Federal Court  Cour fédérale

Date: 20190522

Docket: T-1055-18

Citation: 2019 FC 725

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Ottawa, Ontario, May 22, 2019

PRESENT: The Honourable Madam Associate Chief Justice Gagné

BETWEEN:

RÉMY DUBEAU

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Nature of the matter

[1] Rémy Dubeau is seeking judicial review of a decision by the Social Security Tribunal's Appeal Division, which refused to grant him leave to appeal the decision by the General Division, on the ground that the appeal had no reasonable chance of success.

[2] The General Division upheld a decision rendered by the Canada Employment Insurance Commission, which had denied the applicant benefits on the ground that he was dismissed for misconduct.

II. Introductory remarks

[3] On the day of the hearing, the applicant informed counsel for the respondent and the Registry of the Court that he would not be attending, even though he had been duly summoned in compliance with the *Federal Courts Rules*, SOR/98-106.

[4] Counsel for the respondent asked the Court to simply dismiss the application by default. The Court preferred to exercise the discretion it has been granted under Rule 38 and to proceed with a hearing of the case in the applicant's absence (*Canada (Citizenship and Immigration) v Hanjra*, 2018 FC 207 at para 7; *Canada (Citizenship and Immigration) v Hanjra*, 2018 FC 208 at para 15):

Absence of party	**Absence d'une partie**
38 Where a party fails to appear at a hearing, the Court may proceed in the absence of the party if the Court is satisfied that notice of the hearing was given to that party in accordance with these Rules.	**38** Lorsqu'une partie ne comparaît pas à une audience, la Cour peut procéder en son absence si elle est convaincue qu'un avis de l'audience lui a été donné en conformité avec les présentes règles.

[5] As at the date of this decision, the applicant has not contacted the Registry of the Court again. These reasons therefore take into account the parties' respective memorandums and the oral submissions of counsel for the respondent.

III. Facts

[6] From July 13, 2016, to November 28, 2016, Mr. Dubeau was employed as a maintenance worker by the Commission scolaire régionale de Sherbrooke [CSRS].

[7] The facts that led to his dismissal are relatively simple and are not in dispute.

[8] On November 18, 2016, Mr. Dubeau contacted the payroll department at CSRS to ask why his pay cheque was showing a reduced level of compensation for Labour Day and Thanksgiving. Dissatisfied with the answers that he received, he admits that he lost his temper, called the employee [TRANSLATION] "stupid" and hung up on her.

[9] On November 28, 2016, while he was starting a new assignment for the CSRS, Mr. Dubeau received a call from one of the employer's human resources representatives, who informed him that a complaint had been filed against him in connection with the events of November 18, 2016, and that she wanted to schedule a meeting with him to discuss the matter. Frustrated by the fact that a complaint had been filed against him and by the fact that he had been disturbed while he was starting a new assignment and was busy with his work, Mr. Dubeau admits that he again lost his temper, called the complainant an [TRANSLATION] "idiot" and hung up on the caller.

[10] Since the employer could no longer reach Mr. Dubeau, because he stopped answering his calls, the employer had to ask the school principal to tell Mr. Dubeau to call the human resources

representative back urgently. Mr. Dubeau told the school principal that he was not going to call back and suggested that he call 911 if there was an emergency.

[11] Mr. Dubeau was dismissed that same day for insubordination and unsatisfactory work.

[12] Based on the information obtained from Mr. Dubeau and the CSRS, the Employment Insurance Commission informed Mr. Dubeau that he was not entitled to regular employment insurance benefits because he had lost his job for misconduct.

[13] Mr. Dubeau first asked the Employment Insurance Commission to reconsider its decision, which it refused to do after receiving the additional information required from the parties.

[14] Mr. Dubeau appealed the Commission's decision before the Social Security Tribunal's General Division. He essentially explained that on November 18, 2016, he had been angered by the poor service that he had received and the lack of respect and understanding shown by employees in the payroll department. With respect to the events of November 28, he argued that his conduct should not be interpreted as misconduct because he had been working when he had received the call from human resources, that he had been frustrated to learn that a complaint had been filed against him and that he had wanted to let the dust settle before contacting human resources. He added that he had always performed his duties for the CSRS competently and that he had only received positive feedback. He reproached the CSRS for dismissing him without prior warning.

