Federal Court  Cour fédérale

Date: 20230123

Docket: T-1665-22

Citation: 2023 FC 102

Toronto, Ontario, January 23, 2023

PRESENT: Mr. Justice Pentney

BETWEEN:

ANTHONY CECCHETTO

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] The Applicant, Anthony Cecchetto, seeks judicial review of the Social Security Tribunal – Appeal Division's [SST-AD, or Appeal Division] decision denying him leave to appeal the decision of the Social Security Tribunal – General Division [SST-GD]. The SST-GD had refused to overturn the denial of the Applicant's application for Employment Insurance [EI] benefits.

[2] The Applicant, who has represented himself at every stage of the proceedings including before this Court, submits that the decisions should be overturned because they did not deal with his fundamental questions about the legality of requiring employees to undergo medical procedures (i.e. vaccination and testing) where the efficacy and safety of such procedures have not been established. He says that he has been fired because of his personal medical choices, and the decision-makers in his case have failed to address whether that was lawful. He also disputes the factual findings that were made by the SST-GD and upheld by the Appeal Division.

[3] The Respondent submits that the decision is reasonable, in light of the limited jurisdiction of the SST-GD and SST-AD, and because the Appeal Division's decision properly applied the law to the relevant facts of the case.

II. Background

[4] The Applicant is a former employee of Lakeridge Health in Ontario. He had been employed at the hospital in various roles since July 2017. He was suspended from his employment, and ultimately terminated, because he failed to comply with the employer's policy regarding COVID-19 vaccinations and testing.

[5] Lakeridge Health did not have its own policy, but rather followed the rules set out in Directive 6, issued by Ontario's Chief Medical Officer of Health pursuant to the *Health Protection and Promotion Act*, RSO 1990, c H-7. The relevant portions of Directive 6 are as follows:

> 1. Every Covered Organization must establish, implement and ensure compliance with a COVID-19 vaccination policy requiring its employees, staff, contractors, volunteers and students to provide:
>
> > a) proof of full vaccination against COVID-19; or
> >
> > b) written proof of a medical reason, provided by a physician or registered nurse in the extended class that sets out: (i) a documented medical reason for not being fully vaccinated against COVID-19, and (ii) the effective time-period for the medical reason; or
> >
> > c) proof of completing an educational session approved by the Covered Organization about the benefits of COVID-19 vaccination prior to declining vaccination for any reason other than a medical reason…
>
> 4. Every Covered Organization's vaccination policy shall require that where an employee, staff, contractor[,] volunteer, or student does not provide proof of being fully vaccinated against COVID-19 in accordance with paragraph 1(a), but instead relies upon the medical reason described at paragraph 1(b) or the educational session at 1(c) or if applicable, the employee, staff, contractor, volunteer or student shall:
>
> > a) Submit to regular antigen point of care testing for COVID-19 and demonstrate a negative result, at intervals to be determined by the Covered Organization, which must be at minimum once every seven days.
> >
> > b) Provide verification of the negative test result in a manner determined by the Covered Organization that enables the Covered Organization to confirm the result at its discretion.

[6] The Applicant participated in an education session regarding vaccines, pursuant to paragraph 1(c) of the Directive, but did not get vaccinated or provide antigen test results as he was required to do by the other provisions. As a result, he was put on unpaid leave in September 2021 and then dismissed from his employment in October 2021.

[7] The Applicant applied for Employment Insurance in October 2021. The Canada Employment Insurance Commission [the Commission] denied his application, finding that the Applicant had lost his job due to misconduct. He asked for a reconsideration, but the Commission did not change its decision.

[8] Next, the Applicant appealed the Commission's decision to the SST-GD, arguing that his employer forcing him to get the COVID-19 vaccine amounted to medical coercion. He submitted that the safety and efficacy trials for the vaccine had yet to be completed and maintained his right to refuse the vaccine. He submitted various documents in support of his claim.

[9] On April 5, 2022, the SST-GD dismissed the Applicant's appeal. The SST-GD assessed two issues: why the Applicant had been suspended, and whether the law considered that reason to be misconduct, as that term is understood for the purposes of administering EI benefits.

[10] Although the Applicant alleged he was unaware of the consequences of non-compliance with the Directive, the SST-GD noted that the Applicant admitted to having heard through the "grapevine" that non-compliance would lead to a mandatory leave of absence, followed by termination. The SST-GD found that the employer had advised the Commission that all hospital staff received notification of the directive as of September 1, 2021, and that staff were notified many times afterwards, both via email and verbally.

