Federal Court  Cour fédérale

Date: 20240228

Docket: T-1109-23

Citation: 2024 FC 329

Ottawa, Ontario, FEBRUARY 28, 2024

PRESENT: Madam Justice St-Louis

BETWEEN:

KERRY SPEARS

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Ms. Kerry Spears, seeks judicial review of the decision of the Social Security Tribunal of Canada Appeal Division [the Appeal Division] that denied her leave to appeal the decision of the Social Security Tribunal of Canada General Division [the General Division]. The General Division found Ms. Spears' employment was suspended due to misconduct and agreed with the Canada Employment Insurance Commission's [Commission]

decision to deny her employment insurance benefits [EI benefits]. The misconduct at issue relates to Ms. Spear's non-compliance with her employer's Covid-19 vaccination policy.

[2] The Appeal Division indicated it reviewed the docket of appeal, the decision of the General Division and the arguments raised by Ms. Spears in support of her request for leave to appeal and found that the appeal had no reasonable chance of success.

[3] Before the Court, Ms. Spears submits that the Appeal Division's decision is unreasonable. Ms. Spears requests this Court quash the decision, declare that she did not lose her job due to her own misconduct and order that she receive EI benefits. In support of her application, she raises that (1) the member was required to inquire into legislative intent; and (2) there is no misconduct absent a breach.

[4] For the reasons that follow, I will dismiss Ms. Spears' application for judicial review. In brief, Ms. Spears has not demonstrated that the Appeal Division's decision is unreasonable. I find that the decision bears the hallmarks of reasonableness and find its reasoning logical and consistent in relation to the relevant legal and factual constraints. The intervention of the Court is not justified.

II. Context

[5] From November 20, 2007, to November 12, 2021, Ms. Spears was employed as a public servant with the Government of Canada. From March 2020 to November 2021, she worked remotely.

[6] On October 6, 2021, her employer, introduced and communicated a Covid-19 vaccine policy that required all employees to attest to their current vaccination status by October 29, 2021, while providing a process for seeking accommodation on medical or religious grounds. The policy stated that employees who did not attest to their vaccination status would be considered unwilling to be fully vaccinated and would be placed on leave without pay after November 15, 2021. Ms. Spears did not attest to her vaccination status by the deadline nor did she seek accommodation, and on November 12, 2021, she was suspended.

[7] On December 8, 2021, Ms. Spears applied for EI benefits and on March 31, 2022, the Commission denied her application finding her suspension was due to misconduct. On July 5, 2022, the Commission upheld its decision following reconsideration.

[8] On February 6, 2023, the General Division dismissed Ms. Spears' appeal of the Commission's decision, finding that the Commission had established that Ms. Spears was suspended from her job because of misconduct and that she was therefore disentitled from receiving EI benefits.

[9] On March 5, 2023, Ms. Spears applied for leave to appeal to the Appeal Division. Ms. Spears submitted that the General Division referenced irrelevant case examples. She added that her case was different due to the fact that she posed no threat to others or her employer as she worked from home during the entirety of the pandemic and was not expected to return in person. Ms. Spears also questioned the efficacy of the vaccination, citing documents she attached to her application on the subject. Ms. Spears added that her actions could not be deemed as misconduct as vaccination was not a condition of employment when she was hired; it is neither in her letter of offer nor in her Collective Agreement. She explained that she had indicated to her

management, prior to Covid-19 mandates, that she had no intention of taking the vaccination because of safety concerns and as she was the sole provider for her family and daughter who has a life threatening heart condition. In support of her leave application, Ms. Spears relied heavily on the decision in *AL v Canada Employment Insurance Commission*, 2022 SST 1428 [*AL*] in which the General Division found that the claimant's decision not to be vaccinated, despite her employer's policy, did not constitute misconduct under the *Employment Insurance Act*, SC 1996, c 23 [Employment Insurance Act].

[10] In its April 28, 2023, decision, the Appeal Division found that the appeal had no reasonable chance of success per the criteria set out at section 58 of the *Department of Employment and Social Development Act*, SC 2005, c 34 [Act] and thus denied Ms. Spears leave to appeal.

[11] In brief, the Appeal Division namely addressed the notion of misconduct and outlined that it is sufficient that the misconduct be conscious, deliberate, or intentional; it is not necessary for it to be the result of wrongful intent. It explained that in order to constitute misconduct, "the act complained of must have been wilful or at least of such a careless or negligent nature that one could say the employee wilfully disregarded the effect their actions would have on their performance" (Decision at para 15). In response to Ms. Spears' argument that she posed no threat to herself or her employer because she worked from home and that the vaccine required was not effective or safe as claimed, the Appeal Division answered that ruling on a public health issue is beyond the scope of its expertise in employment-insurance matters and is outside of its jurisdiction. On the question of whether the employer violated Ms. Spears' rights under the

Collective Agreement or whether the policy violated her human and constitutional rights, the Appeal Division noted that it was not the appropriate forum for the remedy she was seeking.

