Federal Court of Appeal  Cour d'appel fédérale

Date: 20200626

Docket: A-233-19

Citation: 2020 FCA 109

[ENGLISH TRANSLATION]

CORAM: **BOIVIN J.A.**
GLEASON J.A.
RIVOALEN J.A.

BETWEEN:

CHRISTO STAVROPOULOS

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

Heard by online videoconference hosted by the Registry

on May 20, 2020

Judgment delivered at Ottawa, Ontario, on June 26, 2020.

REASONS FOR JUDGMENT: RIVOALEN J.A.

CONCURRED IN BY: BOIVIN J.A.
GLEASON J.A.

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REASONS FOR JUDGMENT

RIVOALEN J.A.

I. INTRODUCTION

[1] In this application for judicial review, the applicant, Christo Stavropoulos, is seeking to set aside the decision rendered on May 22, 2019, by the Appeal Division of the Social Security Tribunal of Canada (Appeal Division) (2019 SST 601), whereby it upheld the decision of the General Division of the Tribunal (General Division) rendered on November 20, 2018. The

General Division held that the applicant was disqualified from receiving benefits because he had voluntarily left his employment without just cause within the meaning of subsection 30(1) of the *Employment Insurance Act*, S.C. 1996, c. 23 (the EIA).

[2] For the reasons that follow, I conclude that the application for judicial review should be dismissed, without costs.

II. BACKGROUND

[3] The applicant is a truck driver who was assigned to deliver a load of trucks to the United States on February 22, 2018. On February 17, 2018, he decided to deviate from his route to visit his father-in-law in the hospital. He parked the truck with the goods near his residence, and the loaded truck was stolen during the night. The applicant's employer gave him a three-week suspension without pay (Appeal Division's Reasons, para. 2; applicant's memorandum, para. 1; respondent's memorandum, paras. 9–10).

[4] On March 8, 2018, a meeting was held between the employer and the applicant, who was accompanied by his union representative. During the meeting, the employer accused the applicant of having lied about when he discovered the theft, as the applicant stated that he had seen the truck at around 10:00 a.m. on February 18, 2018. However, according to the surveillance cameras, the theft had actually occurred during the night between February 17 and 18 at 1:30 a.m. (applicant's memorandum, para.1; respondent's memorandum, paras. 11–12, 14 and 16).

[5] After a private discussion with his union representative, the applicant agreed to sign a resignation letter in exchange for good references (applicant's memorandum, para.2; respondent's memorandum, paras. 8, 17).

[6] On March 12, 2018, the applicant applied for regular employment insurance benefits. The Canada Employment Insurance Commission (the Commission) accepted his application and found that his voluntary leaving was justified in light of all the circumstances (applicant's memorandum, para. 3; respondent's memorandum, paras. 7 and 15).

[7] The employer filed an application for administrative review, but the Commission decided to uphold its initial decision. The employer appealed from that decision before the General Division (applicant's memorandum, paras 4 and 6–7; respondent's memorandum, paras. 16 and 18–19).

[8] Following a hearing in which the applicant did not participate, the General Division found that the applicant had voluntarily left his employment and had not been unduly pressured by his employer to resign given that leaving was not the only reasonable alternative. The General Division examined the record and heard testimony from the employer and the employer's witness, who was present during the meeting on March 8, 2018. It found that the applicant had a choice, since he could have gone through the arbitration process to challenge the measures taken by his employer rather than choosing to resign. Thus, the General Division decided that the applicant was disqualified from receiving employment insurance benefits because he had voluntarily left his employment without just cause, within the meaning of subsection 30(1) of the

EIA (General Division's decision, GE-18-1918; applicant's memorandum, para. 9; respondent's memorandum, paras. 2 and 19–20).

[9] On January 9, 2019, the Appeal Division granted leave to appeal under the power provided for in paragraphs 58(1)(*a*) to (*c*) of the *Department of Employment and Social Development Act*, S.C. 2005, c. 34 (the DESDA). On May 22, 2019, it dismissed the applicant's appeal. The Appeal Division concluded that the General Division had not erred in finding that, in the light of the evidence, the applicant had voluntarily left his employment when he had a reasonable alternative, which was to exercise his right to go through the arbitration process to contest the employer's decision with the assistance of his union (Reasons, para. 19).

III. ISSUES

[10] The parties raise a certain number of issues, but I am of the view that the following issues must be addressed:

- What is the appropriate standard of review in this case?

- Is the Appeal Division's decision reasonable?

