Federal Court of Appeal | Cour d'appel fédérale

Date: 20201022

Docket: A-185-18

Citation: 2020 FCA 178

CORAM: **NADON J.A.**
RIVOALEN J.A.
LEBLANC J.A.

BETWEEN:

CARLA GUERRIER

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Ottawa, Ontario, on October 14, 2020.

Judgment delivered at Ottawa, Ontario, on October 22, 2020.

REASONS FOR JUDGMENT BY: RIVOALEN J.A.

CONCURRED IN BY: NADON J.A.
LEBLANC J.A.

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REASONS FOR JUDGMENT

RIVOALEN J.A.

I. Introduction

[1] Carla Guerrier (Ms. Guerrier or the applicant) seeks to set aside a decision of the Social Security Tribunal – Appeal Division (Appeal Division) (2018 SST 560) rendered on May 23, 2018, which dismissed her appeal from a decision of the Social Security Tribunal – General

Division (General Division) (GE-16-4794) denying her application for unemployment benefits under the Employment Insurance Act, S.C. 1996, c. 23 (the Act).

[2] Ms. Guerrier lost her employment in August 2016, because she did not report for work for three consecutive days and did not provide a medical note justifying her absences, as was requested by her employer. Her application for unemployment benefits was denied because the Canada Employment Insurance Commission (the Commission) determined that Ms. Guerrier's failure to report for work, without notifying her employer, constituted misconduct within the meaning of subsection 30(1) of the Act. The General Division upheld this decision.

[3] The General Division determined that the applicant should have known that her failure to show up for work for three consecutive days, without notifying her supervisor, was a serious breach of her employment contract and that her dismissal was a real possibility. In reaching this decision, the General Division took into account the events that gave rise to the applicant's dismissal, including her tense working relationship with her supervisor due to her previous absences and late arrivals at work and the fact that she was directed to contact him to discuss her leave of absence.

[4] The General Division was alive to Ms. Guerrier's arguments surrounding her illness but found that Ms. Guerrier had deliberately chosen to delay providing a medical note to her supervisor until her appointment with a medical specialist without reaching a prior agreement to this effect with her employer. Furthermore, the General Division found that Ms. Guerrier should

have consulted another doctor in order to obtain a medical note justifying her absence, which she had not done.

[5] Based on this evidence, the General Division found that Ms. Guerrier had been reckless and should have known that she would be dismissed from her employment. The General Division did not accept Ms. Guerrier's argument that she was dismissed because of her medical condition. The General Division determined that there was no evidence that the employer's decision to terminate the applicant's employment was based on facts other than those related to her own actions. She was dismissed because she did not report to work for three consecutive days without a medical note and without notifying her employer.

[6] On December 15, 2017, the Appeal Division granted leave to appeal under subsection 58(1) of the *Department of Employment and Social Development Act*, S.C. 2005, c. 34. On May 23, 2018, the Appeal Division dismissed the appeal.

[7] The Appeal Division held that the General Division did not err by finding that the applicant's actions constituted misconduct within the meaning of subsection 30(1) of the Act. The Appeal Division found that the General Division did not commit an error when it determined, based on the evidence that was before it, that the applicant's employment had been terminated because she missed three consecutive days of work without obtaining prior permission from her employer. The Appeal Division concluded that there was no doubt that doing so constitutes misconduct. Finally, the Appeal Division found that the General Division did not err in its interpretation of the legal test for misconduct and did not overlook or

misconstrue the evidence before it when it disqualified the applicant from receiving unemployment benefits pursuant to subsection 30(1) of the Act.

[8] For the reasons given below, I would dismiss the application for judicial review, without costs.

II. Standard of Review

[9] The standard of review on the issues in dispute is reasonableness (Canada (Minister of Citizenship and Immigration) v. Vavilov, 2019 SCC 65, 441 D.L.R. (4th) 1). The task of this Court is to determine whether it was reasonable for the Appeal Division to uphold the General Division's decision that the applicant was dismissed from her employment for misconduct within the meaning of subsection 30(1) of the Act and therefore disqualified from receiving unemployment benefits.

III. The Applicant's Submissions

[10] Before this Court, the applicant raises essentially the same arguments she made before the Appeal Division.

