Federal Court  Cour fédérale

Date: 20240924

Docket: T-2329-23

Citation: 2024 FC 1499

Ottawa, Ontario, September 24, 2024

PRESENT: Madam Justice Pallotta

BETWEEN:

KIMBERLY JEGLUM

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] The applicant, Kimberly Jeglum, seeks judicial review of an October 6, 2023 decision of the Social Security Tribunal's (SST) Appeal Division (Appeal Division). The Appeal Division denied Mrs. Jeglum's request for leave to appeal a decision of the SST's General Division (General Division), which agreed with the Canada Employment Insurance Commission (Commission) that she was not entitled to employment insurance (EI) benefits because she was suspended and then dismissed from her job due to misconduct within the meaning of the

Employment Insurance Act, SC 1996, c 23 [*EI Act*]. The misconduct in question was Mrs. Jeglum's non-compliance with her employer's COVID-19 vaccination policy.

[2] Mrs. Jeglum worked as an attendant at a nursing home. She performed laundry, housekeeping, and meal service duties.

[3] In response to a mandate from Alberta Health Services, Mrs. Jeglum's employer implemented a mandatory COVID-19 vaccination policy in September 2021. According to the policy, non-compliant employees would be placed on an unpaid leave of absence in order to be vaccinated, or terminated if they had no plan or intention to become fully vaccinated. Employees who were unable to be vaccinated for medical or religious reasons, or any other protected ground under the *Alberta Human Rights Act*, RSA 2000, c A-25.5, could request an exemption.

[4] Mrs. Jeglum requested a religious exemption on the basis that the available COVID-19 vaccines were developed with technology that utilized fetal cell lines. Mrs. Jeglum's employer granted her request. Mrs. Jeglum was offered accommodation: an unpaid leave of absence effective December 1, 2021, modified February 7, 2022 to working from home on clerical tasks, two days per week.

[5] In April 2022, the employer informed Mrs. Jeglum of a new vaccine that was not linked to fetal cell lines and stated it expected her to become vaccinated. As Mrs. Jeglum believed the new vaccine had undergone fetal cell line testing, she submitted a second request for a religious exemption on May 4, 2022. This request was refused and the employer informed Mrs. Jeglum that her accommodation would end on May 31, 2022. If she was not vaccinated by then, she

would be suspended, and if she did not have a plan to be vaccinated by July 4, 2022, she would be dismissed. Mrs. Jeglum was not vaccinated. She was placed on leave on June 1, 2022. Her employment was terminated on July 4, 2022.

[6] Mrs. Jeglum applied for EI benefits on January 11, 2022, during her first unpaid leave. The Commission decided she was not entitled to benefits from January 10, 2022 because she had been suspended for misconduct since then. Mrs. Jeglum asked for reconsideration on the basis that she had been granted a religious exemption. On reconsideration, the Commission decided that Mrs. Jeglum was not entitled to EI benefits from January 10, 2022 to July 1, 2022 because she was suspended from her full time position due to misconduct, and she was not entitled to benefits after July 1, 2022 because she had stopped working for her employer on November 30, 2021 due to misconduct.

[7] The General Division dismissed Mrs. Jeglum's appeal of the Commission's decision, finding that she was disqualified from receiving EI benefits because she lost her job due to misconduct under the *EI Act*. It found that Mrs. Jeglum was suspended on June 1, 2022 and then dismissed on July 4, 2022 because she did not comply with her employer's COVID-19 vaccination policy. The General Division stated that Mrs. Jeglum was granted an accommodation for her religious beliefs that was later rescinded, she was given an opportunity to be vaccinated but refused, and she was suspended and ultimately dismissed for not complying with the mandatory vaccination policy. Mrs. Jeglum refused to comply with the policy after her accommodation expired and knew that the consequences would be suspension and then dismissal. The reason for her dismissal amounted to misconduct under the law.

[8] Mrs. Jeglum sought leave to appeal to the Appeal Division. She argued that the General Division made a legal error as to when misconduct arises. Misconduct does not arise when an employee is entitled to a religious accommodation. She also argued that the General Division overlooked evidence and should have recognized the differences between the accommodation period and the period when there was no longer an accommodation.

[9] After considering Mrs. Jeglum's arguments, the Appeal Division concluded that her appeal had no reasonable chance of success and refused to grant leave.

[10] The Appeal Division found that the General Division did not make a legal error when it determined that it could not consider whether Mrs. Jeglum's employer should have made reasonable arrangements or ongoing accommodations for her. An employer's failure to accommodate is not relevant to the question of misconduct, even if the employer had previously granted accommodation: *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36 [*Mishibinijima*].

[11] The Appeal Division also found the General Division had not erred by overlooking facts. The differences between the periods before and after accommodation would have made no difference to the result. The Appeal Division noted Mrs. Jeglum's argument that, because her employer led her to believe it would continue to accommodate her, she was unaware and did not know that she could be dismissed for non-compliance with the policy, and found that the General Division had addressed this point. It was clear from the evidence that the employer told Mrs. Jeglum in May 2022 that it would not continue her accommodation after May 31, 2022, she

would be suspended if she was not fully vaccinated by then, and she would be dismissed if she did not have a plan or intention to be vaccinated by July 4, 2022. Given the evidence before it, the General Division was entitled to conclude that Mrs. Jeglum knew or should have known that dismissal was a possibility unless she complied with policy or received an accommodation.