[11] The SST-GD decision states at paragraph 30: "[t]he employer said that the Claimant was aware this would result in job loss and was issued multiple levels of discipline before termination, but that he refused antigen testing." The SST-GD accepted the employer's evidence, and found the Applicant's denial that he had been notified of the Directive's requirements and that he had never refused antigen testing to be lacking in credibility. The SST-GD found that the Applicant had partly complied with the Directive by completing the education session, but he failed to comply with the other components because he was unwilling to get vaccinated or seek an exemption, and he did not submit antigen test results. Based on this, the SST-GD found the applicant committed misconduct under the law.

[12] The SST-GD noted that their role was not to determine whether the dismissal or associated penalty was justified. Rather, it was to determine whether the Applicant committed misconduct within the meaning of the *Employment Insurance Act*, SC 1996, c 23 [the "EIA"]. The GD concluded that the Commission had proven that the Applicant lost his job due to his misconduct. Because of this, he was not entitled to receive EI benefits.

[13] The Applicant sought leave to appeal to the Appeal Division. The SST-AD described his grounds of appeal in the following way:

> [5] The Claimant seeks leave to appeal of the General Division's decision to the Appeal Division. He submits that the vaccine had not completed safety and efficacy trials before one could say that it stopped transmission from occurring at the time of his dismissal. He feels that he is being discriminated for his personal medical choice. The Claimant puts forward that he has the right to control

> his own bodily integrity and that his rights were violated under Canadian and international law.

[14] On July 6, 2022, the Appeal Division denied the Applicant leave to appeal. It began its analysis by summarizing the grounds of appeal it can consider as set out in the statute as well as the rules governing whether to grant leave to appeal (both of which are described in more detail below). The Appeal Division then turned to the Applicant's arguments, noting that at the leave stage he did not need to prove his case, but rather only needed to show his appeal had a reasonable chance of success.

[15] The Appeal Division noted that in assessing the leave to appeal it was required to rely on the evidence that had been before the SST-GD. It observed that "[t]he notion of misconduct does not imply that it is necessary that the breach of conduct be the result of wrongful intent; it is sufficient that the misconduct be conscious, deliberate, or intentional" (para 17). In addition, the Appeal Division remarked that the SST-GD's role is not to judge the severity of the penalty or determine whether the employer's decision to dismiss the employee was unjustified; instead, it was required to determine whether the Applicant was guilty of misconduct and whether that misconduct led to his dismissal (para 18).

[16] Applying this to the SST-GD's decision, the Appeal Division found that the Applicant had not demonstrated that his appeal had a reasonable chance of success. The SST-GD had determined that he was suspended and dismissed for not following Directive 6; that he was aware of it and his refusal was wilful; and his failure to comply with the policy was the direct

cause of his dismissal. This led the SST-GD to conclude that the Applicant had lost his job because of his misconduct.

[17] The Appeal Division noted that the SST-GD could not make a ruling in relation to misconduct based on the other legislation cited by the Applicant, because it was bound to apply the law as set out by the binding legal precedents. The Appeal Division found that the fact that the Applicant may have avenues of recourse under other legislation did not undermine the SST-GD's finding that the Commission had proven that the employer dismissed the Applicant because of his misconduct, and therefore he was not entitled to EI benefits.

[18] For these reasons, the Appeal Division denied the Applicant leave to appeal. He seeks judicial review of this decision.

III. Issues and Standard of Review

[19] The Applicant did not file a written memorandum of argument or an Application Record as required by the *Federal Courts Rules*, SOR/98-106, but the Court accepted the document he had provided which was styled as his "Affidavit" in the place of a written factum. At the hearing, the Applicant largely reiterated the points he made in writing.

[20] The issue in this case is whether the Appeal Division's decision denying the Applicant leave to appeal is reasonable. The standard to be applied is reasonableness, as described in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at paras 23,

25, 99; (see recently *Gauvreau v Canada (Attorney General)*, 2021 FC 92 [*Gauvreau*] at paras 24-27).

[21] In summary, under the *Vavilov* framework, a reasonable decision is "one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker" (*Vavilov* at para 85). This framework confirms that a Court must play a limited role in conducting a reasonableness review: "reasonableness review finds its starting point in judicial restraint and respects the distinct role of administrative decision makers" (Gauvreau at para 25, citing Vavilov at para 75). There must be sufficiently serious deficiencies for a reviewing Court to find that the decision fails to "exhibit the requisite degree of justification, intelligibility and transparency" (*Gauvreau* at para 25; see also *Vavilov* at para 100).

