Federal Court  Cour fédérale

Date: 20200110

Docket: T-473-19

Citation: 2020 FC 30

Ottawa, Ontario, January 10, 2020

PRESENT: Madam Justice McDonald

BETWEEN:

JON ASTOLFI

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Jon Astolfi, seeks judicial review of the Social Security Tribunal – Appeal Division (AD) decision of February 14, 2019. The AD denied Mr. Astolfi leave to appeal the SST General Division (GD) finding that he was ineligible for Employment Insurance (EI) benefits due to misconduct pursuant to section 30 of the *Employment Insurance Act*, SC 1996, c 23 (the EI Act).

[2] Mr. Astolfi represented himself on this application.

[3] For the reasons that follow, I am allowing this judicial review as I have found the application of the "misconduct" test was unreasonably applied to these circumstances.

Background

[4] Mr. Astolfi was employed with Stone Creek Resorts Inc. as a Project Manager. On February 23, 2018, during a meeting with Mr. Turcotte, the President and CEO of Stone Creek Resorts, Mr. Turcotte, angrily shouted at Mr. Astolfi and pounded his fist on the table. Mr. Astolfi and Mr. Turcotte were attending this meeting in person, others participants were attending the meeting by conference call.

[5] Mr. Astolfi considered this conduct to be harassment, and following the meeting, he sent a letter to Stone Creek stating he would continue his work from "the safety of my personal place of residence… until the situation has been investigated and resolved…".

[6] During a period of imposed leave, Stone Creek advised Mr. Astolfi in telephone conversations on March 21 and 22, 2018, that if he was not physically present at the workplace the following week, he would be deemed to have abandoned his job. When Mr. Astolfi did not present himself at the workplace as directed, Stone Creek issued a dismissal letter on April 3, 2018.

[7] Following his dismissal, Mr. Astolfi applied for EI benefits. The Officer investigating his claim spoke with both Mr. Astolfi and his employer, Mr. Turcotte. Mr. Astolfi also filed documents. The Officer determined that Mr. Astolfi had voluntarily left his employment without just cause. This disqualified the Mr. Astolfi from receiving EI benefits pursuant to s. 30 of the EI Act which states:

30 (1) A 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 (1) Le 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, à moins, selon le cas

[8] Mr. Astolfi sought reconsideration. The reconsideration Officer considered the information compiled by the first Officer, and spoke to both Mr. Astolfi and Mr. Turcotte. The reconsideration Officer also found that Mr. Astolfi did not qualify for EI benefits but for different reasons. The reconsideration Officer determined that Mr. Astolfi was disqualified from EI benefits on the grounds of misconduct.

SST General Division Decision

[9] Mr. Astolfi appealed to the GD. In a decision dated December 27, 2018, the GD upheld the finding that Mr. Astolfi lost his job due to his own misconduct. The GD outlined the test for misconduct being "a willful or deliberate act that an employee knew or ought to have known would result in dismissal". In applying this test, the GD found that Mr. Astolfi was advised that if he did not attend at the workplace he would be deemed to have abandoned his job. According to the GD, Mr. Astolfi committed the "alleged offence" of not attending the workplace.

[10] Although the GD noted Mr. Astolfi's position that he did not attend the workplace due to concerns for his safety, the GD found that the test for misconduct was met and that his actions were wilful or deliberate, and he knew or ought to have known that his conduct would result in his dismissal.

SST Appeal Division Decision

[11] Mr. Astolfi appealed to the AD. In its decision of February 14, 2019, the AD determined that Mr. Astolfi's appeal had no reasonable chance of success and that he did not have an arguable case on any of the possible grounds of appeal outlined in s. 58(1) of the *Department of Employment and Social Development Act*, SC 2005, c 34 (*DESDA*).

[12] According to the AD, there was no arguable case that the GD erred in law. The AD found that the GD applied the correct legal test. The AD found that there was no arguable case that the GD based its decision on an erroneous finding of fact. Mr. Astolfi did not dispute that the employer directed him to come in to work at the office and he was warned of the consequences. The AD determined that Mr. Astolfi's disagreement with the GD finding that there was misconduct despite his belief that he was subject to harassment did not render the GD conclusion erroneous. Rather, the GD "appear[ed] to have properly understood the evidence before it" and made no finding "that ignored or misunderstood significant and relevant evidence".

