Federal Court  Cour fédérale

Date: 20170131

Docket: T-1184-16

Citation: 2017 FC 120

[ENGLISH TRANSLATION]

Ottawa, Ontario, January 31, 2017

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

YOLANDE BERNIER

Respondent

JUDGMENT AND REASONS

[1] The Attorney General of Canada (the applicant) is seeking a judicial review of a decision by the Social Security Tribunal's Appeal Division (SST-AD). That decision concerns the SST-AD's refusal of leave to appeal a decision rendered by the Social Security Tribunal's General Division (SST-GD). The application for judicial review is made pursuant to sections 18 and 18.1 of the *Federal Courts Act* (RSC, 1985, c F-7):

I. Legal framework

[2] First, it is important to place the remedy into its proper context. Had the SST-AD made an appeal decision on the merits of Ms. Bernier's application for employment insurance benefits, the appropriate remedy would have been before the Federal Court of Appeal, which has jurisdiction to hear applications for judicial review involving the SST-AD, except for decisions on leave to appeal. That is exactly what is at issue here. The Attorney General is seeking judicial review of the SST-AD's refusal of leave to appeal the SST-GD's decision.

[3] Section 58 of the *Department of Employment and Social Development Act* (SC 2005, c 34) stipulates that leave to appeal a decision by the SST-GD is refused if the Appeal Division is satisfied that "the appeal has no reasonable chance of success" (subsection 58(2)). The same Act also stipulates the only grounds of appeal. Subsections 58(1) and (2) read 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	**c)** elle a fondé sa décision sur une conclusion de fait erronée, tirée de façon abusive ou

a perverse or capricious manner or without regard for the material before it.	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.

[4] The SST-GD found that Ms. Bernier did not lose her employment for misconduct within the meaning of section 30 of the *Employment Insurance Act* (SC 1996, c 23). In the applicant's opinion, however, the respondent did lose her employment as a result of misconduct, which prevents her, under the *Employment Insurance Act*, from receiving employment insurance benefits. Subsection 30(1) of the Act reads 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.

. . .

[5] The SST-AD, at the leave to appeal stage, should not weigh the evidence and thus make a decision on the merits. Instead, it must be satisfied that the appeal has no reasonable chance of success, a bar that is significantly lower than establishing that the appeal should be allowed. Unless it is satisfied that no ground of appeal has a reasonable chance of success, leave to appeal should be granted.

[6] Moreover, the role of this Court is also limited. On judicial review, the Federal Court reviews only the legality of the decision rendered by the Appeal Division on leave to appeal. In other words, this Court does not generally consider the case on the merits. Under the applicable standard of review, the role of the Federal Court is to determine whether the decision under review is correct, namely with respect to procedural fairness, or reasonable, depending on the issue to be decided.

II. Standard of review

[7] In this case, the applicant agrees that the standard of review is reasonableness and not correctness, which is more favourable to applicants. Recently, my colleague Justice Richard Mosley compiled the jurisprudence of our Court to find that decisions on leave to appeal are subject to judicial review on the reasonableness standard (*Paradis v Canada (Attorney General),*

2016 FC 1282 [*Paradis*], referring to *Canada (Attorney General) v Hines*, 2016 FC 112, at paragraph 28; *Griffin v Canada (Attorney General)*, 2016 FC 874, at paragraph 13; *Canada (Attorney General) v Hoffman*, 2015 FC 1348, at paragraphs 26 and 27 and *Bergeron v Canada (Attorney General)*, 2016 FC 220, at paragraph 6).

[8] Therefore, this Court must show deference to the SST-AD's decision to refuse leave to appeal. As the Supreme Court of Canada stated in *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*], "certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions." Thus, even if this Court favoured one solution over another, it could not give preference to its solution over that of an administrative tribunal, unless it has been demonstrated that the administrative tribunal's decision is unreasonable. This reasonableness has a procedural aspect since the Court also states at paragraph 47 of *Dunsmuir* that "reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process." With respect to the quality of the decision itself, the Court teaches that the decision is reasonable if it falls within "a range of possible, acceptable outcomes which are defensible in respect of the facts and law."

