Federal Court  Cour fédérale

Date: 20210128

Docket: T-995-19

Citation: 2021 FC 92

[ENGLISH TRANSLATION]

Ottawa, Ontario, January 28, 2021

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

SYLVAIN GAUVREAU

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] Sylvain Gauvreau is seeking judicial review of a decision of the Social Security Tribunal of Canada–Appeal Division [SST–AD] rendered on June 5, 2019. In that decision, the SST–AD refused leave to appeal before it. It must be assumed that the application for judicial review was filed pursuant to sections 18 and 18.1 of the *Federal Courts Act*, RSC 1985, c F-7.

[2] Mr. Gauvreau, who is representing himself without the assistance of counsel, contends that he should be entitled to Employment Insurance benefits since he was dismissed without just cause. The Social Security Tribunal–General Division [SST–GD] did not agree. Mr. Gauvreau sought leave to appeal but this was refused. He now wants to have this decision reviewed before this Court. As I explained at the hearing, judicial review is not an appeal where the Court can re-weigh the facts of a case. Rather, the applicant must show that the impugned decision, that of the SST–AD, was unreasonable. Mr. Gauvreau has not made such a demonstration.

I. Facts

[3] I have drawn the facts of this case from the decision of the Social Security Tribunal, General Division, Employment Insurance Section.

[4] The applicant had been working as a driver for several years. On October 12, 2018, he was dismissed for misconduct. His inappropriate behaviour towards both the employer's staff and the company's customers had been raised with him on numerous occasions, and he had been issued with both oral and written warnings.

[5] For example, on May 22, 2018, Mr. Gauvreau is said to have shouted at the dispatcher while he was at a customer's home, as a result of which he was suspended for 24 hours. On June 7, 2018, he engaged in similar behaviour towards a dispatcher, for which he was again suspended. On September 20, 2018, the applicant received a final warning for inappropriate behaviour: he had shouted at the dispatcher and a delivery person. It appears that the final warning did not have the desired effect, as on September 26, 2018, the applicant had again raised

his voice and allegedly [TRANSLATION] “disturbed the staff of one of the employer’s clients”. In fact, the client in question complained to the employer about the applicant’s behaviour at its workplace.

[6] In essence, the applicant denies the actions of which he is accused. He claims that on May 22 and June 7, 2018, he was not speaking to a dispatcher but rather to an old friend. While admitting to using vulgar language, he notes that he was speaking to his friend and not to the dispatcher. With respect to the September 26, 2018, incident, Gauvreau denies bothering staff although he admits that he unplugged keyboards from computers and wrapped employees in plastic wrap; he states, though, that this was a joke. In fact, he says he would joke around on the job at times.

II. SST–GD

[7] The SST–GD noted that the applicant made disrespectful comments on September 6, 11, and 19, 2018, and that the latter incident led to the formal warning issued on September 20, 2018. He was dismissed on October 12, 2018, because of his inappropriate behaviour a few days earlier.

[8] Despite the applicant’s denial, the SST–GD accepted that the alleged acts had been committed. In the Tribunal’s opinion, the balance of probabilities favoured the conclusion that the alleged acts had been committed. In fact, it did not consider the explanations given by the applicant to be very credible.

[9] Having accepted the alleged facts, the SST–GD had to determine whether the alleged acts amounted to misconduct. The *Employment Insurance Act* (SC 1996, c 23) [EIA], provides as follows:

Disqualification — misconduct or leaving without just cause	**Exclusion : inconduite ou départ sans justification**
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, unless	**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 :
(a) the claimant has, since losing or leaving the employment, been employed in insurable employment for the number of hours required by section 7 or 7.1 to qualify to receive benefits; or	**a)** que, depuis qu'il a perdu ou quitté cet emploi, il ait exercé un emploi assurable pendant le nombre d'heures requis, au titre de l'article 7 ou 7.1, pour recevoir des prestations de chômage;
(b) the claimant is disentitled under sections 31 to 33 in relation to the employment.	**b)** qu'il ne soit inadmissible, à l'égard de cet emploi, pour l'une des raisons prévues aux articles 31 à 33.

Under this provision, the applicant was disqualified from receiving Employment Insurance benefits.

[10] The SST–GD relied on the decisions of the Federal Court of Appeal in *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36 [*Mishibinijima*], and *Canada (Attorney General) v Lemire*, 2010 FCA 314 [*Lemire*], which discuss and define the concept of misconduct. Deliberate misconduct occurs where the person knew or ought to have known that his or her misconduct was such that it would result in dismissal. *Lemire* states that "(t)o determine whether the

misconduct could result in dismissal, there must be a causal link between the claimant's misconduct and the claimant's employment; the misconduct must therefore constitute a breach of an express or implied duty resulting from the contract of employment" (para 14).