IV. Analysis

A. *The Legal Framework*

[22] Pursuant to section 58 of the *Department of Employment and Social Development Act*, SC 2005, c 34, , (the *DESDA* or the *Act*), the SST-AD was empowered to set the SST-GD's decision aside only if it found the latter to have 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 without regard to the material before it (*Cameron v Canada (Attorney*

General), 2018 FCA 100 at para 2 [*Cameron*]). The SST-AD was first required to decide whether to grant the Applicant leave to appeal.

[23] Pursuant to subsection 58(2) of the *Act*, leave may be granted only where the appellant satisfies the SST-AD that the proposed appeal has a reasonable chance of success on one of the three grounds listed above (*O'Rourke v Attorney General of Canada*, 2019 FCA 60 at para 9). As this Court stated in *Osaj v Canada (Attorney General)*, 2016 FC 115, at paragraph 12: "having a 'reasonable chance of success' in this context means having some arguable ground upon which the proposed appeal might succeed."

[24] An employee who loses their job due to "misconduct" is not entitled to receive EI benefits; the term "misconduct" in this context refers to the employee's violation of an employment rule. The Federal Court of Appeal has stated that "the breach must have been performed or the omission made wilfully, that is to say consciously, deliberately or intentionally" (*Canada (Attorney General) v Bellavance*, 2005 FCA 87 [*Bellavance*] at para 9).

B. *The Parties' Submissions*

[25] The following is a summary of the core of the Applicant's written submissions, as outlined in the document he titled "Affidavit":

- He was discriminated against "for my personal medical choices", citing the *Canadian Bill of Rights*, SC 1960, c 44;

- He did not consent to treatment;

- He completed the education course as required by Directive 6;

- He never received any disciplinary actions, and none of his questions were answered; the Applicant states that "[n]o one has made clear what my misconduct was…";

- He refers to a decision under which the Ontario Hospital Association mask or vaccine policy was found not to be justified, and says there is "(n)o proof masks or vaccines were effective";

- He continues, stating "it is clear the statements and policies are discriminating against peoples (*sic*) personal medical choices";

- The vaccines are being forced although they had not completed safety and efficacy trials; he says "Public Health continues to ignore the vaccine side effects" and have continued to recommend vaccines even though they have not completed the necessary safety and efficacy trials; and

- The Applicant submits that the education course exemption continues to be ignored, along with other exemptions including natural immunity. There are no exemptions for those with conscientious objections.

[26] In summary, the Applicant's written submissions set out similar arguments to the ones he advanced before the Appeal Division. At the hearing, the Applicant largely reiterated the main elements of his written submissions, but he gave particular emphasis to certain additional points. First, he says that he tried to comply with all of the rules, but his questions about the safety and efficacy of the COVID-19 vaccines and the antigen tests were never satisfactorily answered. Related to this, he states that he never intended or wanted this to get to the stage where he would be fired from his job, and he cannot understand how it all got this far.

[27] The Applicant submits that none of the previous decision-makers who had dealt with his case had addressed his two key questions: (i) what was his misconduct? and (ii) how can a person be forced to take untested medication or testing because this violates everyone's fundamental bodily integrity and amounts to discrimination based on personal medical choices? The Applicant submits that the second question affects many people in Canada, and that vaccine mandates and policies are affecting – he says they are destroying – many people's lives, and this has to stop. He submits that the Appeal Division's decision cannot be upheld because it failed to deal with these aspects of his case.

[28] For its part, the Respondent argues that the Appeal Division reasonably denied the Applicant leave to appeal. This is because the Applicant did not raise an arguable case per the *DESDA*, which is the test it had to apply (affirmed in *Cameron* at para 2 and *O'Rourke v Canada (Attorney General),* 2019 FCA 60 at para 4). The SST-AD identified the correct test for granting leave and properly applied it. Therefore, the Respondent contends, there is no basis for this Court to intervene. Citing *Garvey v Canada (Attorney General),* 2018 FCA 118 at paragraph 7, the

Respondent notes that, “a disagreement with the application of settled principles to the facts of a case does not afford the SST-AD the basis for intervention.”

[29] The Respondent submits that it was reasonable for the AD to refuse leave because the Applicant was asking the AD to reweigh the evidence and reassess the facts (see *Rouleau v Canada (Attorney General*), 2017 FC 534 at para 42). Furthermore, the AD reasonably afforded deference to the GD as the trier of fact, finding that the GD considered the evidence in support of its conclusions (see *Simpson v Canada (Attorney General)*, 2012 FCA 82 at para 10).