[9] In this case, the Attorney General must demonstrate that it was unreasonable for the SST-AD to find that the appeal had no reasonable chance of success.

[10] A detailed account of the facts that led to Ms. Bernier's loss of employment must therefore be presented. Once those facts have been established, it will be necessary to examine the reasons why the SST-GD found that the loss of employment was not a result of misconduct under section 30 of the *Employment Insurance Act*. That is the decision for which leave to appeal was refused because the SST-AD found that the appeal would have no reasonable chance of success.

III. Facts

[11] Ms. Bernier was a program officer at the Correctional Service of Canada. She began her employment there in 2008. She was suspended without pay on March 4, 2014, and was subsequently dismissed on July 8, 2014. It is established that Ms. Bernier engaged in inappropriate conduct by maintaining a personal relationship with an inmate while he was on parole. It is also established that the employer's code of conduct specifically provides that an employee must not have a relationship with an inmate outside of working hours. Although the code reportedly stipulates that employees must inform their employer of any such relationship, Ms. Bernier never did so.

[12] According to the SST-GD's decision, on one occasion, the respondent invited an individual who was on parole and for whom she had been a caseworker to her home. According to the respondent, she provided career coaching to that parolee two afternoons a week. She submits that the meeting at her home that led to her dismissal was limited to a discussion of approximately two hours over coffee and that, during that meeting, they allegedly visited two

antique stores because the parolee was looking for an item. That meeting and what was referred to as the [TRANSLATION] “shopping trip” were apparently a one-time event.

[13] Upon her return from a six-week vacation after the meeting in question, the respondent found out that this individual’s situation had become more problematic. It would appear that he had made threatening remarks that resulted in [TRANSLATION] “restrictive measures concerning his spouse” (respondent’s memorandum of fact and law, paragraph 19). This led to his reincarceration, and the respondent submits that this individual allegedly decided to take revenge by referring to his visit to Ms. Bernier’s home and exaggerating what had occurred, alleging that they had a special relationship. The respondent denies the alleged nature of that relationship. The respondent also denies having used marijuana with this individual during that visit.

[14] An investigation into Ms. Bernier’s actions was ordered. The document on record indicates that the investigation was ordered on March 18, 2014, but Ms. Bernier had already been suspended since March 4. The investigation report, dated April 30, 2014, appears to be significantly more critical of Ms. Bernier than she is willing to admit. Ms. Bernier’s comments on the investigation report are accompanied by a series of concessions on her actions, which are also reproduced in the letter of disciplinary dismissal that was sent to her on July 8, 2014. Both the investigation report and the respondent’s comments indicate that the employer might not be able to trust her. She made the following remark at page 7 of 9 of her comments on the investigation report: [TRANSLATION] “Will my employer be able to trust me again?” The report itself concluded with the following sentence: [TRANSLATION] “The biggest question that remains unresolved today is whether the employer can still trust her.” The letter of disciplinary dismissal,

dated July 8, 2014, notes that Ms. Bernier allegedly [TRANSLATION] "had unprofessional relations with the offender over a period of four months" and provides more specific details of the facts alleged against her:

> [TRANSLATION]
>
> - Added the offender on Facebook
> - Invited the offender to your residence. After this meeting, you asked the offender to contact the Ogilvy CCC halfway house and told him to use a payphone so that the call would not be traced to your residence
> - Went on a shopping trip at an antique store with the offender
> - Shared information about your personal life with the offender
> - Admitted to wearing inappropriate clothing during sessions with the offender
> - Admitted to using marijuana

Other allegations that were investigated were clearly dismissed.

