Federal Court  Cour fédérale

Date: 20231117

Docket: T-209-23

Citation: 2023 FC 1527

Ottawa, Ontario, November 17, 2023

PRESENT: The Honourable Justice Fuhrer

BETWEEN:

DANIEL MATTI

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Daniel Matti, was placed on leave without pay for approximately eight months for refusing to comply with his employer's COVID-19 vaccination policy [Policy].

[2] The Policy, introduced in October 2021 by his employer Canada Post, required all employees to attest to their vaccination status or request a human rights exemption. According to

the Policy, employees who did not comply by the stipulated deadline would be considered unwilling to be fully vaccinated and would be placed on leave without pay.

[3] The Applicant did not attest to his status and, thus, he was placed on leave without pay. The Canada Employment Insurance Commission [CEIC] denied the Applicant's application for employment insurance [EI] benefits, finding that the Applicant was suspended for misconduct pursuant to section 31 of the *Employment Insurance Act*, SC 1996, c 23 [*EI Act*]. (See Annex "A" below for relevant legislative provisions.) In conversations with the CEIC in connection with his unsuccessful reconsideration request, the Applicant stated that he was aware of the Policy and understood that he could be placed on leave, but he was not willing to disclose his medical information and he did not agree with the Policy.

[4] The General Division of the Social Security Tribunal [SST] upheld the CEIC's decision. On December 29, 2022, the SST's Appeal Division denied leave to appeal the General Division's decision.

[5] The Applicant seeks judicial review of the Appeal Division's decision. Notwithstanding that the Applicant also seeks EI benefits to be paid out to him, the sole issue before this Court is the reasonableness of the latter decision: *Francis v Canada (Attorney General)*, 2023 FCA 217 [*Francis*] at para 4.

[6] A reasonable decision is one that exhibits the hallmarks of justification, transparency and intelligibility, and is justified in the context of the applicable factual and legal constraints: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at para 99.

[7] Contrary to the Applicant's Notice of Application and written and oral submissions, the role of the Court on a judicial review, such as this proceeding, is not to consider the matter anew. It is not an appeal. The Court does not step into the shoes of the CEIC, the General Division or, more specifically, the Appeal Division to decide the Applicant's entitlement to EI benefits. Rather, as explained at the hearing, the Court can review the Appeal Division's decision and either: (i) set it aside, if the Court concludes it is unreasonable, and send the matter back to the Appeal Division for redetermination; or (ii) dismiss the judicial review application, if the Court finds that the Appeal Division's decision is not unreasonable.

[8] As the Supreme Court of Canada guides, to succeed on this judicial review, the Applicant has the burden of establishing that the Appeal Division's decision was unreasonable: *Vavilov*, above at para 100.

[9] Having considered the parties' records and their written and oral submissions, I find that the Applicant has not met his burden. Instead, the Applicant expresses disagreement with the various tribunal decisions that rejected his request for EI benefits. His submissions before the Court restate and reargue his position on his entitlement to such benefits, and challenge the Policy itself. For the more detailed reasons that follow, I am of the view that this judicial review application must be dismissed.

II. Analysis

A. *Preliminary Issue – Style of Cause*

[10] Having regard to rule 303 of the *Federal Courts Rules*, SOR/98-106, I agree with the Respondent that the CEIC was incorrectly named as the Respondent and should be replaced with the Attorney General of Canada. I note as well that Canada Post is not a party to the judicial review, and the SST's General Division did not add the employer to the matter before it. The Applicant took no position on the issue of the proper Respondent in his written submissions nor at the hearing of this matter.

[11] In the circumstances, the style of cause will be amended accordingly to identify the Respondent as the Attorney General of Canada, with immediate effect.

B. *Preliminary Issue – Applicant's New Evidence*

[12] I find that much of the Applicant's new evidence in this proceeding is inadmissible, either because it was not contained in the certified tribunal record [CTR], including the supplemental tribunal record, or because it is not relevant.

[13] Evidence not before the decision maker generally is inadmissible on judicial review: *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency*, 2012 FCA 22 [*Access Copyright*] at para 19. There are three exceptions, however: (1) the material assists the court to understand the general background circumstances of the judicial

review; (2) the material is relevant to an issue of procedural fairness or natural justice; and (3) the material highlights a complete absence of evidence before the decision maker: *Access Copyright*, above at para 20.