[11] The applicant argues that misconduct could not have occurred under section 30 since an agreement was entered into between the employer and the applicant under which $4,500 were granted by the employer in exchange for his right to be reinstated. In addition, the employer provided a letter of recommendation for the applicant.

[12] However, according to the SST–GD, the Tribunal was not bound by such a transaction because it resulted from a complaint filed by the appellant (the applicant) with the Commission des normes, de la santé et de la sécurité du travail du Québec. In this regard, the SST–GD stated that it was relying on the Federal Court of Appeal's decision in *Canada (Attorney General) v Morrow*, 1999 CanLII 7550. The SST–GD clearly gave significant weight to the statements of the representative of the client that had filed the complaint with the appellant's employer. Paragraph 46 of the SST–GD's decision reads as follows:

> [TRANSLATION]
>
> [46] According to the representative, the appellant showed up at the wrong place and kept complaining to staff. Staff had difficulty answering calls because the appellant was shouting. The representative had informed the appellant that the order was ready and that he had to go to the second warehouse. The appellant had complained that it was the dispatcher's mistake and that he was being paid by the hour.

The SST–GD found that behaving in such a manner at a client's was inappropriate and that the appellant should have expected to be dismissed given the warnings he had received and his two

suspensions. According to the SST–GD, [TRANSLATION] "(i)n behaving inappropriately, despite the employer's warnings, the appellant acted with a carelessness that bordered on the deliberate" (para 47).

[13] This led to the conclusion that the Canada Employment Insurance Commission had demonstrated, on a balance of probabilities, that it was the applicant's misconduct that had led to his losing his employment. As a result, he was not entitled to the benefits sought.

III. Decision for which judicial review is sought

[14] I have attempted to describe the facts and the decision of the SST–GD in order to capture what is at issue here, given that the SST–AD did not look directly at the alleged facts and make its own assessment of them in deciding that the matter should not be appealed, thereby refusing leave to appeal.

[15] The SST–AD noted that the applicant continued to claim that he was unjustly dismissed, on the grounds that he was not vulgar and the General Division appeared to have ignored the agreement reached with his employer, which confirmed his position. The issue before the SST–AD was therefore whether a reviewable error could give an appeal a reasonable chance of success. According to the SST–AD, none of the grounds of appeal raised could give the appeal a reasonable chance of success.

[16] The grounds of appeal that may be admissible are found in section 58 of the *Department of Employment and Social Development Act* (SC 2005, c 34), and the text of this provision reads as follows:

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.
Criteria	**Critère**
(2) Leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success.	**(2)** La division d'appel rejette la demande de permission d'en appeler si elle est convaincue que l'appel n'a aucune chance raisonnable de succès.

[17] The SST–AD reaffirmed that the existence of a settlement agreement did not determine whether an employee has been dismissed for misconduct. It noted in paragraph 16 of its decision:

> [16] As the General Division noted, the agreement between the employer and the Claimant includes neither explicit nor implicit admissions that the facts in the Claimant's file were erroneous or did not correctly reflect the events as they occurred. The agreement

> does not contain any retraction from the employer regarding the events that initially led to the Claimant's dismissal.

Inappropriate and disrespectful behaviour in the workplace constitutes misconduct under the *Employment Insurance Act*. Since the applicant did not raise any issue that could lead to the setting aside of the impugned decision, leave to appeal to the Appeal Division was denied.

IV. Arguments and discussion

[18] In essence, the applicant is reiterating the same arguments before this Court that he raised before the Social Security Tribunal's General and Appeal Divisions. He claims that his dismissal cannot be attributed to his misconduct. Moreover, he alleges a conspiracy between the client and his former employer, which was motivated by a desire to obtain a client and generating additional income. He explains neither the conspiracy nor why he was a victim of it. Finally, Mr. Gauvreau argues that no one had ever complained about him in almost twenty years of service with this employer; in fact, no evidence of his alleged vulgarity was presented.

[19] The respondent notes that Mr. Gauvreau was not dismissed until October 12, 2018—more than two weeks after the September 26, 2018, incident that gave rise to the customer's complaint—because the owner of the business for which Mr. Gauvreau worked had been on vacation.

[20] The refusal to grant leave to appeal was reasonable. The standard of review in such matters is reasonableness. The application of this standard of review reveals that the applicant has not demonstrated that the SST–AD's decision was unreasonable. According to the

respondent, the notion of misconduct as defined in *Mishibinijima* (above) was the standard that had to be applied, and the SST–GD's decision was supported by the evidence. The respondent submits that the facts of this case are similar to those raised in *Canada (Attorney General) v Hastings*, 2007 FCA 372, in which the Court of Appeal determined that an employee who had hit a computer and a printer, and broadcast an offensive message from a plant's speakers, had engaged in misconduct.