[30] Finally, the Appeal Division properly explained that a deliberate violation of an employer’s policy (or directive, in this case) amounts to misconduct as that term is understood for the purposes of administering the EI statute. On this point, the Respondent cites *Bellavance* at paragraph 6 for the following proposition:

> There is no doubt that the serious faults committed by the respondent constituted misconduct within the meaning of the Act. An employee must act in a way that is compatible "with the due or faithful discharge of his duty"… A serious and conscious if not deliberate violation of the HRDC Code of Conduct, as in this case, indicates reprehensible conduct that is incompatible with the due or faithful discharge of the duties that the respondent was required to perform.

[31] Therefore, according to the Respondent, the AD reasonably explained that the SST-GD’s role was to determine whether the Applicant was guilty of misconduct and, if so, whether the misconduct led to his dismissal. The SST-GD did precisely that. The Applicant did not raise any reviewable errors and the application should therefore be dismissed without costs.

C. *Discussion*

[32] While the Applicant is clearly frustrated that none of the decision-makers have addressed what he sees as the fundamental legal or factual issues that he raises – for example regarding bodily integrity, consent to medical testing, the safety and efficacy of the COVID-19 vaccines or antigen tests – that does not make the decision of the Appeal Division unreasonable. The key problem with the Applicant's argument is that he is criticizing decision-makers for failing to deal with a set of questions they are not, by law, permitted to address.

[33] Having carefully reviewed the Applicant's written and oral submissions, and the record that was before the Appeal Division, I am not persuaded that there is any basis to find the decision unreasonable, in accordance with the *Vavilov* framework. The Appeal Division properly summarized the law that applies to this case, in particular its limited role in making a decision whether to grant leave to appeal from a decision of the SST-GD. As well, the Appeal Division reviewed the key factual findings on which the SST-GD based its decision.

[34] The Appeal Division pointed out that the SST-GD made two crucial determinations, namely: that the Applicant had been dismissed from his employment because he knowingly failed to follow Directive 6, which Lakeridge Health was legally obligated to implement, and that this constituted "misconduct" as that term is understood and defined by the binding case-law regarding eligibility for EI (citing *Bellavance*).

[35] The Applicant argues that he did not fail to follow Directive 6 and that his questions about the vaccines and antigen testing were never answered to his satisfaction. He also says that he was never subjected to any disciplinary actions, or advised that he would be fired if he did not comply. The problem for the Applicant is that the SST-GD has made findings on all of these points, based on its assessment of the evidence in the record, including the Applicant's evidence and arguments. He has not pointed to any particular failing by the SST-GD, or in turn the Appeal Division, but rather he simply expresses his disagreement with the findings and says they are not true.

[36] I am not persuaded that the Appeal Division made any of the kinds of factual errors that might justify overturning its decision. The SST-GD heard the evidence and made its factual and legal findings, and the Appeal Division considered the Applicant's arguments and decided that his appeal had no reasonable chance of success, based on the facts and the law. This is a reasonable finding, based on the legal framework that the Appeal Division properly summarized, and the factual determinations that it reasonably considered.

[37] The Appeal Division's decision, like that of the SST-GD, is rooted in the interpretation of the term "misconduct" in this area of the law. As confirmed by *Bellavance*, in order for an action to rise to the level of misconduct, it must be performed consciously, deliberately, or intentionally (para 9). Misconduct does not require that the employee act with malicious intent, as some might assume.

[38] In this case, the SST-GD considered the evidence of the Commission and the Applicant. It assessed why the Applicant was suspended and later terminated, and whether this constituted misconduct. The employer made it clear that the Applicant faced multiple levels of discipline before his eventual termination, and the SST-GD accepted this evidence.

[39] The Court in *Nelson v Canada (Attorney General)*, 2019 FCA 22 affirmed that "there will be misconduct where the claimant knew or ought to have known that his conduct was such as to impair the performance of the duties owed to his employer and that, as a result, dismissal was a real possibility" (para 21). The SST-GD noted that the Applicant admitted he had heard about the consequences of non-compliance with the policy through the "grapevine" and he had the opportunity to remedy his behaviour when suspended, but did not do so. Hospital staff, the Applicant included, received repeated notification of the policy both verbally and over email. Based on these findings, the SST- GD reasonably determined that the Applicant had committed misconduct.

[40] In denying leave to appeal, the Appeal Division considered whether the Applicant raised any of the reviewable errors listed in subsection 58(1) of the *DESDA* and whether the appeal ultimately had a reasonable chance of success, as it was required to do under subsection 58(2) of the *DESDA*. The Applicant raised none of the sorts of errors that could justify the granting of his appeal, and the Appeal Division reasonably concluded that his appeal had no chance of success.

