Federal Court Cour fédérale

Date: 20201216

Docket: T-480-19

Citation: 2020 FC 1157

[ENGLISH TRANSLATION]

Montréal, Quebec, December 16, 2020

PRESENT: The Honourable Madam Justice St-Louis

BETWEEN:

FRANÇOIS HOULE

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] François Houle seeks judicial review of the decision of the Social Security Tribunal of Canada, Appeal Division, dated February 15, 2019 [the Appeal Division], denying his application for leave to appeal the decision of the General Division, Employment Insurance

Section [the General Division], on the grounds that the appeal has no reasonable chance of success.

[2] For the reasons below, the application for judicial review will be dismissed.

II. Background

[3] On or about November 1, 2016, Mr. Houle began his employment as a garbage collector with Gaudreau Environnement Inc. (Applicant's Record, page 134).

[4] On October 30, 2017, Mr. Houle made inappropriate remarks to another employee, which he repeated to an inspector of the company on the same day (Applicant's Record, page 118). On November 1, 2017, the employer suspended Mr. Houle, following the events of October 30 (Applicant's Record, page 59), and the applicant signed a letter presenting his version of the events and an apology (Applicant's Record, pages 99-101). On November 3, 2017, the employer terminated Mr. Houle's employment. In his letter to Mr. Houle at the time, the deputy director of the company noted, [TRANSLATION] "Following recent events, your behaviour at work does not meet the minimum standards required by Gaudreau Environnement. In light of these facts, we are terminating your employment relationship today without further notice or delay" (Applicant's Record, page 58).

[5] On September 6, 2017, Mr. Houle made an initial claim for Employment Insurance benefits.

[6] On July 31, 2018, after conducting an investigation, the Canada Employment Insurance Commission [the Commission] informed Mr. Houle that it could not pay him regular Employment Insurance benefits because he ceased working on November 3, 2017, owing to his misconduct, and was therefore disqualified under subsection 30(1) of the *Employment Insurance Act*, SC 1996, c 23 [the EI Act].

[7] On August 29, 2018, Mr. Houle applied for a review of this decision, alleging that the situation was the result of an obvious personality conflict between the two individuals, not misconduct on his part. He submitted that the events did not meet the legal criteria for dismissal for misconduct, that he challenged his dismissal, that his version of the facts and remorse are credible, and that, in the circumstances, he must be given the benefit of the doubt (Applicant's Record, pages 94–95).

[8] On October 10, 2018, the Commission informed him that it would not vary the original decision because of the [TRANSLATION] "issue: misconduct".

[9] Mr. Houle appealed this decision to the General Division. He then admitted having uttered inappropriate remarks, but alleged that his words, although they may have been [TRANSLATION] "somewhat exaggerated", were uttered in a fit of anger and frustration and could not justify his dismissal or disqualify him from receiving Employment Insurance benefits. He then insisted that he had not received any disciplinary warnings prior to these events and that progressive discipline had not been applied to his case (Applicant's Record, pages 35 and 36).

[10] On January 7, 2019, the Appeal Division dismissed Mr. Houle's appeal. It concluded that he had lost his employment because of his own misconduct. In its decision, the General Division set out the disqualification under section 30 of the EI Act, reaffirmed the Federal Court of Appeal's interpretation of the notion of misconduct and confirmed that the onus is on the Commission to prove, on a balance of probabilities, that a claimant lost their employment because of their misconduct.

[11] The General Division determined that (1) Mr. Houle did indeed make the remarks he was accused of making on October 30, 2017, toward one of his colleagues and during the disciplinary meeting that followed the incident (Mr. Houle did not deny it, and the documentary evidence confirms it); (2) his conduct was wilful and deliberate and could not be excused by his anger and frustration; (3) Mr. Houle knew or should have known that his remarks were serious and that, in acting as he did, he contravened a basic principle necessary to maintain any employment, which dictates that such behaviour has no place in the workplace, such that the General Division therefore did not consider it necessary for the employer to issue a warning or impose progressive discipline for his behaviour to be considered misconduct, and assigned limited weight to the letter of apology; (4) the sequence of events clearly showed that Mr. Houle was dismissed on November 3, 2017, because of the actions of which he was accused, and that there was a causal link between the alleged act and the loss of employment. There is no support for Mr. Houle's contention that he [TRANSLATION] "bore the brunt of a staff reduction . . . following the loss of a major contract" (General Division decision at para 30).

[12] The General Division therefore concluded that Mr. Houle lost his employment because of his misconduct and that he was consequently disqualified under section 30 of the EI Act.

[13] On November 6, 2018, counsel for Mr. Houle applied to the Appeal Division for leave to appeal the decision of the General Division. In his application form, which he signed, together with Mr. Houle, for this purpose, his counsel alleged that the General Division erred in disqualifying Mr. Houle from receiving benefits. He pointed out that Mr. Houle had worked in the company for a year, that the [TRANSLATION] "world of garbage collectors . . . is not an easy one and does not sugar-coat things", and that the employer did not apply progressive discipline or issue a disciplinary warning as it should have (Applicant's Record, pages 31–36).