IV. STANDARD OF REVIEW

[11] The applicable standard of review in this case is that of reasonableness. The issue that we must decide is therefore whether the Appeal Division could reasonably conclude that the General Division had not erred in law by ruling as it did or that it had not based its decision on an

erroneous finding of fact. It is for the Appeal Division to determine whether the General Division erred in fact or in law pursuant to subsection 58(1) of the DESDA. This Court's role is to determine whether the Appeal Division's finding and reasons are reasonable (*Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, 312 A.C.W.S. (3d) 460 [*Vavilov*], paras. 83 and 86; *Stojanovic v. Canada (Attorney General)*, 2020 FCA 6, 313 A.C.W.S. (3d) 563, paras. 34–35) in light of the Appeal Division's role pursuant to subsection 58(1) of the DESDA (*Bose v. Canada (Attorney General)*, 2018 FCA 220, 299 A.C.W.S. (3d) 104, para. 6).

V. ANALYSIS

[12] The applicant submits a number of arguments.

[13] First, he alleges that the Appeal Division granted leave to appeal regarding a number of arguments but ultimately identified and addressed only one issue. Thus, he argues that it is unreasonable not to address all of the issues the applicant raised once leave to appeal is granted.

[14] According to the applicant, because the General Division did not address all of the issues, the Appeal Division did not correctly exercise its jurisdiction. This absence of reasons on those issues is therefore unreasonable because it is impossible to understand the Appeal Division's reasoning (applicant's memorandum, para. 25). In support of his arguments, the applicant refers to paragraph 28 of *Hillier v. Canada (Attorney General)*, 2019 FCA 44, 302 A.C.W.S. (3d) 429 [*Hillier*].

[15] On the contrary, the respondent submits that all of the applicant's arguments presented on appeal were already considered and reviewed by the Appeal Division. The respondent refers us in particular to paragraph 21 of the decision, which reads as follows:

> The Tribunal finds that the General Division decision is supported by the facts and complies with the law and the decided cases. There is no reason to intervene and change that decision.

[16] As for *Hillier*, the respondent submits that it can be distinguished as it involved a situation where the Appeal Division had specifically decided to grant two grounds of appeal and to reject others it considered to be unfounded at the leave to appeal stage, unlike in this case. The controversy in that case therefore concerned the Appeal Division's power to circumscribe the issues at the stage of granting leave to appeal.

[17] It should be noted that the Appeal Division was no longer at the stage of granting leave to appeal, but rather at the appeal on the merits. Therefore, I cannot accept the applicant's argument. As explained in the reasons that follow, the Appeal Division did respond to all of the issues, since it held that the General Division had not erred in law or with regard to a finding of fact by deciding that the applicant had voluntarily left his employment. The Appeal Division thus exercised its power by dismissing the appeal on the basis of subsection 59(1) of the DESDA.

[18] Second, the applicant alleges that the Appeal Division did not correctly exercise its power by deciding a question of fact without having previously determined that one of the potential errors listed in subsection 58(1) of the DESDA existed. The applicant submits that the General Division found that [TRANSLATION] "the Employer could not have dismissed the Claimant

because his employment was unionized", while the Appeal Division [TRANSLATION] "recognized that the Employer did in effect dismiss the Claimant." The Appeal Division thus allegedly corrected an erroneous finding of fact made by the General Division without ruling that it had erred. Consequently, according to the applicant, this results in an unreasonable decision because the Appeal Division did not correctly exercise its power. Citing paragraph 17 of *Nelson v. Canada (Attorney General)*, 2019 FCA 222, 308 A.C.W.S. (3d) 774 [*Nelson*], the applicant argues that it is only when the Appeal Division determines that there are legitimate grounds to intervene that it may do so:

> I respectfully disagree. It is true that the Appeal Division cannot intervene for the sole reason that it would have weighed the evidence on record differently than the General Division (*Garvey v Canada (Attorney General)*, 2018 FCA 118, at para 5). Once the Appeal Division finds that there is a legitimate reason to intervene with the General Division's decision based on the grounds of appeal listed under subsection 58(1) of the *DESDA*, it may proceed to decide factual questions necessary to the disposition of any application. . . .

[19] After reading the reasons of the General Division and Appeal Division, I cannot accept the applicant's argument.

[20] Throughout its reasons, the General Division states that the applicant had the alternative of going through the arbitration process. It is clear that when the General Division refers to that reasonable alternative, it was in relation to dismissal. For example, regarding the issue "Did the [Employee] have just cause for voluntarily leaving his employment? Were there any other reasonable alternatives?", the General Division states the following at paragraph 11:

> No, I find that the Employee did not have just cause for voluntarily leaving his employment because a reasonable alternative would have been to file a union grievance and participated [*sic*] in the arbitration process instead of quitting his employment.