[15] The respondent filed a grievance against her dismissal. That grievance was settled through a memorandum of understanding between the respondent and her employer and was considered by the SST-GD. The considerations put forward appear at paragraph 53 of the SST-GD's decision:

> [TRANSLATION]
> 53. When I examine Exhibit GD-17, which is a copy of the memorandum of understanding between the appellant and her employer, I note that it contains mitigating factors to explain the appellant's professional error, namely:
>
> a) Absence of bad faith on the complainant's part;
>
> No personal interest in the error committed;

> Particular family situation;
>
> Years of experience;
>
> Performance evaluation;
>
> The fact that the complainant promptly notified the authorities of the offender's heightened risk of violence while he was participating in his program.

[16] Ms. Bernier was suspended without pay on March 4, 2014, and her application for employment insurance benefits was denied by the Employment Insurance Commission [the Commission] on May 14, 2014. The application for review was also unsuccessful, with the Commission upholding its initial decision on November 6, 2014. Ms. Bernier subsequently filed an appeal with the Social Security Tribunal on December 5, 2014. The SST-GD heard the matter on October 14, 2015, and made its decision on February 6, 2016. In that decision, the SST-GD agreed with Ms. Bernier. Finally, the SST-AD's decision refusing leave to appeal was made on July 11, 2016.

IV. The Social Security Tribunal decisions

[17] The decision under judicial review is that refusing leave to appeal because, according to the SST-AD, an appeal would have no reasonable chance of success. This Court must show deference to that decision.

[18] What makes the matter somewhat different from judicial reviews of decisions made on the merits is that the bar to be granted leave to appeal is much lower than for reviews based on the merits. It is not a matter of satisfying the SST-AD that the alleged misconduct meets the

jurisprudential definition of "misconduct" within the meaning of section 30 of the *Employment Insurance Act*, but rather of determining whether there is "some arguable ground upon which the proposed appeal might succeed" (*Osaj v Canada (Attorney General)*, 2016 FC 115, at paragraph 12; *Paradis*, at paragraph 34). The SST-AD need not decide the case on the merits at that stage, but rather determine whether it is satisfied that there are no such arguable grounds. The outcome decided on by the SST-AD, to use the wording of the Supreme Court in *Dunsmuir*, is that there are no arguable grounds. If an arguable ground exists, the decision would be unreasonable. Furthermore, the SST-AD must render a decision that is justified, transparent and intelligible in order for the decision to be considered reasonable. Insofar as the decision has the qualities of reasonableness, the Court's intervention is not warranted.

[19] If I understand the applicant's position correctly, which is not always easy given the complexity of the argument, it was not for the SST-GD to decide, even implicitly, on the severity of the penalty for misconduct. The argument is that this is what was done. The only question that had to be answered was whether Ms. Bernier had lost her employment as a result of her misconduct. Since the issue concerns leave to appeal being refused, merely reviewing the SST-AD's decision is insufficient. The context of that decision is established based on the decision against which leave to appeal is refused.

A. *The SST-GD's decision*

[20] The initial decision, that of the General Division, was made on February 8, 2016. The basic facts that led to the disciplinary dismissal on July 8, 2014, are undisputed. However, the SST-GD received evidence of circumstances that could only have been presented as mitigating.

Furthermore, some of the inmate's allegations (Ms. Bernier's use of drugs with the inmate while he was on parole, sexual relations) are denied by the respondent (who does not, however, deny using marijuana).

[21] The Commission cited misconduct within the meaning of section 30, while the respondent described a one-time event, mitigated by her personal situation at the time, that would not constitute misconduct within the meaning of section 30.

[22] In the words of the SST-GD, the Commission was of the view that, based on the investigation conducted by the employer, Ms. Bernier [TRANSLATION] "did indeed commit the acts of which her employer accused her, that those actions, considered to be deliberate, were committed despite the foreseeable consequence of losing her employment, and that they constitute misconduct within the meaning of the Act" (paragraph 37(d) of the SST-GD's decision).

[23] The problem, and it is a problem that arises throughout this case, is that the SST-GD's decision is unclear. Twice in the 22 paragraphs that comprise the analysis, the SST-GD stresses that not all reprehensible conduct necessarily constitutes misconduct. According to the SST-GD, [TRANSLATION] "misconduct is a breach by a party such that the perpetrator would reasonably foresee that it would likely result in dismissal" (paragraph 39). Thus, the SST-GD must be satisfied that the misconduct is the reason, and not the excuse, for the dismissal. What exacerbates the problem is that the SST-GD provides a series of propositions that serve as a

template. These propositions are drawn from the jurisprudence, but it is unclear how they relate to the facts of the case.