[14] The Respondent objected to some of the evidence contained in the Applicant's record (as more particularized in Annex "B" below), including statements made by former Employment Minister Carla Qualtrough, news articles, a written statement, emails from Canada Post, a letter from the Applicant's union, social media posts, and scientific studies. I note that, while the Respondent objected to the letter from the union, this letter was in the CTR and, therefore, in my view, it is properly before the Court.

[15] Otherwise, the Respondent generally did not object to documents that were contained in the CTR, including the record of employment, certain excerpts from an article dealing with personal protective equipment, and a letter from the Justice Centre for Constitutional Freedoms. In addition, the Respondent did not object to the Applicant's collective agreement and excerpts of certain policies, on the basis that they fall within the "general background" exception to the inadmissibility of new evidence as described in *Access Copyright* (above at para 20).

[16] In my view, however, none of the Applicant's other new evidence falls under any of the above categories. I further find that, for the most part, the evidence is not relevant to the issue of whether the Appeal Division's decision is reasonable: *Kuk v Canada (Attorney General)*, 2023 FC 1134 [*Kuk*] at paras 18, 45. Instead, the new evidence has been submitted to support the

Applicant's misplaced effort to have his entitlement to EI benefits considered afresh or to challenge the Policy, by rearguing submissions he made before the SST.

C. *The Appeal Division's decision was not unreasonable*

[17] I find that the Applicant's submissions essentially amount to a disagreement with the Appeal Division's decision and a request for the Court to reweigh the evidence that was before the decision maker and consider the matter afresh. This is not the Court's role on judicial review: *Vavilov*, above at para 125.

[18] Further, this Court's jurisprudence confirms that the SST does not have jurisdiction to, and therefore should not, consider the soundness of the Policy: *Cecchetto v Canada (Attorney General)*, 2023 FC 102 [*Cecchetto*] at paras 32, 48; *Milovac v Canada (Attorney General)*, 2023 FC 1120 at para 27; *Kuk*, above at para 45. In my view, the General and Appeal Divisions reasonably focused instead on the Applicant's behaviour and whether it amounted to misconduct in the legal sense in his situation.

[19] In addition, the Applicant argues that, as it relates to the definition of misconduct under the *EI Act*, a condition of employment must exist at the time the employment contract is formed. He did not provide any supporting authorities, however, for this assertion. I agree with the Respondent that, based on applicable jurisprudence, it was not necessary for the Policy to be in the initial agreement; misconduct can be assessed in relation to policies that arise after the employment relationship begins: *Karelia v Canada (Human Resources and Skills Development)*, 2012 FCA 140 at paras 8, 18; *Cecchetto*, above at para 30; *Kuk*, above at para 34.

[20] As for the Applicant's submissions that other claimants in similar positions had obtained EI benefits, their circumstances were not before the decision maker and are outside the scope of the Court's jurisdiction in the context of this judicial review.

[21] Although the Applicant maintains before this Court that the Policy was unreasonable, the Applicant informed the Court at the hearing that he was seeking relief concurrently from his employer on this basis. I agree with the Respondent that the SST and the Court are not the proper forums for seeking a remedy where an employee believes they have been wronged by an employer's policy: *Kuk*, above at para 36; *Paradis v Canada (Attorney General)*, 2016 FC 1282 at paras 30-31.

[22] Similarly, the efficacy of COVID-19 vaccines and the Applicant's asserted natural immunity are beyond the scope of the SST's role, which is focused more narrowly on misconduct for the purpose of the *EI Act*: *Cecchetto*, above at para 47.

[23] Finally, there is no factual basis to support the Applicant's written claim that the Appeal Division was biased in favour of a non-participatory party, namely, the CEIC. Leaving aside the issue of whether the CEIC was *functus*, or put another way, whether it had any participatory role in the matter beyond its initial decision, the Applicant bore the onus to show that the grounds of appeal (as permitted under subsection 58(1) of the *Department of Employment and Social Development Act*, SC 2005, c 34) had a reasonable chance of success for the Appeal Division to grant leave to appeal the General Division's decision.

[24] In the end, I find that the Applicant has not described any specific error in the Appeal Division's decision that could render it unreasonable. The decision is rational and intelligible. The credibility findings are based on the record, and "the Appeal Decision has a limited scope to interfere with [the General Division's] findings of fact": *Francis*, above at para 13.

III. Conclusion

[25] For the above reasons, the Applicant's judicial review application is dismissed.

[26] The Court acknowledges the Applicant's frustration and disappointment with the Policy and the process for seeking redress. The Court, however, must take into account the legal constraints on the lower tribunals in the context of the Court's jurisdiction and scope on judicial review.

