeal Division then recognized that Mr. Puig would be disappointed with the result, and commented on the question of hardship. It observed that "[u]nfortunately, the law has worked a real hardship in [Mr. Puig's] case… [as he] acted honestly throughout yet is now left with a substantial debt" (AD Decision at para. 122). While sympathetic to Mr. Puig's situation, the Appeal Division noted that it could not provide him with a remedy (AD Decision at para. 123).

[34] In *Molchan* at paragraphs 40-55, I examine whether the Commission was bound to consider financial hardship in the exercise of its discretion under section 52 of the EIA. While the Commission's exercise of discretion in that case was guided by the reconsideration policy, I find in *Molchan* that the Appeal Division's comments regarding the claimant's ability to seek a write-off of her debt are consistent with the legislation, which sets out a specific procedure for undue hardship cases. Subparagraph 56(1)(*f*)(ii) of the *Employment Insurance Regulations*, S.O.R./96-332 gives the Commission broad powers to write off an amount payable under section 43 of the EIA if the repayment of the amount due would result in undue hardship to the claimant. Section 43 provides that a claimant is liable to repay an amount paid by the Commission as benefits and to which the claimant was not entitled.

[35] Consequently, as the Appeal Division noted, the authority to overwrite a debt does not lie with either the General Division or the Appeal Division. That said, Mr. Puig is not left without relief. He may ask the Commission for a write-off on the basis of financial hardship and it will be for the Commission to decide if relief is appropriate.

[36] Regarding Mr. Puig's second argument, that the Commission could not exercise its discretion judicially if it did not know it was doing so, I am not persuaded that the Appeal Division committed a reviewable error. It is not inconsistent for the Appeal Division to conclude that the Commission judicially exercised a discretion that it did not know it was exercising, provided that the underlying discretionary analysis is conducted, even if it is not expressly recognized as an exercise of discretion. The Appeal Division found that there was no evidence that the Commission considered irrelevant factors, ignored relevant ones or acted in bad faith in deciding to verify Mr. Puig's entitlement to benefits. The Commission had acted on information calling into question Mr. Puig's availability, as he was attending a program to which he was not referred by the Commission.

[37] The fact that the Commission does not expressly designate this analysis as an exercise of discretion does not change the fact that this analysis addresses what a discretionary analysis would address. Thus, even if Mr. Puig is correct in stating that the Commission did not know it was exercising its discretion, it remains that he has not demonstrated that the Commission's conclusion is unreasonable.

[38] Regarding Mr. Puig's third argument, this Court found in *Canada (Attorney General) v. Buors*, 2002 FCA 372 and in *Granger v. Canada Employment and Immigration Commission*, [1986] 3 F.C. 70, 29 D.L.R. (4th) 501 (F.C.A.) (*Granger*), later upheld by the Supreme Court of Canada in *Granger v. Canada (Canada Employment and Immigration Commission)*, [1989] 1 S.C.R. 141, that a claimant cannot rely on misinformation from the Commission or its representatives that is contrary to what is prescribed by law. I dismiss a similar argument in *Molchan* at paragraphs 37-39. On the issue of the delay to verify the claim, the Commission acted within the time frame imposed under the EIA. Aside from the issue of hardship which I address above, Mr. Puig has not demonstrated why it was unreasonable for the Appeal Division to find that the delay was not a relevant factor to the Commission's exercise of discretion.

III. Conclusion

[39] To conclude, despite his counsel's able submissions, Mr. Puig has failed to persuade me that the Appeal Division's decision is unreasonable. While he may not agree with the outcome, the Appeal Division's decision is based on an internally coherent and rational chain of analysis and is justified in relation to the facts and the law it was required to apply in the circumstances (*Vavilov* at para. 85). Although I am sympathetic to Mr. Puig's unfortunate situation, I am unable to find any basis upon which to intervene.

[40] On a final note, I wish to point out that no issue was raised before this Court in relation to this Court's recent decision in *Page*, which held that full-time students are not systematically disentitled from receiving EI benefits and that a contextual analysis is required to ascertain whether the presumption of non-availability has been rebutted. As no argument was made

regarding the basis on which the Commission found that Mr. Puig was unavailable for work, these reasons should not be read as a validation of the Commission's grounds.

[41] For these reasons, I would dismiss the application for judicial review. The respondent did not seek costs and none will be awarded.

"Sylvie E. Roussel"
J.A.

"I agree.
David Stratas J.A."

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

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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