[21] The following is also noted at paragraph 17 of the General Division's reasons: "The Employer stated that he was given two choices, to either resign or go thru [*sic*] the arbitration process." At paragraph 20, it states: "The Employee could have exercised his right to file a union grievance and proceed with arbitration".

[22] Consequently, if we consider the General Division's reasons as a whole, we cannot conclude that it determined that the employer could not have dismissed the applicant. The applicant's dismissal is a constant backdrop to any mention of the arbitration process. This is also supported by the statement of the Appeal Division at paragraph 21 of its reasons that "[t]here is no reason to intervene and change that decision."

[23] In my view, it was reasonable for the Appeal Division not to intervene with regard to the General Division's decision on this point.

[24] Third, the applicant submits that the General Division did not correctly determine the actual cause of the termination of his employment and adds that the General Division erred in analyzing whether he left voluntarily without considering elements brought to its attention. Once again, I am of the view that it was reasonable for the Appeal Division to conclude as it did. I will discuss both of these arguments by the applicant simultaneously.

[25] The applicant notes that it was following the discussions with the union representative that the employer agreed to substitute dismissal with resignation. On the basis of *Thibodeau v. Canada (Attorney General)*, 2015 FCA 167, 256 A.C.W.S. (3d) 189, para. 58 [*Thibodeau*], the applicant submits that an agreement cannot have the effect of changing the actual cause of the loss of employment and that such an agreement was not binding on the General Division. Citing *Canada (Attorney General) v. Borden*, 2004 FCA 176, 130 A.C.W.S. (3d) 1135 [*Borden*], the applicant states that the General Division erred in law because it was required to [TRANSLATION] "determine, in accordance with *Canada (AG) v. Borden* whether the loss of employment 'results from a deliberate action of the employee'" (applicant's memorandum, para. 32). Consequently, according to the applicant, the General Division should have designated the dismissal as the actual cause of the loss of employment.

[26] In addition, the applicant argues that the error in identifying the actual cause of the loss of employment means that the General Division was unable to apply the appropriate legal test for misconduct. The burden of proof was on the Commission to demonstrate that it was a dismissal for misconduct, and it noted that no aspect of the applicant's behaviour could be qualified as misconduct.

[27] I find that it was reasonable for the Appeal Division not to intervene in the General Division's determination of the actual cause of loss of employment. The General Division concluded, in light of the evidence, that the applicant had voluntarily left his employment without just cause since he had an alternative, which was to file a grievance with his union's assistance.

[28] Thus, while *Thibodeau* might contain factual elements that are similar to this application, it does not apply in this case. In fact, in *Thibodeau*, an agreement existed between the parties that stipulated in its preamble that [TRANSLATION] "the parties wish to settle this dispute out of court without any admission of responsibility on either side" (*Thibodeau*, para. 9), which is not the case here.

[29] It was for the General Division to determine whether the matter before it concerned a dismissal for "misconduct" or whether the applicant had voluntarily left his employment without just cause. These are two distinct concepts that are addressed differently under the EIA even though they are connected and sanctioned in the same way by a special exclusion and even though the two concepts are logically connected because they both concern situations where the loss of employment is the result of a deliberate act by the employee (*Smith v. Canada (Attorney General)*, 1997 CanLII 5451 (FCA), 73 A.C.W.S. (3d) 1070; *Borden*, para. 6).

[30] Moreover, the General Division's role, after having heard the testimony of the employer and the employer's witness and examining the Commission's record, was to make findings of fact. That is what it did. The application of established principles to the facts is a question of mixed fact and law and does not constitute an error of law (*Quadir v. Canada (Attorney General)*, 2018 FCA 21, 287 A.C.W.S. (3d) 294, para. 9).

[31] I also note that the applicant was assisted by his union representative during the meeting with his employer before he signed the resignation letter. That representative had a duty of fair

representation toward the applicant. It was therefore reasonable for the Appeal Division not to intervene in the General Division's finding that the employer did not exert any undue pressure.

[32] Insisting on the issue of voluntary leaving, the applicant submits that the General Division erred in analyzing whether he had left voluntarily without considering certain elements brought to its attention. He argues that it was insufficient for the General Division to conclude that he had quit his employment, and that it ought to have determined whether the termination of employment was indeed "voluntary." That argument is based on paragraph 2 of *Bédard v. Canada (Attorney General)* (2001 FCA 76, 2001 CarswellNat 2157):

> In our view, the board should in the circumstances have considered the question of whether the appellant left his employment within the meaning of section 29 of the *Employment Insurance Act*, S.C. 1996, c. 23, and if so, whether that termination of employment was voluntary. Neither the board nor the umpire considered these questions.