[27] The Respondent indicated at the outset of the hearing that the parties had agreed on costs. I note simply that the Respondent has not requested costs. Accordingly, no costs are awarded.

JUDGMENT in T-209-23

THIS COURT'S JUDGMENT is that:

1. The style of cause is amended to identify the Respondent as the Attorney General of Canada, with immediate effect.
2. The Applicant's application for judicial review of the Social Security Tribunal Appeal Division's December 29, 2022 decision is dismissed.
3. No costs are awarded.

"Janet M. Fuhrer"
Judge

Annex "A": Relevant Provisions

***Federal Courts Rules* (SOR/98-106)**
***Règles des Cours fédérales* (DORS/98-106)**

Respondents	**Défendeurs**
303 (1) Subject to subsection (2), an applicant shall name as a respondent every person	**303 (1)** Sous réserve du paragraphe (2), le demandeur désigne à titre de défendeur :
(a) directly affected by the order sought in the application, other than a tribunal in respect of which the application is brought; or **(b)** required to be named as a party under an Act of Parliament pursuant to which the application is brought.	**a)** toute personne directement touchée par l'ordonnance recherchée, autre que l'office fédéral visé par la demande; **b)** toute autre personne qui doit être désignée à titre de partie aux termes de la loi fédérale ou de ses textes d'application qui prévoient ou autorisent la présentation de la demande.
Application for judicial review	**Défendeurs — demande de contrôle judiciaire**
(2) Where in an application for judicial review there are no persons that can be named under subsection (1), the applicant shall name the Attorney General of Canada as a respondent.	**(2)** Dans une demande de contrôle judiciaire, si aucun défendeur n'est désigné en application du paragraphe (1), le demandeur désigne le procureur général du Canada à ce titre.

***Employment Insurance Act*, SC 1996, c 23**
***Loi sur l'assurance-emploi*, LC 1996, ch 23**

Disentitlement — suspension for misconduct	**Inadmissibilité : suspension pour inconduite**
31 A claimant who is suspended from their employment because of their misconduct is not entitled to receive benefits until	**31** Le prestataire suspendu de son emploi en raison de son inconduite n'est pas admissible au bénéfice des prestations jusqu'à, selon le cas :
(a) the period of suspension expires; **(b)** the claimant loses or voluntarily leaves the employment; or **(c)** the claimant, after the beginning of the period of suspension, accumulates with another employer the number of hours of	**a)** la fin de la période de suspension; **b)** la perte de cet emploi ou son départ volontaire; **c)** le cumul chez un autre employeur, depuis le début de cette période, du nombre d'heures d'emploi assurable exigé à l'article 7 ou 7.1.

insurable employment required by section 7 or 7.1 to qualify to receive benefits.	

***Department of Employment and Social Development Act*, SC 2005, c 34**
***Loi sur le ministère de l'Emploi et du Développement social*, LC 2005, ch 34**

Grounds of appeal — Employment Insurance Section **58 (1)** The only grounds of appeal of a decision made by the Employment Insurance Section are that the Section **(a)** failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction; **(b)** erred in law in making its decision, whether or not the error appears on the face of the record; or **(c)** 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.	**Moyens d'appel — section de l'assurance-emploi** **58 (1)** Les seuls moyens d'appel d'une décision rendue par la section de l'assurance-emploi sont les suivants : **a)** la section 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.

Annex "B": Summary of Respondent's Objections and Non-objections to the Applicant's Evidence

The Respondent objected to the following pages of the Applicant's record:

- 16-18: social media posts and news articles;
- 22: annotated notes or submissions;
- 25-38: emails between the Applicant and Canada Post employees; annotated statutory provisions; emails between the Applicant and government employees; news articles; social media posts; scientific studies.
- 41-57: news articles; scientific studies; letter from the Applicant's union to the Honourable Carla Qualtrough; and
- 64-68: excerpts of news article.

The Respondent did not object to the following pages of the Applicant's record:

- 19–-: a link to the collective agreement and excerpts of certain policies;
- 23-24: the Applicant's record of employment;
- 39–-: excerpt of article dealing with personal protective equipment; and
- 58-63: letter from the Justice Centre for Constitutional Freedoms to the Honourable Carla Qualtrough.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-209-23
STYLE OF CAUSE:	DANIEL MATTI v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	HELD VIA VIDEOCONFERENCE
DATE OF HEARING:	NOVEMBER 15, 2023
JUDGMENT AND REASONS:	FUHRER J.
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APPEARANCES:

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