[21] The settlement agreement was not disregarded, but the SST is not bound by such agreements.

[22] Finally, the respondent argues that the applicant's subjective perception is irrelevant since the employee should have known that his actions were likely to result in his dismissal, which is an objective standard (*Nelson v Canada* (*Attorney General)*, 2019 FCA 222, at para 21 [*Nelson*]). Past suspensions and warnings make it difficult to argue that the applicant's subjective perception was relevant. Unplugging computer keyboards, wrapping employees in plastic wrap, and making vulgar comments on the pretext that they were [TRANSLATION] "jokes" are examples of disrespectful or vulgar conduct.

[23] This Court cannot interfere in the decision not to grant leave to appeal since it was reasonable for the SST–AD to conclude that the appeal sought by the applicant had no reasonable chance of success.

[24] The only ground of appeal raised by the applicant could only have been the one provided for in paragraph 58(1)(b) of the *Department of Employment and Social Development Act* [the Act]. A finding of fact would have had to be erroneous, and made in a perverse or capricious manner or without regard to the material before the SST–GD, in order for leave to appeal to be viable, that is, for an appeal to have a reasonable chance of success under the Act. If the SST–AD is satisfied that an appeal has no reasonable chance of success, leave to appeal is refused. On judicial review, the reviewing court must consider the reasonableness of the decision. In keeping with this Court's case law, this is the standard of review that applies in this case (*Malonga v Canada* (*Attorney General)*, 2020 FC 913, para 10; *Marcoux v Canada (Attorney General)*, 2020 FC 609, para 10; *Astolfi v Canada (Attorney General)*, 2020 FC 30, para 15.

[25] The application of the reasonableness standard of review is important because the reviewing court can only play a limited role. As held in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], "reasonableness review finds its starting point in judicial restraint and respects the distinct role of administrative decision makers" (para 75). The party challenging the decision must show that it is unreasonable. Such a demonstration requires there to be sufficiently serious deficiencies in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency. Two types of fundamental flaws are a failure of rationality internal to the reasoning process, and where a decision is in some respect untenable in light of the relevant factual and legal constraints that bear on it (*Vavilov*, para 101).

[26] The applicant did not make this demonstration in his record before the Court. He has not discharged his burden. Paragraph 99 of *Vavilov* describes what the reviewing court must do:

> [99] 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.

[27] The Court has not found in what way the decision of the SST–AD does not bear the hallmarks of reasonableness. It does not see any erroneous finding of fact that was drawn in a perverse or capricious manner. Exercising restraint, the Court does not seek to substitute its opinion for that of the administrative tribunals on which Parliament has conferred a distinct role. If it were otherwise, the Court would proceed on the basis of the correctness standard, which would allow it to substitute its own opinion. In these types of matters, such is not the case. Rather, serious deficiencies arising from a failure of rationality internal to the reasoning process or from the decision being untenable must be shown. This was not done in this case. The Federal Court of Appeal's description of misconduct continues to be the applicable decision in these matters (*Nelson*, above, para 21; *Canada (Attorney General) v Ahmat Djalabi*, 2013 FCA 213, para 21; *Canada (Attorney General) v Doucet*, 2012 FCA 105, para 10; *Canada (Attorney General) v Bergeron*, 2011 FCA 284, para 30; *Dubeau v Canada (Attorney General)*, 2019 FC 725, para 38. As Mainville J.A. stated in *Lemire*, above, at paragraph 15:

> [15] However, this is not a question of deciding whether or not the dismissal is justified under the meaning of labour law but, rather, of determining, according to an objective assessment of the evidence, whether the misconduct was such that its author could normally foresee that it would be likely to result in his or her dismissal . . . .

[28] The administrative tribunal did what was required of it. The SST–GD examined the evidence and drew inferences. The SST–AD upheld this analysis as being neither perverse nor capricious, and the applicant failed to discharge his burden of showing that the decision was unreasonable. The allegation that there was a conspiracy between the employer and the client is implausible, and I do not see how the agreement between the applicant and his former employer could have tipped the scales in the applicant's favour, since the agreement announces:

> [TRANSLATION]
> It is the parties' desire to settle the said claim out of court, without admission or acknowledgment of liability by either party.
>
> (CTR, p 145)

There are many reasons for settling a case out of court. In this case, it was explicitly stated by the parties that neither party was conceding liability.

V. Conclusion

[29] Accordingly, the application for judicial review is dismissed. The respondent has not asked for its costs, and none will be awarded.

JUDGMENT in T-995-19

THIS COURT ORDERS as follows:

1. The application for judicial review is dismissed.

2. Without costs.

"Yvan Roy"
Judge

Certified true translation
Johanna Kratz, March 15, 2021

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-995-19
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