[41] The Applicant's arguments on this judicial review largely reiterate his previous submissions, but I find that none of them provide a basis to overturn the Appeal Division's

decision. The Applicant, however, pointed to a recent decision of the SST-GD that found that an employee's failure to comply with an employer's mandatory vaccine requirement did not amount to "misconduct" which disentitled the employee to EI benefits (*AL v Canada Employment Insurance Commission*, 2022 SST 1428 [*AL*]**)**. The Applicant argues that this case establishes that it is not misconduct to refuse to abide by a vaccine policy unilaterally imposed by an employer.

[42] I am not persuaded, because that case involved significantly different facts than the one before me here. The SST-GD's ruling in *AL* rests on several key findings, including that the employer's imposition of the vaccine requirement had changed the terms of the collective agreement that governed the essential terms of the employment relationship, although the employer did not have either the union's or the employee's consent to this change. In addition, the SST-GD noted that the terms of the employer's policy did not allow any exceptions or provide for testing as an alternative, and also that the collective agreement included some specific provisions regarding vaccination (with reference to the influenza vaccine) and which made it clear that it was the employee's choice whether or not to get vaccinated.

[43] I find that *AL*, which is now under appeal, has limited relevance here because it is based on a fundamentally different factual foundation. To name but one significant difference, in that case the employer's policy required mandatory vaccination and did not provide for any exemptions or for testing as an alternative, as was set out in Directive 6. Because the Applicant here was terminated because he failed to comply with the requirement to submit to weekly antigen tests and to provide the negative results to Lakeridge Health, the case he refers to simply

does not support his claim. That decision does not establish any kind of blanket rule that applies to other factual situations, and in addition, it is not binding on me.

[44] For these reasons, I am not persuaded that *AL* provides a basis to overturn the Appeal Division's decision.

V. Conclusion

[45] For the reasons set out above, the Applicant's application for judicial review is dismissed.

[46] As noted earlier, it is likely that the Applicant will find this result frustrating, because my reasons do not deal with the fundamental legal, ethical, and factual questions he is raising. That is because many of these questions are simply beyond the scope of this case. It is not unreasonable for a decision-maker to fail to address legal arguments that fall outside the scope of its legal mandate.

[47] The SST-GD, and the Appeal Division, have an important, but narrow and specific role to play in the legal system. In this case, that role involved determining why the Applicant was dismissed from his employment, and whether that reason constituted "misconduct." That is exactly what they did, and the Applicant has not put forward any legal or factual argument that persuades me that the Appeal Division's decision is unreasonable.

[48] Despite the Applicant's arguments, there is no basis to overturn the Appeal Division's decision because of its failure to assess or rule on the merits, legitimacy, or legality of Directive 6. That sort of finding was not within the mandate or jurisdiction of the Appeal Division, nor the SST-GD (*Canada (Attorney General) v* Caul, 2006 FCA 251 at para 6; *Canada (Attorney General) v Lee*, 2007 FCA 406 at para 5).

[49] Having said that, it is also worth noting that there have been other challenges to COVID-19 policies and legal requirements, and some of these are still underway (in this Court, see, for example: *Spencer v Canada (Health)*, 2021 FC 621 (appeal dismissed: 2023 FCA 8); *Khodeir v Canada (Attorney General)*, 2022 FC 44; *Lavergne-Poitras v Canada (Attorney General)*, 2021 FC 1232*; Neri v Canada*, 2021 FC 1443; *Association of Justice Counsel v Canada (Attorney General)*, 2022 FC 1090; *Latham v Canada*, 2020 FC 670). Many of these cases raise the kinds of questions regarding fundamental rights and freedoms under the *Charter* and the factual basis for imposing vaccine and/or mask or face covering requirements that the Applicant has put forward here. While this may not satisfy the Applicant, I point it out simply to make the point that there are ways in which his claims can properly be advanced under the legal system.

[50] The application for judicial review is dismissed. No costs are awarded; each party will bear its own costs.

[51] Finally, I want to express my appreciation to all of the Courts Administration Staff, including the Registry Officers, Information Technology specialists, and Court security staff, who made significant efforts under extreme time pressure to provide a room equipped with the

necessary computer and camera facilities, in order to permit the Applicant to participate in this hearing via Zoom after he objected to complying with the Court's masking policy. Despite the lack of advance notice, the staff's work on the morning of the hearing made it possible for the Applicant to have his day in Court, as scheduled, and I want to acknowledge their professionalism. JUDGMENT in T-1665-22.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. No costs are awarded.

"William F. Pentney"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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