Federal Court  Cour fédérale

Date: 20190201

Docket: T-227-18

Citation: 2019 FC 137

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Ottawa, Ontario, February 1, 2019

PRESENT: The Honourable Madam Justice St-Louis

BETWEEN:

MARTIN BOSSÉ

Applicant

And

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] Martin Bossé is seeking judicial review of the decision rendered January 23, 2018, by the Appeal Division of the Social Security Tribunal (Appeal Division) dismissing his application for leave to appeal from the decision of the General Division of that Tribunal (General Division).

I. BACKGROUND

[2] On October 4, 2010, Mr. Bossé began working for the company Canpar Transport. On October 5, 2010, after two days of training, he left his job.

[3] On May 18, 2011, an investigator with the Integrity Services Branch of Human Resources and Skills Development Canada wrote to Mr. Bossé to inform him that she believed he voluntarily left his job at Canpar Transport on October 5, 2010, but that he did not inform anyone. Indeed, during his telephone declaration covering this period, Mr. Bossé confirmed that he had not "stopped working for an employer" during the period of September 26 to October 9, 2010 (Respondent's Record, at pp 306-315).

[4] On May 19, 2011, Mr. Bossé signed a declaration confirming that it was accurate that he did not declare this information and provided the following explanation: [TRANSLATION] "After 2 days of training, it was not full-time employment they offered me so I did not appreciate that. I did not want to unload vans, I wanted to be a delivery person. When I was hired, I was supposed to be a delivery person or even a representative, which was not the case."

[5] On May 29, 2013, the Employment Insurance Commission informed Mr. Bossé of measures that had been taken with regard to his employment insurance application. In regard to his job with Canpar Transport, the Commission informed Mr. Bossé that it could not pay regular employment insurance benefits as of October 3, 2010, because he had voluntarily left his

employment at Canpar Transport on October 5, 2010, without just cause within the meaning of the *Employment Insurance Act*, SC 1996, c. 23 [the *Employment Insurance Act*].

[6] The General Division dismissed Mr. Bossé's appeal from the Commission's decision and the Appeal Division then refused his application for leave to appeal. Mr. Bossé sought judicial review of this refusal at the Federal Court, which allowed the application and referred the case back to the Appeal Division, finding that it had violated procedural fairness by not informing Mr. Bossé that he had used the wrong form in his appeal. The Appeal Division then allowed the application for leave to appeal and Mr. Bossé's appeal, such that the case was referred back to the General Division for reassessment of the Commission's May 29, 2013, decision.

[7] Back before the General division, Mr. Bossé submitted that he had cause to leave his employment because there was a significant change to the conditions respecting his salary (subparagraph 29(c)(vii) of the *Employment Insurance Act*) and his work duties (subparagraph 29(c)(ix) of the *Employment Insurance Act*). Regarding the one-month training on trucks offered by the employer, Mr. Bossé alleged that he was not aware of this at the time he was hired.

[8] On June 22, 2017, the General Division dismissed Mr. Bossé's appeal. It found that he did not have just cause to voluntarily leave his employment with Canpar Transport on October 5, 2010, because this solution was not the only reasonable solution in this case. The General Division felt that a reasonable solution would have been for Mr. Bossé to continue this employment with Canpar Transport and wait to find another job before leaving. As a result, it

found that Mr. Bossé was excluded from benefits pursuant to sections 29 and 30 of the *Employment Insurance Act*.

[9] The General Division noted in particular that Mr. Bossé (1) left because his had ambitions to get his class 1 (decision of the General Division at para 25); (2) pled subparagraphs 29(c)(vii) and 29(c)(ix) (para 26); (3) did not show there was a modification to the conditions respecting his salary because he had the opportunity to take full-time training (para 30); and (4) did not show that the modification to his duties as representative and delivery person were a problem (para 30).

[10] The General Division also noted that leaving employment to take training is a ground for disqualification from benefits (*Canada (Attorney General) v Gauthier*, 2006 FCA 40 [*Gauthier*]; *Canada (Attorney General) v Vairamuthu*, 2009 FCA 277) (decision of the General Division at paras 33, 37).

[11] In relation to the training period, the General Division noted that Mr. Bossé stated, in his declaration to the Commission and during the hearing, that the employer offered him full-time training as a delivery person for 30 days (decision of the General Division at paras 6(h), 8(h), 24, 27–28, 32).