[11] In her written representations, the applicant submits that she provided multiple medical notes and explained that she was sick and unable to obtain an additional medical note within the timeframe requested by her employer. She submits that she did not want to attend a hospital emergency room or walk-in clinic because those medical professionals were unfamiliar with her

sickness, unlike the specialist who is responsible for her care. She justifies the absence of a medical note because she could not afford it and did not have the time to obtain one.

[12] The applicant argues that both the General Division and Appeal Division erred because they had no regard for her inability to provide the medical note because of her struggle with her chronic sickness. She contends that, by siding with the Commission, both the General Division and Appeal Division were unfair and not receptive to her. In addition, the applicant submits that the General Division did not take into consideration the evidence that she contacted the hospital and that she was informed that they could not provide her with a medical note within three days.

[13] During her oral submissions, the applicant disagrees that she acted recklessly or deliberately. She says she was suffering from her medical condition and could not attend work because she was taking heavy pain medication. She communicated with her employer and was unable to provide the medical note within the requested timeframe. She was aware of the employer's policy that a medical note was required to justify an absence from work for more than three days for reasons of sickness.

IV. Analysis

[14] Unfortunately, I cannot accept any of the applicant's arguments. She has been unable to persuade me that the decision of the Appeal Division was unreasonable when it upheld the General Division's decision to deny her unemployment benefits because she did not qualify pursuant to subsection 30(1) of the Act.

[15] During her submissions, it was clear that the applicant was most concerned with the negative connotation inferred from the text used in subsection 30(1) of the Act, that is to say that she has been found liable for misconduct. The record and findings of the Appeal Division do not suggest that Ms. Guerrier acted in a delinquent or illegal manner. However, for the purpose of subsection 30(1) of the Act, it was reasonable for the Appeal Division to find that her actions constituted misconduct. The record supports the finding of the General Division, as upheld by the Appeal Division, that the applicant wilfully missed three consecutive days of work, without a medical note to justify her absence, and notwithstanding her employer's direction that a note was required. No agreement was reached between Ms. Guerrier and her employer. Although she had done so in the past for previous medical absences, on this occasion, Ms. Guerrier chose not go to a walk-in clinic or hospital emergency room to obtain a medical note. The applicant admits that she was aware of her employer's policy requiring the medical note. On the evidence before the General Division, as reviewed by the Appeal Division, it is reasonable to conclude that the applicant's conduct falls under the definition of "misconduct" in subsection 30(1) of the Act

[16] For the purpose of subsection 30(1) of the Act, the notion of misconduct has been defined by the case law as being wilful when the claimant knew or ought to have known that her conduct was such that it would result in dismissal. To be wilful, it is sufficient that the misconduct be conscious, deliberate or intentional. The conduct must also constitute a breach of an express or implied duty resulting from the contract of employment. In addition, misconduct must be the cause of the employee's dismissal from employment (*Canada (Attorney General) v. Maher*, 2014 FCA 22, 2014 CarswellNat 435 (WL Can) at para. 6; *Canada (Attorney General) v.*

Lemire, 2010 FCA 314, [2010] 331 D.L.R. (4th) 247 at para. 11; *Canada (Attorney General) v. Brissette*, [1994] 1 F.C. 684, 168 N.R. 60 (F.C.A.) at para. 12).

V. Conclusion

[17] It is not our role to re-decide the applicant's case on the merits. Based on the record that was before the General Division and the application of the facts to subsection 30(1) of the Act, it was open to the General Division to conclude that the applicant lost her employment because of her own misconduct and therefore was not entitled to unemployment benefits.

[18] In the case before us, in light of the history and the context of the proceedings, it was reasonable for the Appeal Division to uphold the General Division's findings. The Appeal Division's reasons are based on a coherent and rational chain of analysis, and are justified in relation to the facts and the law that it was required to apply. They fall within a range of possible, acceptable outcomes.

[19] For these reasons, I would dismiss the application for judicial review, without costs.

"Marianne Rivoalen"
J.A.

"I agree.
M. Nadon J.A."

"I agree.
René LeBlanc J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-185-18
STYLE OF CAUSE:	CARLA GUERRIER v. ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	OCTOBER 14, 2020
REASONS FOR JUDGMENT BY:	RIVOALEN J.A.
CONCURRED IN BY:	NADON J.A. LEBLANC J.A.
DATED:	OCTOBER 22, 2020

APPEARANCES:

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