III. Issue and standard of review

[12] The only issue before the Court in this application is to determine whether Ms. Spears established that the Appeal Division unreasonably denied her leave to appeal the decision of the General Division.

[13] The standard of review to be applied to a decision of the Appeal Division denying leave to appeal is reasonableness (*Bhamra v Canada (Attorney General)*, 2023 FCA 121 [*Bhamra*] at para 3, citing *Cameron v Canada (Attorney General)*, 2018 FCA 100 at para 3; *Hillier v Canada (Attorney General)*, 2019 FCA 44 at paras 11–12; *Langlois c Canada (Procureur général)*, 2018 FC 1108 at para 4).

[14] When this standard of review is applicable, the Court's role is to review the administrative decision-maker's reasons and determine if the decision 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" (*Canada (Minister of Citizenship and Immigration) v Vavilov* 2019 SCC 65 [*Vavilov*] at para 85). The Court "must consider the outcome of the administrative decision in light of its underlying rationale in order to ensure that the decision as a whole is transparent, intelligible and justified" (*Vavilov* au para 15). The Court cannot reweigh the evidence or interfere with factual conclusions to substitute its own (*Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67 at para 61; *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2018 SCC 31 at para 55). It must instead consider

the reasons in their entirety, in conjunction with the case (*Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 53) and simply ask whether the conclusions are irrational or arbitrary.

[15] The Court must bear in mind that there are limited grounds of appeal and, that, per the language of the statute, the Appeal Division will refuse to grant leave if it is satisfied that the appeal has no reasonable chance of success. This is set out in subsections 58(1) and (2) of the Act and reads :

Grounds of appeal – Employment Insurance Section	**Moyens d'appel – section de l'assurance-emploi**
58 (1) The only grounds of appeal of a decision made by the Employment Insurance Section are that the Section	58 (1) Les seuls moyens d'appel d'une décision rendue par la section de l'assurance-emploi sont les suivants :
(a) failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;	**a)** la section n'a pas observé un principe de justice naturelle ou a autrement excédé ou refusé d'exercer sa compétence;
(b) erred in law in making its decision, whether or not the error appears on the face of the record; or	b) elle a rendu une décision entachée d'une erreur de droit, que l'erreur ressorte ou non à la lecture du dossier;
(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.	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.
Criteria	**Critère**
(2) Leave to appeal is refused if the Appeal Division is	**(2)** La division d'appel rejette la demande de permission

satisfied that the appeal has no reasonable chance of success.	d'en appeler si elle est convaincue que l'appel n'a aucune chance raisonnable de succès

[Emphasis added]

IV. Analysis

[16] Generally, Ms. Spears submits the Court must determine whether her adherence to her conduct is "misconduct" within the meaning of the Employment Insurance Act. Particularly, Ms. Spears raises two arguments, first, she submits that the member of the General Division was required to inquire into legislative intent and second that there is no misconduct absent a breach.

A. *Legislative intent*

[17] As part of her first argument, Ms. Spears submits that (1) the member ran afoul of subsection 49(2) of the Employment Insurance Act by failing to give the employee the benefit of the doubt; (2) the claim that the member can only look at the claimant's action is false and misconduct cannot be the reason for her suspension if vaccination was not a condition of employment or was not included as a condition in the Collective Agreement; (3) it is not beyond the jurisdiction of the member of the Social Security Tribunal to apply the previous conditions of Ms. Spears' conditions of employment in their decision; (4) if the employee does not comply with a policy that is unlawful, arguably, they are not committing misconduct (*NE v Canada Employment Insurance Commission*, 2022 SST 732 at paras 36-39); (5) a decision maker should justify departing from a previous Appeal Decision; (6) there exists a carve-out to the rule to catch only reprehensible conduct and the member did not examine this element.

[18] The Attorney General of Canada [AGC] responds that the Appeal Division made no errors regarding the test for misconduct. The AGC outlines that the Appeal Division reasonably

came to the conclusion that the General Division made no error when it found that it had no jurisdiction to decide questions about the effectiveness of the vaccine or the reasonableness of the vaccine policy. The AGC further submits that the Tribunal did not unreasonably fail to apply subsection 49(2) of the Employment Insurance Act. Lastly, the AGC states that the examples given by Ms. Spears, asserting that the focus on the employee's conduct and not the employers would disregard a sexually harassed employee or a transgender employee facing discrimination, are hypothetical and do not apply to the facts of the present case.