[12] On July 3, 2017, Mr. Bossé applied to the Appeal Division for leave to appeal the decision of the General Division. In the application form that he signed for this purpose on July 3, 2017, Mr. Bossé raised a single ground for appeal, namely that the General Division made an

important error regarding the facts in the appeal file. In the same form, Mr. Bossé stated that the portion of the decision of the General Division that [TRANSLATION] "there would be a 30-day training was erroneous. No one-month training was guaranteed or offered."

[13] On January 23, 2018, the Appeal Division refused Mr. Bossé's application for leave to appeal. It found that the appeal would not have a reasonable chance for success because there was no erroneous finding of fact that was made in a perverse or capricious manner or without regard for the material before it (paragraph 58(1)(c) of the *Department of Employment and Social Development Act*, SC 2005, c. 34 [the *Department of Employment Act*]).

[14] The Appeal Division noted that the General Division considered the evidence on record and did not ignore any elements. It noted that Mr. Bossé testified, during the June 8, 2017, hearing, that he had begun a one-month training and the one-month training was mentioned in the appeal record (Decision of the Appeal Division at paras 12–13).

[15] This is the decision that is the subject of the present judicial review.

II. POSITION OF THE PARTIES

A. *Position of Mr. Bossé*

[16] In support of his case, Mr. Bossé filed his own affidavit, signed February 15, 2018. The affidavit appears to have two exhibits, namely the decision the Federal Court rendered in his favour in 2015 and the affidavit he had submitted in the previous case. Unfortunately, Mr. Bossé

did not refer to these exhibits in his affidavit and they were not identified with the signature of the person before whom the affidavit was sworn, as required under subsection 80(3) of the *Federal Courts Rules*, SOR/98-106.

[17] In his affidavit, Mr. Bossé contested the fact that the March 2014 hearing before the General Division was held by teleconference and stated that he disagrees with the Commission's decision since he had no choice but to leave his employment. Then, he alleged that there was a violation of the principles of natural justice because the General Division neglected, twice, to address his "main argument" raised in his notices of appeal; however, he did not specify what this argument was. Lastly, he argued that the needed to be understood and he had the impression that [TRANSLATION] "everything is already predetermined" based on the facts on paper without considering the human factor of his decision to leave his employment.

[18] In his memorandum, Mr. Bossé did not present any arguments challenging the legality of the January 23, 2018, decision of the Appeal Division or the June 22, 2017, decision of the General Division. Mr. Bossé first stated that the standard applicable to the refusal of the Appeal Division to grant leave to appeal is reasonableness (*Bergeron v Canada (Attorney General)*, 2016 FC 220 at para 6).

[19] Mr. Bossé then presented the legislative framework, citing sections 260 and 262 of the [TRANSLATION] "JGLPA [*sic*]" and subsections 58(1) and 58(2) of the [TRANSLATION] "DHRSD Act [*sic*]" and referring to the transitional provisions and the impact of adopting new legislation. The Court has difficulty understanding the nature of Mr. Bossé's proposal in this regard and he

did not provide any useful clarifications in response to the questions raised by the Court during the hearing.

[20] Also in his memorandum, Mr. Bossé submitted that, in a judicial review of a decision regarding leave to appeal, the Court must first ask whether the Appeal Division applied the correct criterion, namely the criterion of "reasonable chance of success". Then, the Court must determine, using the reasonableness standard, whether the criterion was properly applied (*Belo-Alves v Canada (Attorney General)*, 2014 FC 1100 at paras 55–60, 63–65). He concluded his memorandum by stating that he should have the opportunity to be heard, [TRANSLATION] "fairly and equitably and before a jury".

[21] During the hearing, Mr. Bossé relied on the fact that the same decision maker made three decisions in his case and he suggested that this could be problematic. However, he did not provide details about his concerns in this regard and he did not address the fact that two of the three decisions were in his favour.

[22] Before the Court, Mr. Bossé did not present any argument to the effect that he was justified in leaving his employment for any of the grounds listed under paragraph 29(c) of the *Employment Insurance Act*.

B. *Position of the respondent*

[23] The respondent stated that the standard that applies to decisions of the Appeal Division regarding an application for leave to appeal is reasonableness (*Canada (Attorney General) v*

Hines, 2016 FC 112 at para 28; *Tracey v Canada (Attorney General)*, 2015 FC 1300 at paras 12–23). The respondent submitted that the decision of the General Division and that of the Appeal Division refusing the application for leave to appeal were reasonable.

