Federal Court Cour fédérale

Date: 20240617

Docket: T-1339-23

Citation: 2024 FC 928

Vancouver, British Columbia, June 17, 2024

PRESENT: Mr. Justice Sébastien Grammond

BETWEEN:

NICOLETA HAZAPARU

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] Ms. Hazaparu was denied employment insurance benefits because the loss of her employment resulted from her failure to comply with her employer's vaccination policy. According to both divisions of the Social Security Tribunal, this constituted misconduct disentitling her from benefits, irrespective of one's views about the lawfulness or wisdom of the employer's policy.

[2] I am dismissing Ms. Hazaparu's application for judicial review. It was reasonable for the Tribunal to reach these conclusions. In fact, the Federal Court of Appeal has held that it is not the Social Security Tribunal's role to review an employer's policy when ruling on a dismissed employee's claim for employment insurance benefits.

I. Background

[3] Ms. Hazaparu was employed by the Vancouver Coastal Health Authority [VCH].

[4] On October 14, 2021, the Provincial Health Officer of British Columbia, Dr. Bonnie Henry, issued an Order pursuant to the *Public Health Act*, SBC 2008, c 28. The Order required employees of health care organizations such as VCH to disclose their vaccination status to their employers. Moreover, the Order provided that, as of October 26, 2021, employees needed to be vaccinated in order to work.

[5] Shortly thereafter, VCH issued a written notice to its employees, indicating that all employees had to comply with the Order and that employees who refused to comply would be placed on leave without pay and would be subject to termination.

[6] Upon learning of these new requirements, Ms. Hazaparu engaged in intensive discussions with her employer as to the meaning and justification of the requirement to be vaccinated. She was suspended on October 26, 2021 for non-compliance with the Order. Her employment was terminated on December 7, 2021.

[7] Ms. Hazaparu then claimed employment insurance benefits. The Canada Employment Insurance Commission denied her claim, because her refusal to comply with the Order constituted "misconduct" as defined in section 30 of the *Employment Insurance Act*, SC 1996, c 23 [the EI Act].

[8] Ms. Hazaparu then appealed to the General Division of the Social Security Tribunal. On March 8, 2023, the General Division dismissed her appeal. It found that Ms. Hazaparu was dismissed because she did not comply with her employer's vaccination policy. Moreover, it found that her dismissal was the result of her "misconduct" as this term is defined in section 30 of the EI Act. The General Division reviewed the email exchanges between Ms. Hazaparu and her employer and found that Ms. Hazaparu clearly knew what her employer's expectations were. It also took note of Ms. Hazaparu's submissions regarding the unfairness or invalidity of her employer's policy, but stated that it did not have jurisdiction to consider such arguments.

[9] Ms. Hazaparu then appealed to the Appeal Division of the Social Security Tribunal. To do this, she first needed to seek leave to appeal, pursuant to section 56 of the *Department of Employment and Social Development Act*, SC 2005, c 34 [the DESD Act]. On May 24, 2023, the Appeal Division denied leave to appeal, because Ms. Hazaparu did not raise an arguable case that the General Division had made any mistake. Therefore, her appeal did not have a reasonable chance of success. The Appeal Division noted that Ms. Hazaparu's grounds of appeal amounted to a challenge to the validity of her employer's policy. However, it found that the case law of the Federal Court, in particular *Cecchetto v Canada (Attorney General)*, 2023 FC 102, precluded it

from assessing the validity or wisdom of an employer's policy when deciding whether the employee's dismissal was due to misconduct.

[10] Ms. Hazaparu is now seeking judicial review of the Appeal Division's decision to deny leave to appeal.

II. Analysis

[11] The role of a court performing judicial review was explained by the Supreme Court of Canada in its decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, [2019] 4 SCR 653 [*Vavilov*]. The court must show deference to the decision made by the administrative decision-maker, in this case the Appeal Division. The court can only intervene if it finds the decision to be unreasonable. This is a high threshold: the applicant must show that the decision-maker disregarded the law or fundamentally misapprehended the evidence: *Vavilov*, at paragraphs 108, 125 and 126. Moreover, new arguments cannot be raised on judicial review: *Vavilov*, at paragraph 96. Rather, the issue is whether the decision-maker "meaningfully grapple[d] with key issues or central arguments raised by the parties" before them: *Vavilov*, at paragraph 128.

[12] Ms. Hazaparu failed to persuade me that the Appeal Division's decision is unreasonable.