[13] The AD found that Mr. Astolfi had not demonstrated that the GD failed to observe a principle of natural justice or made an error of jurisdiction.

Issues

[14] The following are the issues which arise from the positions taken by the parties:

1. Who is the proper respondent?
2. Has Mr. Astolfi filed evidence that cannot be considered on judicial review?
3. Is the decision of the AD reasonable?

Standard of Review

[15] It is settled law that the applicable standard of review when reviewing a decision of the AD to deny leave to appeal is reasonableness (*Hurtubise v Canada (Attorney General)*, 2016 FCA 147 at para 5; *Bossé v Canada (Procureur général)*, 2019 FC 137 at para 32).

[16] A reasonable decision is a decision that 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 para 47).

[17] This is affirmed by the majority in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 6 at para 99 as follows:

> "A reviewing court must develop an understanding of the decision maker's reasoning process in order to determine whether the decision as a whole is reasonable. To make this determination, the reviewing court asks whether the decision bears the hallmarks of reasonableness — justification, transparency and intelligibility — and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision: *Dunsmuir*, at paras. 47 and 74; *Catalyst*, at para. 13."

Who is the proper respondent?

[18] The Respondent asserts that the Social Security Tribunal of Canada (SST) is not a proper party pursuant to *Rule* 303(1)(a) of the *Federal Courts Rules*, SOR/98-106. They submit that the Attorney General of Canada should be named as the Respondent.

[19] Mr. Astolfi explains that he named the SST because it made the decision for which he seeks judicial review.

[20] I agree with the Respondent and would note that government departments are not legal entities and therefore should not be named as parties (*Hideq v Canada (Attorney General)*, 2017 FC 439 at para 12.)

[21] Accordingly, the style of cause shall be amended herewith to name the Attorney General of Canada as the Respondent.

Has Mr. Astolfi filed evidence that cannot be considered on judicial review?

[22] As a general rule, the evidentiary record considered by the Court on judicial review is confined to the same material that was before the administrative decision-maker (*Delios v Canada (Attorney General)*, 2015 FCA 117 at para 42).

[23] The Respondent objects to various statements and exhibits contained in the two Affidavits of Mr. Astolfi sworn on the same date. They argue that Affidavit 1 contains

information that was not before the SST. They argue that the Court should not consider Exhibits A, B, C and D to this Affidavit. With respect to Affidavit 2, the Respondent objects to Exhibit B which is a typed transcript of the oral hearing before the GD which was prepared by Mr. Astolfi.

[24] I agree with the Respondent that information not before the SST should not be considered on this judicial review. Further, the information does not meet one of the recognized exceptions to the general rule (*Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at para 20).

[25] Likewise, I also agree that the transcript prepared by Mr. Astolfi is not appropriate or necessary for the Court to consider. Having not been prepared and certified as required, the transcript does not meet the reliability requirement in order to be considered by the Court. In any event, a digital audio recording of the oral hearing itself was included in the certified tribunal record and considered by the Court.

Is the decision of the AD reasonable?

[26] Mr. Astolfi argues that the AD (as well as the GD and the EI Officers) erred in their interpretation of section 30(1) of the EI Act. He argues that he was justified in not attending at his workplace because of the harassment he experienced. He argues that the AD erred by failing to evaluate what constitutes harassment and "just cause" under the EI Act and by relying on the erroneous finding of facts of the EI officers.

[27] The purpose of the leave to appeal requirement to the AD from a decision of the GD is to eliminate appeals that have no reasonable chance of success (*Paradis v Canada (Attorney General)*, 2016 FC 1282 at para 32). Section 58 of the *DESDA* limits the AD's discretion in deciding whether to grant leave to appeal.

[28] The reason Mr. Astolfi was found to be disqualified from EI benefits, starting from the EI Commission re-determination, was not that he voluntarily left his employment without just cause, but rather that he engaged in misconduct within the meaning of the EI Act. At the GD hearing, the Member confirmed that "misconduct" was the issue for consideration.