[15] The General Division essentially repeated the Commission's reasons and found that under sections 29 and 30 of the *Employment Insurance Act*, SC 1996, c 23, a person may be disqualified from benefits if the person lost the employment because of their misconduct. Misconduct is conduct that is voluntary or wilful or of such a careless or negligent nature that it appears to have been committed deliberately. There must also be a causal relationship between the misconduct and the dismissal.

[16] In this case, there are sufficient reasons to demonstrate the deliberate nature of the applicant's misconduct. Before dismissing him, the employer gave the applicant a chance to calmly provide his version of the facts, but the applicant failed to seize this opportunity. Instead, he was disrespectful and insubordinate, which resulted in the breakdown of the relationship of trust between him and the employer. Once again, his conduct was conscious, deliberate and intentional (*Forgues v Canada (Attorney General)*, 2006 FCA 120; *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36; *Canada (Attorney General) v Lemire*, 2010 FCA 314).

[17] The General Division concluded that it was Mr. Dubeau's conduct which led to his dismissal; he knew or ought to have known that his conduct was such as to impair the performance of the duties owed to his employer and that, as a result, there was a strong likelihood that he would be dismissed (*Mishibinijima* at para 14; *Canada (Attorney General) v Nolet* (March 19, 1992), Québec A-517-91 (FCA)).

[18] The employer therefore discharged its burden of demonstrating, on a preponderance of evidence, that Mr. Dubeau lost his job as a result of his own misconduct (*Canada (Minister of*

Employment and Immigration) v Bartone (January 18, 1989), Toronto A-369-88 (FCA); *Canada (Attorney General) v Davlut* (December 10, 1982), Toronto A-241-82 (FCA)).

[19] Once this has been established, the General Division need not question whether the dismissal was justified. In other words, the conduct of the employer is not at issue before the Social Security Tribunal (*Canada (Attorney General) v Marion*, 2002 FCA 185; *Canada (Attorney General) v McNamara*, 2007 FCA 107; *Fleming v Canada (Attorney General)*, 2006 FCA 16).

[20] Consequently, the General Division found that the applicant lost his employment by reason of his own misconduct.

[21] Mr. Dubeau filed an application seeking leave to appeal this decision before the Social Security Tribunal's Appeal Division. Without actually providing additional details, he reiterated that he was provoked by the employees in the payroll department, who had failed to show him respect. In his opinion, the General Division misinterpreted various aspects of his testimony.

[22] Mr. Dubeau added that he should not bear sole responsibility for his dismissal and that the General Division had erred in finding otherwise.

IV. Impugned decision

[23] The Appeal Division recalls that the only grounds for appealing a decision rendered by the General Division are (1) failure to observe a principle of natural justice or refusal to exercise

its jurisdiction; (2) an error of law; and (3) an erroneous finding of fact made in a perverse and capricious manner or without regard for the material before it. In order for leave to appeal to be granted, an applicant must raise one of these grounds and must demonstrate that the appeal has a reasonable chance of success.

[24] The Appeal Division refused to grant the applicant leave to appeal the decision rendered by the General Division on the grounds that he had merely repeated the version of facts already submitted to the General Division, that his application did not raise any serious ground for appeal and that he did not establish that his appeal had a reasonable chance of success.

V. Issues and standard of review

[25] This application for judicial review raises only one issue:

> *Did the Social Security Tribunal's Appeal Division err by refusing to grant the applicant leave to appeal the decision rendered by the General Division?*

[26] The standard of review applicable to this question is that of reasonableness (*Canada (Attorney General) v Bernier*, 2017 FC 120 at paras 7–8).

VI. Analysis

[27] First, it should be pointed out that the Court is not directly being asked to consider the merits of the appeal filed by the applicant, but the refusal of the Appeal Division to grant the applicant leave to appeal the decision of the General Division.

[28] In order for the Appeal Division to grant leave to appeal, the application must have a reasonable chance of success. A reasonable chance of success "means having some arguable ground upon which the proposed appeal might succeed" (*Osaj v Canada (Attorney General)*, 2016 FC 115 at para 12). The applicant's burden is considerably lower than on the merits.