[19] I am not persuaded by Ms. Spear's argument.

[20] Under sections 29 to 33 of the Employment Insurance Act, a claimant's lost employment is only insurable if it is involuntary; claimants are disqualified from receiving EI benefits if they voluntarily leave their job without "just cause" or due to their own misconduct per section 30 of the Employment Insurance Act. Paragraph 29 c) of the Employment Insurance Act outlines that 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, and includes namely sexual harassment and discrimination.

[21] The Federal Court has confirmed that the assessment of the merits of an employer's policy is not part of the test for misconduct (*Cecchetto v Canada (Attorney General)*, 2023 FC 102 [*Cecchetto*] at para 48). As Justice Pentney outlined in *Cecchetto* at para 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)

[22] The General Division's decision Ms. Spears relies on, *AL*, has been distinguished by the Appeal Division in the decision at the heart of the present judicial review and is not in line with the case law from this Court on the issue. Here, the evidence confirmed that: the employer adopted a policy; Ms. Spears knew of this policy; Ms. Spears knew the consequences of non-compliance; and she chose not to comply. The policy remained valid notwithstanding that it was not part of the original written contract or collective agreement; our Court has confirmed that misconduct is possible even if the violated policy is adopted after hiring (*Nelson v Canada (Attorney General)*, 2019 FCA 222 at paras 22-26; *Kuk v Canada (Attorney General)*, 2023 FC 1134 [*Kuk*] at paras 34, 36-38). In addition, the Social Security Tribunal is not the proper forum to challenge the validity of the employer's policy (*Cecchetto* at paras 47-48; *Kuk* at para 44).

[23] Furthermore, the examples Ms. Spears raises fail as proper points of comparison as they are encompassed in the just causes for voluntarily leaving an employment as stated in paragraph 29 c) of the Employment Insurance Act.

[24] I found no errors in the Appeal Division's application of the test for misconduct and find, as the Court did in *Cecchetto*, that questions on the merits of the employer's policy, including questions on the efficacy and reasonableness of the vaccine policy, are not part of the test for misconduct. The test for misconduct does not involve an assessment of the employer's conduct either, as explained in the following section of this analysis. The Appeal Decision reasonably stated that misconduct within the meaning of the Employment Insurance Act is to "consciously, deliberately or intentionally" violate the employer's policy (*Canada (Attorney General) v Bellavance*, 2005 FCA 87 at para 9).

B. *Breach*

[25] Ms. Spears submits she breached no obligation and that there is no misconduct absent a breach on her part. She submits that the member (1) failed to demonstrate that her conduct breached an obligation arising from her employment contract; she asserts that to ground a finding of misconduct, a duty must be owed in the first place; (2) failed to consider the personal implications to her of the vaccination policy; (3) failed to address the circumstances of her dismissal and the actions of her employer.

[26] Again, the policy remains valid notwithstanding that it was not part of the original written contract or collective agreement, misconduct is possible even if the violated policy is adopted after hiring (*Kuk* at paras 34, 36-38). Arguments that the General Division made errors of fact or law relating to the employer's adoption of a vaccine policy had no reasonable chance of success, as found by the Appeal Division, since the Tribunal lacks the power to address these questions (*Cecchetto* at para 48).

[27] The test for misconduct does not focus on the conduct of the employer (*Cecchetto* at para 48; *Kuk* at paras 36–37; *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36 at paras 23, 39; *Canada (Attorney General) v McNamara*, 2007 FCA 107 at para 22; *Paradis v Canada (Attorney General)*, 2016 FC 1282 at paras 30-34).

[28] Ms. Spears' argument cannot succeed.

V. Conclusion

[29] I have not been convinced that the Appeal Division made any errors that would justify granting this application for judicial review. I find the Appeal Division, in denying leave to appeal, reasonably considered whether Ms. Spears had raised any of the reviewable errors listed in subsection 58(1) of the Act and whether her appeal had a reasonable chance of success. The decision as a whole is transparent, intelligible and justified" (*Vavilov* au para 15).

JUDGMENT in T-1109-23

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. No costs are awarded.

"Martine St-Louis"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1109-23
STYLE OF CAUSE:	KERRY SPEARS v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	WINNIPEG, MANITOBA
DATE OF HEARING:	FEBRUARY 21,2024
JUDGMENT AND REASONS:	ST-LOUIS J.
DATED:	FEBRUARY 28, 2024

APPEARANCES:

Kerry Spears	ON HER OWN BEHALF
Marcus Dirnberger	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Department of Justice of Canada Gatineau, QC	FOR THE RESPONDENT