[24] Having established certain jurisprudential principles specific to the notion of misconduct, the SST-GD appears to find it sufficient to be informed of those principles. It does not explain how those principles apply and what conclusions must be drawn in relation to the case at hand. Instead, the SST-GD proceeds in its analysis to accept the respondent's mitigated version. It must be concluded that the SST-GD accepts Ms. Bernier's version, which is less damning than the employer's investigation report.

[25] In my view, the crux of the decision appears in paragraphs 56, 57 and 58, which read as follows:

> [TRANSLATION]
> [56] Should we find that there was misconduct? That is not my opinion. I note that the appellant was experiencing a difficult period in her life and that her judgment might have been impaired. Had there been repeated meetings outside of work or evidence of other professional errors, the Tribunal could have found that the appellant had deliberately chosen to disregard the consequences of her actions on her employment.
>
> [57] The evidence, however, suggests otherwise. I therefore find that there was no such intention in this case. I find that there was an error of judgment that, in the employer's view, warranted dismissal.
>
> [58] The jurisprudence tells us that reprehensible conduct does not necessarily amount to misconduct. The appellant unquestionably erred, but I find that she did not commit all the wrongdoings of which she was initially accused. I accept the appellant's remarks that she had been unaware that the breach was so severe that she could reasonably foresee being dismissed.

The lack of connection between the jurisprudential principles that were merely stated and the decision does not facilitate understanding. The notion of misconduct adopted by the SST-GD is not developed. The SST-GD appears to be seeking a deliberate intention on the respondent's part to disregard the consequences of her actions in order for there to be misconduct. It would therefore be the intent of the claimant that prevails. Did she deliberately choose to disregard the consequences?

[26] Nevertheless, the SST-GD does not appear to explain why the dismissal for a professional error does not constitute misconduct within the meaning of section 30. Rather, there is some confusion between the lack of intent to disregard the consequences of the behaviour and the presence of an error of judgment (which the employer considered to warrant dismissal) that leads, without further explanation, to a finding of a lack of misconduct.

B. *The SST-AD's decision*

[27] The only question before the SST-AD was therefore whether an appeal of that decision had no reasonable chance of success. In its decision dated July 11, 2016, it found that there was no chance of success. As required under subsection 58(4) of the *Department of Employment and Social Development Act*, written reasons were provided for the decision that is the subject of this judicial review.

[28] The SST-AD's decision is also not particularly clear. Recognizing that the application for appeal concerns alleged errors of law and an erroneous finding of fact made in a perverse or

capricious manner, the SST-AD dealt with it without really providing a comprehensive articulation of its reasoning.

[29] First, with respect to the alleged error of fact, the SST-AD describes it as being [TRANSLATION] "the finding that the respondent's alleged actions did not constitute misconduct" (paragraph 16).

[30] There follows a series of paragraphs that seek to dismiss that allegation. We are told that the respondent recognized that she had made an error of judgment and that the employer [TRANSLATION] "had agreed not to make any submissions in the Tribunal record" (paragraph 17). However, that is not correct. At most, the memorandum of understanding acknowledges that [TRANSLATION] "if submissions are made, they would comply with this memorandum." The employer attests only that it [TRANSLATION] "does not undertake to make submissions in the employment insurance record," which is not an undertaking not to make submissions. In this context, the employer declares that it will not intervene in favour of the claimant, but that if submissions are made, they will not depart from the content of the memorandum of understanding.

[31] The SST has evidence that the disciplinary dismissal in July 2014 is now described as a professional error, which means that the parties agree that it is impossible for the employer to reinstate Ms. Bernier. The mitigating factors are duly noted.