[33] I do not accept this argument. *Bédard* concerned a "voluntary" leaving following a misunderstanding (*Bédard*, para. 1). In this case, it was open to the Appeal Division not to intervene in the General Division's finding that the applicant had voluntarily resigned following a discussion with his union representative. The Appeal Division therefore did not err in its analysis of whether the applicant had "voluntarily" left.

[34] Consequently, it was reasonable for the Appeal Division to decline to intervene in the General Division's decision regarding the actual cause of loss of employment. Since the General Division considered the legal test for leaving voluntarily, it was therefore reasonable for the Appeal Division not to intervene and not to consider the legal test for misconduct.

[35] Fourth, the applicant alleges that the General Division's conclusion at paragraph 22 of its reasons is unfounded in law. This refers to the conclusion, which was already examined at paragraph [18] above, that it would have been impossible for the employer to dismiss the applicant because his employment was unionized. For the same reasons as those mentioned at paragraphs 20 to 23 above, this argument is destined to fail and warrants no further consideration.

[36] Lastly, the applicant alleges that the General Division did not adequately summarize the evidence of record and argues that it is [TRANSLATION] "required to examine all of the evidence and, if it decides to reject certain elements or not give them the probative value they appear to warrant, it must clearly explain its decision; otherwise, its decision will contain an error of law or be qualified as capricious." The applicant then cites various excerpts from his initial application for benefits and elaborates on his record of employment and resignation letter. The applicant cites *Oberde Bellefleur OP Clinique dentaire O. Bellefleur (Employer) v. Canada (Attorney General)*, 2008 FCA 13, 175 A.C.W.S. (3d) 440, para. 3 [*Bellefleur*], where this Court held that when a Board of Referees "is faced with contradictory evidence" it "must consider it" and explain why "the evidence should be dismissed or assigned little or no weight at all".

[37] In my view, it was reasonable for the Appeal Division not to intervene. Indeed, at paragraph 9 of its reasons, the General Division states the following regarding the first issue it identified, namely that the facts are undisputed:

> The parties agree that the reason for separation from employment was because the Employee quit his employment on March 8, 2018. Accordingly, I accept that the Employee quit his employment on March 8, 2018.
>
> [Emphasis added.]

[38] Consequently, the statement at paragraph 3 of *Bellefleur* can be distinguished herein because it addresses the issue of contradictory evidence. The General Division was not faced with contradictory evidence on this issue, meaning that it was reasonable for the Appeal Division not to intervene in this regard.

[39] It is also important to note that the applicant's submissions are more akin to a request for reassessment of the evidence. In *Vavilov*, the Supreme Court reiterated that the role of a reviewing court is not to engage in a line-by-line treasure hunt for error. It must also refrain from reassessing the evidence (*Vavilov*, paras. 102 and 125).

[40] By choosing to leave his employment, the applicant disqualified himself from receiving employment insurance benefits. He had the option to retain his employment and contest his dismissal with his union's assistance. It must be kept in mind that the primary objective of the EIA is to compensate claimants who involuntarily lost their employment (*Canada (Attorney General) v. Lavallée*, 2003 FCA 255, para. 10; *Canada (Attorney General) v. Easson*, [1994] F.C.J. No. 124, 46 A.C.W.S. (3d) 578 (F.C.A.), para. 4; *Tanguay v. Canada (Employment Insurance Commission)*, [1985] F.C.J. No. 910, 37 A.C.W.S. (2d) 8, para. 10 (F.C.A.)).

VI. CONCLUSION

[41] Despite the able submissions from counsel for Mr. Stavropoulos, I cannot conclude that the Appeal Division's decision was unreasonable, given the deference the standard of reasonableness requires. The Appeal Division's conclusion that the General Division did not err with regard to subsection 58(1) of the DESDA is reasonable. The reasons are justified, intelligible and transparent, and our Court's intervention is therefore unwarranted (*Vavilov*, paras. 86, 95–96; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at para. 47).

[42] Consequently, and for the reasons set out above, I find that the application for judicial review should be dismissed, without costs.

"Marianne Rivoalen"
J.A.

"I agree.
Richard Boivin J.A."

"I agree.
Mary J. L. Gleason J.A."

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

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APPEARANCES:

Kim Bouchard	FOR THE APPLICANT
Liliane Bruneau	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Mouvement Action-Chômage Montréal Montreal, Quebec	FOR THE APPLICANT
Nathalie G. Drouin Deputy Attorney General of Canada Ottawa, Ontario	FOR THE RESPONDENT