[24] The respondent then presented the facts and the legislative framework. Under section 58 of the *Department of Employment Act*, the Appeal Division grants leave to appeal if the grounds raised have a reasonable chance of success. This consists of "having some arguable ground upon which the proposed appeal might succeed" (*Osaj v Canada (Attorney General)*, 2016 FC 115 at para 12 [*Osaj*]). Sections 29 and 30 of the *Employment Insurance Act* allow for a determination of whether a voluntary departure is justified. To lighten the text, the relevant provisions are reproduced in whole, in the annex.

[25] The respondent noted that the decision of the General Division was reasonable since the evidence on record shows that Mr. Bossé could have continued his training while waiting to find another job. He also argued that the decision of the Appeal Division was reasonable because it applied the correct provisions from the *Department of Employment Act* and the correct test to rule on the application for leave to appeal. He added that it was Mr. Bossé's responsibility to show that he was justified in leaving his employment (*Canada (Attorney General) v White*, 2011 FCA 190 at paras 1–7; *Tanguay v Canada (Unemployment insurance Commission)*, (FCA) [1985] FCJ No. 910 at paras 2–3), and that the reasons Mr. Bossé raised are not justifications within the meaning of paragraph 29(c) of the *Employment Insurance Act* (*Gauthier* at para 2).

[26] Also, the respondent submitted that the Appeal Division followed the teachings in *Karadeolian v Canada (Attorney General)*, 2016 FC 615 [*Karadeolian*] (at para 10) by reviewing the evidence on file and not applying section 58 of the *Department of Employment Act* mechanically.

[27] Finally, the respondent noted that it is well established that appeals heard based on the record respect the principles of natural justice (*Bossé v Canada (Attorney General)*, 2015 FC 1142 at para 34).

III. DISCUSSION

A. *Legislative framework*

[28] The *Employment Insurance Act*, adopted in 2005, has the goal of ensuring the safety of citizens by offering assistance to individuals who have lost their employment and by helping unemployed persons return to work. Moreover, a person is disqualified from receiving benefits if they, voluntarily and without justification, take a period of leave or leave their employment (sections 29 to 33 of the *Employment Insurance Act*). Paragraph 29(c) of the *Employment Insurance Act* states that the beneficiary has just cause to voluntarily leave employment or take leave if, considering all the circumstances, in particular those listed, the departure or leave constitutes the only reasonable solution in that case. One of the circumstances listed is a significant modification to the conditions regarding wages (subparagraph 29(c)(vii)) and significant changes in work duties (subparagraph 29(c)(ix)). A beneficiary in such a situation would not be disqualified from receiving benefits.

[29] 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 can only be brought with leave (subsection 56(1) of the *Department of Employment Act*).

[30] Subsection 58(1) of the *Department of Employment Act* provides means for appeal that may be raised with the Appeal division, including that set out in paragraph 58(1)(c), if 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. Lastly, subsection 58(2) of the *Department of Employment Act* sets out that an application for leave to appeal is only granted if the appeal has a reasonable chance of success.

[31] The Court 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, in particular, when significant evidence has been overlooked or misconstrued (*Griffin v Canada (Attorney General)*, 2016 FC 874 at para 20; *Karadeolian* at para 10).

B. *Standard of review*

[32] The standard of review that applies to a refusal by the Appeal Division to grant leave 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).

C. *The decisions are reasonable considering the evidence on file*

[33] The Court has reviewed the decision of the General Division and that of the Appeal Division, which is the subject of the present judicial review, and is not convinced they are unreasonable.

[34] The evidence shows that Mr. Bossé himself confirmed that Canpar Transport offered a full-time training of 30 days (Respondent's Record at pp 333, 399) and the General Division did not err on this.

[35] Moreover, Mr. Bossé did not raise any arguments against the findings of the General Division with regard to the reasons for his departure and subparagraphs 29(c)(vii) and 29(c)(ix) of the *Employment Insurance Act*, either before the Appeal Division or before this court. The Court sees no reason to intervene on this subject.

[36] Since the evidence before the Appeal Division indicates that Mr. Bossé himself confirmed that he was receiving a 30-day full-time training, and that it is the only ground for appeal, it was reasonable for the Appeal Division to find that Mr. Bossé's appeal had no reasonable chance of success and to refuse his application for leave to appeal.

[37] The decision of the Appeal Division falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47) and it was reasonable.

JUDGMENT

THIS COURT'S JUDGMENT is that:

- The application for judicial review is dismissed.
- Without costs.