[14] On February 15, 2019, the Appeal Division concluded that the appeal did not have a reasonable chance of success and refused Mr. Houle leave to appeal the decision of the General Division. The Appeal Division then examined whether the grounds for appeal raised by Mr. Houle revealed that the General Division had committed a reviewable error giving the appeal a reasonable chance of success. Subsection 58(2) of the *Department of Employment and Social Development Act*, SC 2005, c 34 [the Department of Employment Act] provides that leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success.

[15] The Appeal Division noted that the notion of wilful misconduct does not necessarily imply that the faulty behaviour was the result of malicious intent: it is sufficient that the misconduct be conscious, wilful or intentional. It added that the issue was whether the claimant

had engaged in misconduct and not whether the employer had engaged in misconduct by dismissing the claimant.

[16] The Appeal Division noted the evidence that was before the General Division and the fact that Mr. Houle's admission that he had made the inappropriate remarks confirmed in a momentary lapse of judgment. The fact that he had apologized was not relevant to whether there had been misconduct within the meaning of the EI Act. Finally, the Appeal Division confirmed that the General Division had not erred in finding that the employer had dismissed Mr. Houle for verbal violence in the workplace. This decision is the subject of the application for judicial review.

III. Positions of the parties

A. *Mr. Houle's position*

[17] In support of his case, Mr. Houle filed his own affidavit, sworn on April 16, 2019. In his memorandum, Mr. Houle submits that his appeal to the Appeal Division had reasonable chances of success, since the General Division had erred in its decision.

[18] Mr. Houle argues that he always claimed that he should not have been dismissed, and that the decision maker was unreasonable in concluding that his conduct amounted to a wilful and deliberate act, depriving him of his benefits. Mr. Houle argues that the specific circumstances of his case deserved to be heard on appeal. He considers that his remarks were the result of

provocation on the part of his work colleague, that he apologized and that his dismissal was rather the result of the loss of a contract.

[19] Mr. Houle argues that the purpose of disqualification under section 30 of the EI Act is to ensure that [TRANSLATION] "someone does not have to act as if they were voluntarily dismissed, which therefore amounts to a constructive resignation" and that the law must be interpreted restrictively (Applicant's Record, page 136).

B. *Respondent's position*

[20] The respondent, the Attorney General of Canada, submits that the standard of review applicable to decisions of the Appeal Division in respect of applications for leave to appeal is reasonableness. The respondent submits that the decision is reasonable, given the legislative framework and the case law of this Court and the Federal Court of Appeal.

IV. Discussion

[21] The Court must determine whether the Appeal Division erred by refusing Mr. Houle leave to appeal the decision of the General Division.

[22] The standard of review applicable to the decision of the Appeal Division to refuse leave to appeal is reasonableness (*Langlois v Canada (Attorney General)*, 2018 FC 1108 at para 4; *Lazure v Canada (Attorney General)*, 2018 FC 467 at para 18; *Tracey v Canada (Attorney General)*, 2015 FC 1300 at paras 17–22).

[23] In *Canada (Minister of Citizenship and Immigration) v Vavilov* (2019 SCC 65 [*Vavilov*]), the Supreme Court of Canada established the presumption that the standard of reasonableness is the applicable standard (*Vavilov* at para 16). None of the situations allowing this presumption to be rebutted apply in this case.

[24] Where the applicable standard of review is reasonableness, the role of the Court on judicial review is to examine the reasons given by the administrative decision maker and determine whether the decision is based on "an inherently coherent and rational analysis and that is justified in relation to the facts and law that constrain the decision maker" (*Vavilov* at para 85; *Canada Post Corporation v Canadian Union of Postal Workers*, 2019 SCC 67 [*Canada Post Corporation*] at paras 2, 31). The Court must consider the "outcome of the administrative decision in light of its underlying rationale in order to ensure that the decision as a whole is transparent, intelligible and justified" (*Vavilov* at para 15*).*

[25] It is not the task of a reviewing court to reweigh the evidence on record, or to reassess a decision maker's findings of fact and substitute its own (*Canada Post Corporation* at para 61; *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2018 SCC 31 at para 55). Rather, it must consider the reasons as a whole, in the context of the record (*Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 53) and simply limit itself to whether the conclusions are irrational or arbitrary.

[26] The purpose of the EI Act, as amended in 2005, is to ensure the security of citizens by providing assistance to those who have lost their jobs and by helping the unemployed return to

work. In addition, a person may be disqualified from receiving benefits. Thus, subsection 30(1) of the EI Act provides that, except in certain situations that do not apply in this case, "[a] claimant is disqualified from receiving any benefits if the claimant lost any employment because of their misconduct". Subsection 30(2) states that the disqualification is for each week of the claimant's benefit period following the waiting period.