[29] Subsections 58(1) and 58(2) of the *Department of Employment and Social Development Act*, SC 2005, c 34, set out the Appeal Division's powers of intervention for decisions rendered by the General Division.

Grounds of appeal	**Moyens d'appel**
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 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.

[30] However, in *Karadeolian v Canada (Attorney General)*, 2016 FC 615 at paragraph 10, the Honourable Mr. Justice Robert Barnes explained that the Appeal Division should not be

limited to the grounds for appeal specifically raised by a self-represented party; if the Appeal Division notes that certain evidence was overlooked by the General Division, it should grant leave to appeal.

[31] In his appeal application and letter of clarification, the applicant submits that the General Division committed an error of fact by finding him fully responsible for his misconduct. However, he does not contest the facts as set out by the General Division; instead he maintains that they did not constitute misconduct within the meaning of the *Employment Insurance Act*. Even though he does not say so in so many words, the applicant actually appears to reproach the General Division for failing to consider the employer's conduct to explain his own misconduct.

[32] First, the employer's conduct is not relevant to determine whether an applicant who is dismissed for misconduct is disqualified from receiving employment insurance benefits (*Paradis v Canada (Attorney General)*, 2016 FC 1282 at para 30-31; *Fleming* at para 10). The fact that the sanction was too severe or that the sanctions were not progressive is also not relevant.

[33] Furthermore, it is my opinion that both the General Division and the Appeal Division considered all of the evidence and arguments raised by the applicant. The General Division concluded that there was misconduct by the applicant, while the Appeal Division rightly found that the applicant's application for leave to appeal did not raise any question of law, fact or jurisdiction that could lead to the reversal of the decision rendered by the General Division.

[34] The application for leave to appeal does not raise any question of fact because the applicant does not dispute the version of facts accepted by the General Division. A broad interpretation of the application for leave to appeal might suggest that it raises a question of law; the applicant believes that the employer's conduct is relevant to determine whether his own conduct constituted misconduct. However, as mentioned earlier, this particular question of law has been definitively settled by the Federal Court of Appeal; this factor is not relevant (*Fleming* at para 10).

[35] Under section 30 of the *Employment Insurance Act*, the conduct of the beneficiary is the only relevant factor required to determine whether the beneficiary should be disqualified from receiving benefits:

Disqualification — misconduct or leaving without just cause	**Exclusion : inconduite ou départ sans justification**
30. […] claimant is disqualified from receiving any benefits if the claimant lost any employment because of their misconduct or voluntarily left any employment without just cause […]	30. […] prestataire est exclu du bénéfice des prestations s'il perd un emploi en raison de son inconduite ou s'il quitte volontairement un emploi sans justification […]

[36] Even if one accepts that the applicant's reproaches against the employer are well-founded, it is not the responsibility of Canadian taxpayers to assume the cost of wrongful conduct by an employer by way of employment insurance benefits (*McNamara* at para 23; *Paradis* at para 34).

[37] The key question is whether the employee's alleged act or omission constitutes misconduct within the meaning of the *Employment Insurance Act* (*McNamara* at paras 22–23).

[38] It has been recognized that the applicant's conduct, disrespectful remarks and insubordination can constitute misconduct (*Auclair v Canada (Attorney General)*, 2007 FCA 19 at para 3). Moreover, the applicant does not dispute the fact that he was partly responsible for the breakdown of the relationship of trust with his employer (Applicant's Memorandum, para 57). He therefore knew or ought to have known that his actions were such that they could result in his dismissal (*Mishibinijima* at para 14; *Canada (Attorney General) v Lee*, 2007 FCA 406 at para 6).

VII. Conclusion

[39] It is therefore my opinion that the Appeal Division did not err in concluding that the applicant's appeal did not raise a question of jurisdiction, fact or law with some reasonable chance of success. The application for judicial review will therefore be dismissed.

[40] Since the respondent did not request costs, none will be awarded.

JUDGMENT in T-1055-18

THIS COURT'S JUDGMENT IS that:

1. The application for judicial review is dismissed;

2. No costs are awarded.

"Jocelyne Gagné"
Associate Chief Justice

Certified true translation
This 5th day of June 2019.

Johanna Kratz, Translator

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1055-18
STYLE OF CAUSE:	RÉMY DUBEAU v ATTORNEY GENERAL OF CANADA
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