[32] It seems to me that the inference that must be drawn from the memorandum of understanding is that the employer did not want to interfere with Ms. Bernier's chances of receiving employment insurance benefits. However, the memorandum of understanding clearly states that the professional error is the reason that Ms. Bernier cannot be reinstated. Despite the circumlocution, the issue is whether she lost her employment as a result of her misconduct.

[33] The SST-AD states that its role is not to examine and reassess the evidence. It correctly states that it must instead determine whether an appeal has a reasonable chance of success. One might have thought that it would follow from this finding that a review on the merits is inappropriate and that the bar is lower because the test for leave to appeal is the belief that the appeal has no reasonable chance of success.

[34] The SST-AD accepts that an error of fact is alleged. For that error to be determinative within the meaning of paragraph 58(1)(*c*), the GD's decision would have to have been based on a finding of fact made in a perverse or capricious manner. The erroneous finding of fact must therefore be particularly evident. Mere disagreement on the finding of fact will not suffice. The decision must be based on the error of fact, and the finding of fact must be made in a perverse or capricious manner. However, its explanation for finding that there is no reasonable chance of success in this regard is unintelligible. The error of fact the SST-AD is attempting to address is as follows: [TRANSLATION] "the finding of fact stated, according to the applicant, is the finding that the respondent's alleged actions did not constitute misconduct." That was the proposition put forward by the Commission.

[35] If the SST-AD sought to respond to that assertion as being an error of fact, it was difficult to succeed because it is not an error of fact. This obviously makes the decision impossible to understand. The issue does not concern a finding of fact; it is at minimum a question of mixed fact and law, namely, do the facts as they were presented constitute misconduct? The legal content of the notion of misconduct, which is not defined in the Act, is based in the jurisprudence that has sought over the years to circumscribe it. The finding that there does not appear to have been misconduct is not an erroneous finding of fact. It is a finding of law drawn from the facts. The content of the notion of misconduct would be a question of law. Applying facts to the law is a mixed question.

[36] In the case at hand, an erroneous finding of fact could have been, for example, that Ms. Bernier did not receive a parolee at her home. Such a finding of fact could be viewed as having been made in a perverse or capricious manner since even Ms. Bernier acknowledges that such a meeting occurred. Conversely, it would be difficult for the Commission to claim a perverse or capricious error of fact if it submitted that its evidence, which is more damning, should have been accepted even though it did not even attempt to cross-examine the respondent, whose testimony was ultimately favoured. If there was an error of fact, it could hardly have been perverse or capricious when the testimony was not challenged. It is not impossible to make such an argument, for example in cases where the testimony is so far-fetched and implausible that it could not possibly and rationally be given any credibility. Favouring such a testimony under those circumstances could be considered perverse or capricious. However, that is not what was argued in this case; at most, it constitutes a choice that may be dissatisfactory.

[37] The same argument was made on judicial review. The same confusion exists. In fact, the Attorney General appears to me to be arguing both that there is an error of fact and an error of law. The Attorney General describes the error of fact as being [TRANSLATION] "the application of the facts to the notion of misconduct, which means that the SST-GD based its decision on an erroneous finding of fact made in a perverse or capricious manner without regard for the material before it" (paragraph 36, memorandum of fact and law). However, paragraph 53 states that [TRANSLATION] "by erroneously applying the facts to the legal notion of misconduct, the SST-GD made a decision vitiated by an error of law."

[38] I am afraid that an error of fact and an error of mixed fact and law have also been confused. It has not been properly argued, much less demonstrated, that the SST-GD made an erroneous finding of fact within the meaning of paragraph 58(1)(*c*) of the *Department of Employment and Social Development Act*. What is alleged is that the SST-GD should have made a finding of misconduct based on the facts. This is not an issue of fact. The Commission and the SST-AD took a misguided approach. If the right question is not asked, it is hardly surprising that the answer is no better. It was not argued that the decision is based on a finding of fact made in a perverse or capricious manner.