[27] The test for misconduct is whether the act complained of was wilful, or at least of such a careless or negligent nature that one could say that the employee wilfully disregarded the effects their actions would have on job performance (*Canada (Attorney General) v Kaba*, 2013 FCA 208 at para 3 [*Kaba*], quoting (*Canada (Attorney General) v Tucker*, [1986] 2 FC 329).

[28] The Social Security Tribunal was constituted under the Department of Employment Act. It is composed of a General Division and an Appeal Division (subsection 44(1) of the Department of Employment Act). In general, an appeal to the Appeal Division may only be brought if leave to appeal is granted (subsection 56(1) of the Department of Employment Act).

[29] Subsection 58(1) of the Department of Employment Act sets out the grounds of appeal that may be invoked before the Appeal Division. Lastly, subsection 58(2) of the Department of Employment Act provides that an application for leave to appeal is only granted if the appeal has a reasonable chance of success.

[30] The Court has determined that "having a 'reasonable chance of success' in this context means having some arguable ground upon which the proposed appeal might succeed" (*Osaj* at

para 12). Leave to appeal is granted when, among other reasons, important evidence has been arguably overlooked or possibly misconstrued (*Griffin v Canada (Attorney General)*, 2016 FC 874 at para 20, citing *Karadeolian v Canada (Attorney General)*, 2016 FC 615 at para 10).

[31] The Court reviewed the decision of the General Division and that of the Appeal Division, which is the subject of the present judicial review, and was not satisfied that the latter is unreasonable.

[32] First, the evidence reveals that Mr. Houle himself confirmed that he had made inappropriate remarks and that he did not deny the nature of his remarks, having even repeated them to the company representative. The affidavit he filed before the Court confirms this statement.

[33] The decisive question is whether it is reasonable to consider that Mr. Houle's alleged conduct constitutes misconduct within the meaning of the EI Act. Several decisions confirm that the decision of the General Division to treat Mr. Houle's conduct as misconduct is reasonable.

[34] Indeed, it has been determined that verbal violence may constitute misconduct and that the fact that Mr. Houle regrets his actions, that he was provoked, that he acted on the spur of the moment or that he never received disciplinary warnings was not relevant. The Federal Court of Appeal adopted this position in clear terms in *Kaba*:

> The test for misconduct is whether the act complained of was wilful, or at least of such a careless or negligent nature that one could say that the employee wilfully disregarded the effects his or her actions would have on job performance.

> In the present case, the board of referees found that Mr. Kaba's violent act was not deliberate. The board of referees based its favourable decision on the following facts: Mr. Kaba regretted his actions and had no prior disciplinary record, the other party to the altercation had provoked him by harassing him, and the employer had reinstated him without him admitting to the alleged facts.
>
> However, the above factors and the fact that Mr. Kaba acted on the spur of the moment are not relevant to determining whether there was misconduct. Mr. Kaba should have known that his conduct could lead to his dismissal. Physical or verbal violence in the workplace is unacceptable and must not be condoned by an entitlement to benefits.
>
> The purpose of the Act is to protect workers who lose their employment involuntarily, not those who find themselves jobless by their own fault (at paras 3–6, citations omitted [emphasis added]).

[35] Second, the Court has already determined that the employer's conduct is not relevant in determining whether an applicant who has been dismissed for misconduct is disqualified from receiving Employment Insurance benefits (*Paradis v Canada (Attorney General*), 2016 FC 1282 at paras 30–31).

[36] Moreover, the fact that the sanction was too severe or that the sanctions were not progressive is also not relevant (*Dubeau v Canada (Attorney General*), 2019 FC 725 at para 32).

[37] Since Mr. Houle has admitted to uttering the words attributed to him, and taking into account the above-mentioned case law of the Federal Court of Appeal and this Court, it was reasonable for the Appeal Division to conclude that Mr. Houle's appeal had no reasonable chance of success and to refuse his application for leave to appeal.

[38] The decision of the Appeal Division is transparent, intelligible and justified in the circumstances and is reasonable.

JUDGMENT in T-480-19

THIS COURT'S JUDGMENT is as follows:

1. The application for judicial review is dismissed.

2. There will be no award as to costs.

"Martine St-Louis"
Judge

Certified true translation
Michael Palles, Reviser

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-480-19
STYLE OF CAUSE:	FRANÇOIS HOULE AND ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	MONTRÉAL, QUEBEC (VIA ZOOM VIDEOCONFERENCE)
DATE OF HEARING:	DECEMBER 3, 2020
JUDGMENT AND REASONS:	ST-LOUIS J.
DATED:	DECEMBER 16, 2020

APPEARANCES:

Philippe Thériault	FOR THE APPLICANT
Paul Deschênes	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Côté Carrier Avocats Québec, Quebec	FOR THE APPLICANT
Attorney General of Canada Montréal, Quebec	FOR THE RESPONDENT