[13] The analysis must begin with the grounds of appeal that Ms. Hazaparu identified in her application for leave to appeal to the Appeal Division. These were the "key issues [and] central

arguments" that the Appeal Division had to grapple with. The entirety of Ms. Hazaparu's grounds of appeal is reproduced below:

> A finding of misconduct, in this case, would mean the Commission ignores the unlawful, coercive, unfair, unjust, immoral COVID-19 Vaccination Status Reporting and Preventive Measures (in all VCH settings) set by the Employer (GD9-2) as being relevant to the employee's actions. In this case you cannot divorce the employee's actions from the Employer's new policy because the actions of the employee are direct consequences of the Employer's new policy, which does not exist in the Collective Agreement.
>
> A finding of misconduct, in this case, by the Commission will confirm for all employers that they can implement policies that are coercive and threatening to the safety and security of employees without consequence.

[14] In my view, the Appeal Division reasonably analyzed these grounds of appeal and found that they had no reasonable chance of success, which is the test for granting leave established by subsection 58(2) of the DESD Act.

[15] The Appeal Division reasonably concluded that Ms. Hazaparu was in effect challenging the validity of her employer's vaccination policy and that the law precluded it from addressing this issue. Since the Appeal Division made its decision regarding Ms. Hazaparu, the Federal Court of Appeal has issued several decisions confirming that it is not the role of the Social Security Tribunal to review the validity or wisdom of an employer's vaccination policy and that, therefore, the failure to comply with such a policy constitutes "misconduct" according to section 30 of the EI Act: *Sullivan v Canada (Attorney General)*, 2024 FCA 7; *Lalancette c Canada (Procureur général)*, 2024 CAF 58; *Kuk v Canada (Attorney General)*, 2024 FCA 74; *Palozzi v Canada (Attorney General)*, 2024 FCA 81; *Cecchetto v Canada (Attorney General)*, 2024 FCA 102. These decisions are binding on me. As the facts of these cases cannot be meaningfully

distinguished from those of Ms. Hazaparu's, they compel me to find that the Appeal Division's decision is reasonable.

[16] At the hearing before me, Ms. Hazaparu reiterated her challenge to her employer's policy. She argued that the policy was unlawful, that it impinged upon bodily autonomy and that it disregarded fundamental rights. She stated that medical treatment or vaccination could not be compelled. She queried how Dr. Henry could issue an order requiring her to be vaccinated without having examined her first. All these submissions, however, amount to a challenge to the lawfulness or wisdom of the policy. While I understand that Ms. Hazaparu feels strongly about these issues, they were not matters that the Appeal Division could consider, as I explained above, and they are not grounds for me to find that the Appeal Division's decision was unreasonable. For this reason, I will not attempt to address these issues myself or to provide answers to the questions Ms. Hazaparu asked during her oral submissions in this regard.

[17] Ms. Hazaparu also argued that her refusal to comply with her employer's vaccination policy could not be described as "misconduct", as it did not amount to a crime, or to wrongful or otherwise objectionable conduct. However, she did not raise this issue in her application for leave to appeal. Therefore, the Appeal Division was not required to address it, and the failure to address the issue explicitly is not a ground for judicial review.

[18] In any event, the manner in which both divisions of the Social Security Tribunal applied the concept of "misconduct" was reasonable. As the Federal Court of Appeal stated in the cases mentioned above, "misconduct" in section 30 of the EI Act has a wider meaning than in common

parlance or in dictionaries. It includes any conscious contravention of a policy set by the employer. It does not require a particular level of moral blameworthiness. Both divisions' findings that Ms. Hazaparu's dismissal was due to "misconduct" within the meaning of section 30 of the EI Act was thus reasonable.

[19] Likewise, Ms. Hazaparu's submissions that she lacked clarity about her employer's policy were not raised in her application for leave to appeal and cannot constitute a ground of judicial review in this Court. In any event, upon my review, the General Division's finding that she was fully aware of her employer's expectations is firmly grounded in the evidence.

III. Disposition

[20] As the decision of the Appeal Division was reasonable, Ms. Hazaparu's application for judicial review will be dismissed. The Attorney General is not seeking costs and none will be awarded.

JUDGMENT in T-1339-23

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. No costs are awarded.

"Sébastien Grammond"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1339-23
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APPEARANCES:

Nicoleta Hazaparu	THE APPLICANT ON HER OWN BEHALF
Ian McRobbie	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Attorney General of Canada Vancouver, British Columbia	FOR THE RESPONDENT