[39] The real issue concerns rather the alleged error of law. Remarkably little is articulated in this respect in the SST-AD's decision. It amounts to two paragraphs:

> [TRANSLATION]
> [28] The GD found that there was no intention "to disregard the consequences of her actions on her employment," that the applicant "had been unaware that the breach was so severe that she could reasonably foresee being dismissed" and that she "did not act

> deliberately or voluntarily or demonstrate such carelessness or negligence that she herself caused her dismissal."
>
> [29] The GD applied the principles set out in *Attorney General of Canada v Tucker*, A-381-85 and *Locke v Canada (Attorney General)*, 2003 FCA 262, among other decisions, to the applicant's situation. The decision was not vitiated by an error of law.

V. Analysis

[40] In my opinion, this matter should be referred back to a different panel for reconsideration of whether an appeal based on an error of law has a reasonable chance of success.

[41] What is clear from paragraph 28 of the SST-AD's decision is that misconduct is defined by a subjective test that is based solely on the claimant's state of mind. If she misjudged the consequences of her actions, they would not amount to misconduct.

[42] At paragraph 29, the only argument, without explanation or articulation, is that the SST-GD allegedly followed the jurisprudence.

[43] In this case, the applicant raises three reasons why this apparently constitutes an error of law:

a) it is not a subjective test as to the foreseeability of the loss of employment;

b) the claimant's justification is taken into account. This is a mistake. What matters is that the loss of employment is a result of the misconduct;

c) the legitimacy of the dismissal is challenged by ruling on the severity of the penalty. This is inappropriate.

[44] Relying on considerable jurisprudence of the Federal Court of Appeal, the applicant argues that these errors of law must be corrected and that, therefore, an appeal before the SST-AD would have an excellent chance of success: the SST-AD could not be satisfied that the appeal had no reasonable chance of success.

[45] The Federal Court does not have jurisdiction to rule on the definition of misconduct within the meaning of section 30 of the *Employment Insurance Act*. I therefore have no intention of attempting to determine whether there was misconduct in this case. The Court's role is limited to determining the reasonableness of the SST-AD's finding that the case has no reasonable chance of success.

[46] To do so, the Court consulted all of the jurisprudence submitted by the parties. In my view, it is far from clear that *Locke* and *Tucker* alone dispose of the case as the SST-AD indicates at paragraph 29 of its decision. At the very least, the SST-AD should have explained how those decisions dispose of the case at hand. The jurisprudence subsequent to those decisions may well provide a different perspective and should be considered. The three arguments put forward, as set out in these reasons, seem to me to warrant consideration to determine whether they are so devoid of value that they have no reasonable chance of success in light of the subsequent jurisprudence, to which no reference is made.

[47] I recognize from the outset that even for a question of law, the reviewing court must show deference to the tribunal that is responsible for applying those provisions (*Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61, [2011]

3 SCR 654 at paragraph 39). In my opinion, the SST-AD's decision is unreasonable because it does not have the necessary qualities. In *Dunsmuir*, the Supreme Court stated that "[t]ribunals have a margin of appreciation within the range of acceptable and rational solutions" (paragraph 47). Here, justification is completely lacking. While "reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process", the SST-AD's decision is obviously very brief, to the point of failing to explain why an appeal would have no reasonable chance of success. It is not so much the inadequacy of the reasons that is the problem, but rather their absence. Deference to the decisions of administrative tribunals requires respectful attention to the reasons offered or which could be offered (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708 at paragraph 12) [*Newfoundland*]. Nevertheless, reasons must be given. In *Newfoundland*, the Court noted the following at paragraph 16:

> In other words, if the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the *Dunsmuir* criteria are met.

[48] Having been exposed to the jurisprudence of the Federal Court of Appeal, the basis of the SST-AD's decision is quite uncertain, and the reasons do not make it possible to know, much less understand, the basis of the decision and whether the refusal of leave to appeal because there is no reasonable chance of success is a possible, acceptable outcome in light of the alleged errors of law.

