Federal Court of Appeal

Cour d'appel fédérale

Date: 20181203

Docket: A-409-17

Citation: 2018 FCA 220

CORAM: **RENNIE J.A.**
WOODS J.A.
LASKIN J.A.

BETWEEN:

BASU BOSE

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Toronto, Ontario, on November 27, 2018.

Judgment delivered at Ottawa, Ontario, on December 3, 2018.

REASONS FOR JUDGMENT BY: RENNIE J.A.

CONCURRED IN BY: WOODS J.A.
LASKIN J.A.

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REASONS FOR JUDGMENT

RENNIE J.A.

[1] The applicant, Basu Bose, seeks to set aside the decision of the Appeal Division of the Social Security Tribunal (SST) (2017 SSTADEI 391). In that decision, the Appeal Division upheld the decision of the SST-General Division that the applicant voluntarily left his employment without just cause as contemplated by paragraph 29(*c*) of the *Employment Insurance Act*, S.C. 1996, c. 23 (Act), and was therefore disqualified from receiving employment insurance benefits. Under that provision, just cause is established where a claimant, having

regard to all the circumstances, had no reasonable alternative but to leave his employment. The burden is on the claimant to establish that there was no reasonable alternative to leaving his employment (*Canada (Attorney General) v. White*, 2011 FCA 190 at paras. 3-4).

[2] The facts giving rise to the application may be briefly summarized.

[3] The applicant's position in the Ontario Public Service (OPS) was declared surplus. While a grievance of that decision was pending, he found other employment with a different ministry of the Ontario government. The applicant eventually entered into settlement negotiations with his employer, as a result of which he was offered a lump sum severance payment conditional on agreeing to retire. The applicant accepted the settlement and left his employment.

[4] The applicant subsequently applied for employment insurance benefits on the basis that he could no longer work due to a shortage of work. The Canada Employment Insurance Commission denied his claim on the basis that he had left his employment without just cause.

[5] On appeal of the Commission's decision, the SST-General Division concluded that the applicant voluntarily left his employment. It found that he had a reasonable alternative to leaving his employment, namely to continue working in his new position in a new ministry. It also found that the offer to pay severance conditional on retirement did not amount to just cause as contemplated by paragraph 29(*c*) of the Act.

[6] An appeal of that decision was dismissed by the SST-Appeal Division. Under subsection 58(1) of the *Department of Employment and Social Development Act*, S.C. 2005, c. 34 (DESDA), the Appeal Division can only intervene in a decision of the General Division where it

failed to observe a principle of natural justice, erred in law, or based its decision on an erroneous finding of fact made in a perverse or capricious manner. The role of this Court, sitting in review of a decision of the Appeal Division, is to determine whether the Appeal Division's consideration and disposition of the factors set forth in subsection 58(1) was reasonable (*Quadir v. Canada (Attorney General)*, 2018 FCA 21; *Cameron v. Canada (Attorney General)*, 2018 FCA 100 at para. 6; *Garvey v. Canada (Attorney General)*, 2018 FCA 118, at paras. 7-8).

[7] Before this Court, the applicant advances two arguments. In my view, neither of these arguments can succeed.

[8] The applicant's first argument is that the Appeal Division and the General Division erred in not considering the "context" in which the applicant agreed to resign. The applicant says that, having regard to the entire context, he was required to give up his job in order to obtain his severance pay, and that the Appeal Division erred in not concluding that this made his departure involuntary.

[9] This is not a reviewable error on the part of the Appeal Division. It was not the role of the Appeal Division to reconsider the evidence on whether the facts constituted just cause. Its mandate, in so far as the evidence and fact finding is concerned, is set forth in paragraph 58(1)(*c*) of the DESDA. No argument was advanced before us that the General Division made an erroneous finding of fact made in a perverse or capricious manner, as required by paragraph 58(1)(*c*), which was overlooked by the Appeal Division. An argument about the facts giving rise to just cause does not fall within the scope of paragraph 58(1)(*c*).

[10] The applicant's second argument arises from the Appeal Division's comment in paragraph 16 of its reasons, that the applicant could have continued in his employment and pursued the grievance at the same time. The applicant stresses that there was no evidence before the Appeal Division to support this statement, and that this assumption renders the Appeal Division decision unreasonable. While the applicant is correct that there is nothing in the record to support this comment by the Appeal Division, it is an error of no consequence. There are two reasons for this.

[11] First, it is important to recall that it is the General Division which made the findings of fact as to whether the applicant left his employment for just cause. It did not make any finding or assumption that the applicant could have pursued the grievance while keeping his new position. The assumption was made only by the Appeal Division, and only after it concluded that there were no errors in the General Division decision which were reviewable under subsection 58(1) of the DESDA. The reasons for decision of the Appeal Division, when read in their entirety as they must be, demonstrate that the Appeal Division addressed itself to the questions before it under subsection 58(1) and that this comment is superfluous. Indeed, had the Appeal Division engaged it its own, independent consideration of the evidence, as opposed to reviewing the General Division's consideration of the record, it would have been outside of its mandate which is limited to the considerations under subsection 58(1).

[12] Second, the Appeal Division's observation, whether correct or incorrect, is immaterial, and can have no bearing on the reasonableness of the Appeal Division decision. Had the applicant succeeded in his grievance of the decision to declare his former position surplus, he would remain employed in his former position. Had the grievance ended with the applicant's

acceptance of new employment, he would remain employed in his new position. In either case, he would have been employed. This observation by the Appeal Division cannot displace the General Division finding that the applicant had a reasonable alternative to leaving his employment.

[13] The application will therefore be dismissed. Costs were not sought and none shall be awarded.

"Donald J. Rennie"
J.A.

"I agree
Judith Woods J.A."

"I agree
J.B. Laskin J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

APPLICATION FOR JUDICIAL REVIEW OF A DECISION OF THE APPEAL DIVISION OF THE SOCIAL SECURITY TRIBUNAL DATED NOVEMBER 8, 2017, TRIBUNAL FILE NUMBER AD-17-377

DOCKET:	A-409-17
STYLE OF CAUSE:	BASU BOSE v. ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	NOVEMBER 27, 2018
REASONS FOR JUDGMENT BY:	RENNIE J.A.
CONCURRED IN BY:	WOODS J.A. LASKIN J.A.
DATED:	DECEMBER 3, 2018

APPEARANCES:

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