[29] On this issue, the AD found that the GD did not make any errors on findings of fact and did not make errors by overlooking or misunderstanding key evidence. The AD states:

> [18] I have not discovered such an error. The Claimant does not dispute that the employer directed him to come in to work at the office and that he refused to work there while his employer was also at the office. There is also no dispute that the Claimant was told what the consequences would be if he disobeyed his employer's instruction.
>
> [19] The Claimant disagrees with the General Division's conclusion that his actions were still misconduct even if he believed he would be subject to harassment by his employer. However, the General Division appears to have properly understood the evidence before it, and it is not apparent that the General Division based its decision on any finding that ignored or misunderstood significant and relevant evidence…

[30] Despite this finding of the AD, upon review of the GD decision, it is clear that the GD conducted no analysis of the harassment issue raised by Mr. Astolfi. Throughout the decision, the GD acknowledges Mr. Astolfi's stated reasons for not attending the office on April 3, 2018.

For example, at para 24 the GD states: “The Appellant stated that the reason for his absence from the office environment was due to his concern for his safety. He felt that the employer was not offering him a safe work environment”. Despite noting this, the GD did not engage with or consider these concerns. Instead, the GD found at para 26: “The Tribunal does not have to determine whether the dismissal was justified or whether the penalty was justified… Tribunals have to focus on the conduct of the claimant, not the employer”.

[31] The statement that the GD had to “focus on the conduct of the claimant, not the employer” is problematic for a number of reasons. First, it is a narrow application of the legal test for misconduct and led the GD to misinterpret the case law. It is true that once employee misconduct is established, there is no obligation for the GD to question whether the dismissal was justified (*Dubeau v Canada (Attorney General)*, 2019 FC 725 at para 19). However, there is an important distinction between an employer’s conduct after alleged misconduct, and an employer’s conduct which may have led to the “misconduct” in the first place.

[32] Second, the GD relied upon *Canada (Attorney General) v Caul*, 2006 FCA 251, for the proposition that it did not need to consider the employer’s conduct. However, in *Caul* the issue was theft by the employee. In those circumstances, the FCA found that the employer’s actions after the misconduct had occurred was irrelevant to the question of whether the claimant had in fact engaged in misconduct. This case obviously involves very different circumstances.

[33] Here, according to Mr. Astolfi, his refusal to attend at the work place (the “misconduct” as found by the Commission), was a direct result of the employer’s actions before the

misconduct. Accordingly, in my view, a reasonable decision required some consideration of the employer's conduct prior to the "misconduct" in order to properly assess whether the employee's conduct was intentional or not. The GD does not make a finding that the allegations of harassment were not credible. Rather, the GD simply focused on the post-harassment misconduct, stating that the employers conduct was irrelevant. In my view, this is an error. The allegations of harassment needed to be considered in the full context, and the GD, and therefore the AD, did not undertake the necessary analysis.

[34] The AD decision in affirming the GD decision is unreasonable because it does not fall within a range of possible, acceptable outcomes, defensible on the facts and the law. The SCC reaffirms this in *Vavilov* at paras 86, as follows:

> [86] … Reasonableness, according to *Dunsmuir*, "is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process", as well as "with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *ibid.* In short, it is not enough for the outcome of a decision to be *justifiable*. Where reasons for a decision are required, the decision must also be *justified*, by way of those reasons, by the decision maker to those to whom the decision applies. While some outcomes may be so at odds with the legal and factual context that they could never be supported by intelligible and rational reasoning, an otherwise reasonable outcome also cannot stand if it was reached on an improper basis.

[35] To be reasonable, a decision must both be internally coherent and "justified in relation to the factual and legal constraints that bear on the decision" (*Vavilov* at para 99). The decision here does not meet those requirements.

Costs

[36] As noted above, Mr. Astolfi who is self-represented seeks substantial costs. In the circumstances, I award him costs in the fixed amount of $1,000.00.

JUDGMENT in T-473-19

THIS COURT'S JUDGMENT is that:

1. The Attorney General of Canada is herewith named as the Respondent.

2. This judicial review is granted and the matter is returned to the SST Appeal Division for redetermination.

3. The Applicant is entitled to costs in the fixed amount of $1,000.00.

"Ann Marie McDonald"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-473-19
STYLE OF CAUSE:	JON ASTOLFI v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	CALGARY, ALBERTA
DATE OF HEARING:	NOVEMBER 27, 2019
JUDGMENT AND REASONS:	MCDONALD J.
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APPEARANCES:

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Andrea Bailer	FOR THE RESPONDENT

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