[49] As noted above, while the applicant submitted at paragraph 36 of his memorandum that applying the facts to the notion of misconduct involved an error of fact, which was a source of confusion, he also submits at paragraph 53 that [TRANSLATION] "by erroneously applying the facts to the legal notion of misconduct, the SST-GD made a decision vitiated by an error of law." That is, in my opinion, the best question, which has not been answered, other than to cite *Tucker* and *Locke*, which allegedly dispose of the question. It is unclear how those decisions dispose of the question.

[50] The SST-AD was required to give reasons allowing this Court to understand why an appeal on a question of law had no reasonable chance of success, particularly in light of the most recent Federal Court of Appeal jurisprudence. The question of whether the criteria applied to determine whether there was misconduct outlined at paragraph 28 of the SST-AD's decision (these passages are cited directly from paragraphs 56, 58 and 59 of the SST-GD's decision) suggest that the test is merely subjective. It is unclear from both the GD's and the AD's decision how and why this should be so. A different panel from the SST-AD should consider the issue of leave to appeal.

[51] Lastly, the applicant presents, for the first time on the judicial review of the SST-AD's decision, an allegation that, in any event, the claimant would have left her employment without just cause had she not lost it as a result of her misconduct, which also excludes her from receiving benefits under section 30 of the *Employment Insurance Act*. This attempt is inappropriate and belies a misunderstanding of the nature of the judicial review.

[52] On judicial review, the reviewing court seeks to determine the legality of an administrative tribunal's decision. That is the only decision that may be considered. If the administrative tribunal's decision does not relate to a given issue, then it cannot be subject to judicial review: there is nothing to review. An applicant cannot interject and present new allegations in a judicial review of an entirely different decision. Throughout the proceedings, what has been debated is the loss of employment as a result of misconduct. At the hearing, I asked where in the record I would find the alternative ground raised. It does not appear anywhere. A judicial review hearing is not a *trial de novo* (*Paradis*, at paragraph 22), nor does it deal with the merits, because questions of merit are entrusted by Parliament to the administrative tribunals created for that purpose (*Bernard v Canada (Revenue Agency)*, 2015 FCA 263; 479 NR 189).

[53] The new allegation is simply inappropriate. It demonstrates a poor understanding of the judicial review and must simply be dismissed.

[54] The applicant wanted the matter to be referred back to the SST-AD so that it could be dealt with as if it had been decided that the appeal had a reasonable chance of success and that it was now sufficient to hear the case on the merits. I do not consider that to be the correct approach.

[55] This case was somewhat confusing. It appears that questions of law were presented as questions of fact. The questions of law were therefore improperly assessed. Furthermore, the reasons given for refusing leave to appeal are themselves deficient, so it is unclear whether or not

the appeal has a reasonable chance of success. However, Parliament has entrusted the SST-AD with the task of determining whether leave to appeal should be granted.

[56] Consequently, the application for judicial review is allowed on the sole issue of determining whether there is an error of law in the SST-GD's decision on the question of the loss of employment as a result of misconduct within the meaning of section 30 of the *Employment Insurance Act*. The SST-AD will therefore have to determine, with supporting reasons, whether the allegation of an error of law on the notion of misconduct committed by the SST-GD could have a reasonable chance of success. Given the confusion that surrounded this case, the parties should be allowed to resubmit their arguments in light of these reasons.

[57] No costs will be awarded.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application for judicial review is allowed.

2. No costs.

"Yvan Roy"
Judge

Certified true translation
This 16th day of April 2020

Lionbridge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1184-16
STYLE OF CAUSE:	ATTORNEY GENERAL OF CANADA v YOLANDE BERNIER
PLACE OF HEARING:	MONTREAL, QUEBEC
DATE OF HEARING:	JANUARY 16, 2017
JUDGMENT AND REASONS:	ROY J.
DATED:	JANUARY 31, 2017

APPEARANCES:

Carole Vary	FOR THE APPLICANT
Yolande Bernier	FOR THE RESPONDENT (ON HER OWN BEHALF)

SOLICITORS OF RECORD:

William F. Pentney Deputy Attorney General of Canada Montreal, Quebec	FOR THE APPLICANT