"Martine St-Louis"
Judge

Certified true translation
This 13th day of February 2019.
Elizabeth Tan, Translator

ANNEX

***Employment Insurance Act*, SC 1996, c 23**

Disqualification and Disentitlement

29 For the purposes of sections 30 to 33,
(c) just cause for voluntarily leaving an employment or taking leave from an employment exists if the claimant had no reasonable alternative to leaving or taking leave, having regard to all the circumstances, including any of the following:
(i) sexual or other harassment,
(ii) obligation to accompany a spouse, common-law partner or dependent child to another residence,
(iii) discrimination on a prohibited ground of discrimination within the meaning of the Canadian Human Rights Act,
(iv) working conditions that constitute a danger to health or safety,
(v) obligation to care for a child or a member of the immediate family,
(vi) reasonable assurance of another employment in the immediate future,
(vii) significant modification of terms and conditions respecting wages or salary,
(viii) excessive overtime work or refusal to pay for overtime work,
(ix) significant changes in work duties,
(x) antagonism with a supervisor if the claimant is not primarily responsible for the antagonism,
(xi) practices of an employer that are contrary to law,
(xii) discrimination with regard to employment because of membership in an association, organization or union of workers,
(xiii) undue pressure by an employer on the claimant to leave their employment, and
(xiv) any other reasonable circumstances that are prescribed.

Disqualification — misconduct or leaving without just cause

30 (1) A claimant is disqualified from

***Loi sur l'assurance-emploi*, LC 1996, ch 23**

Exclusion et inadmissibilité

29 Pour l'application des articles 30 à 33 :
c) le prestataire est fondé à quitter volontairement son emploi ou à prendre congé si, compte tenu de toutes les circonstances, notamment de celles qui sont énumérées ci-après, son départ ou son congé constitue la seule solution raisonnable dans son cas :
(i) harcèlement, de nature sexuelle ou autre,
(ii) nécessité d'accompagner son époux ou conjoint de fait ou un enfant à charge vers un autre lieu de résidence,
(iii) discrimination fondée sur des motifs de distinction illicite, au sens de la Loi canadienne sur les droits de la personne,
(iv) conditions de travail dangereuses pour sa santé ou sa sécurité,
(v) nécessité de prendre soin d'un enfant ou d'un proche parent,
(vi) assurance raisonnable d'un autre emploi dans un avenir immédiat,
(vii) modification importante de ses conditions de rémunération,
(viii) excès d'heures supplémentaires ou non-rémunération de celles-ci,
(ix) modification importante des fonctions,
(x) relations conflictuelles, dont la cause ne lui est pas essentiellement imputable, avec un supérieur,
(xi) pratiques de l'employeur contraires au droit,
(xii) discrimination relative à l'emploi en raison de l'appartenance à une association, une organisation ou un syndicat de travailleurs,
(xiii) incitation indue par l'employeur à l'égard du prestataire à quitter son emploi,
(xiv) toute autre circonstance raisonnable prévue par règlement.

Exclusion : inconduite ou départ sans justification

30 (1) Le prestataire est exclu du bénéfice des

receiving any benefits if the claimant lost any employment because of their misconduct or voluntarily left any employment without just cause, unless

(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

(b) the claimant is disentitled under sections 31 to 33 in relation to the employment.

***Department of Employment and Social Development Act*, SC 2005, c 34**

Leave

56 (1) An appeal to the Appeal Division may only be brought if leave to appeal is granted.

Grounds of appeal

58 (1) The only grounds of appeal are that

(a) the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;

(b) the General Division erred in law in making its decision, whether or not the error appears on the face of the record; or

(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.

Criteria

(2) Leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success.

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) 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) qu'il ne soit inadmissible, à l'égard de cet emploi, pour l'une des raisons prévues aux articles 31 à 33.

***Loi sur le ministère de l'Emploi et du Développement social*, LC 2005, ch 34**

Autorisation du Tribunal

56 (1) Il ne peut être interjeté d'appel à la division d'appel sans permission.

Moyens d'appel

58 (1) Les seuls moyens d'appel sont les suivants :

a) la division générale n'a pas observé un principe de justice naturelle ou a autrement excédé ou refusé d'exercer sa compétence;

b) elle a rendu une décision entachée d'une erreur de droit, que l'erreur ressorte ou non à la lecture du dossier;

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.

Critère

(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.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-227-18
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