[12] Mrs. Jeglum submits that the Appeal Division's decision was unreasonable.

[13] Mrs. Jeglum states the Appeal Division erred because she had been granted a religious exemption until May 31, 2022. Misconduct does not arise when an employer provides an accommodation, and the Commission denied EI benefits based on a false finding of misconduct that did not apply to the period when the exemption was in place. Mrs. Jeglum states that, subject to any waiting period rules, she was entitled to full EI benefits from the commencement of her accommodation to February 14, 2022, and she was entitled to reduced EI benefits (to account for her part-time earnings) from February 15, 2022 to May 31, 2022.

[14] Furthermore, Mrs. Jeglum submits she was not disqualified from EI benefits for the period beginning June 1, 2022. First, she submits the *EI Act* only contemplates disciplinary suspensions and she was not disciplined at any time. She was placed on administrative leaves of absence—first as part of her accommodation between December 2021 and February 2022, and then beginning on June 1, 2022. It was unreasonable to equate an administrative leave of absence with a disciplinary suspension. Second, Mrs. Jeglum contends the Appeal Division failed to weigh the evidence and meaningfully grapple with the issue of whether there was a basis for her continued religious objection to vaccination. She states she continued to abstain from vaccination

after June 1, 2022 because of a supported belief that all available vaccines utilized fetal cell line testing. Her religious objection to the vaccines did not change at any point, the employer erred in refusing to continue the accommodation, and she should not be disqualified from EI benefits if her employer's error caused the alleged misconduct: *Astolfi v Canada (Attorney General)*, 2020 FC 30 at paras 31, 33. Third, Mrs. Jeglum states she could not have committed misconduct on the basis of an immutable characteristic that cannot be extinguished at law: *Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203 at para 13, 173 DLR (4th) 1; *Quebec (Attorney General) v A*, 2013 SCC 5 at para 335. Misconduct must be voluntary. Religion is conduct-governing and not a true choice. Mrs. Jeglum states she did not owe a duty to her employer to do the impossible: extinguish an inextinguishable characteristic.

[15] The respondent submits that the Appeal Division's decision was reasonable. The test for misconduct under the *EI Act* focuses on the employee's knowledge and actions—not the employer's behaviour or the reasonableness of its work policies. The SST applied the correct analysis, which is whether Mrs. Jeglum was guilty of misconduct and whether that misconduct resulted in her dismissal: *Paradis v Canada (Attorney General)*, 2016 FC 1282 at para 14 [*Paradis*]. The respondent argues it is not the SST's role to determine whether a claimant's dismissal was justified or whether additional accommodations should be provided: *Paradis* at paras 30, 34. Furthermore, religious belief does not restrict free will, and Mrs. Jeglum made a voluntary decision to remain employed while knowingly violating her employer's vaccination policy.

[16] The sole issue for determination in this proceeding is whether Mrs. Jeglum has established that the Appeal Division's decision to deny leave was unreasonable. The guiding principles for reasonableness review are set out in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]. The Court's role is to conduct a deferential but robust form of review that considers whether the decision, including the reasoning process and the outcome, was transparent, intelligible, and justified: *Vavilov* at paras 13, 99.

[17] The Appeal Division may only grant leave to appeal when an appellant can demonstrate that their appeal has a reasonable chance of success based on a permitted ground of appeal: *Department of Employment and Social Development Act*, SC 2005, c 34, s 58; *Butu v Canada (Attorney General)*, 2024 FC 321 at para 69, citing *O'Rourke v Canada (Attorney General)*, 2019 FCA 60 at para 9, among other cases. The Appeal Division will refuse leave if it is satisfied that an appeal has no reasonable chance of success.

[18] I find Mrs. Jeglum has established that the Appeal Division's decision to refuse leave was unreasonable. In determining whether Mrs. Jeglum's appeal had a reasonable chance of success, the Appeal Division did not grapple with her argument that the General Division had erred by failing to properly address her entitlement to benefits in each of two, distinct periods. The decision denying leave to appeal was not justified in relation to the relevant factual and legal constraints: *Vavilov* at para 99.

[19] The General Division made a clear finding that Mrs. Jeglum had been granted a religious exemption. While the General Division stated that Mrs. Jeglum's religious exemption was

"rescinded", it is worth noting that her employer did not retroactively change its position on the religious exemption that was initially granted. Rather, the employer refused a second request for religious exemption on the basis that there was no need for continued accommodation because a new vaccine unlinked to fetal cell lines was available. The employer's May 19, 2022 letter to Mrs. Jeglum explained its position that there was "no longer any basis by which you are unable to comply with the Policy", expressed the expectation that she would comply with the policy going forward, and stated that the offer of accommodated work would cease on May 31, 2022.

[20] A central argument of Mrs. Jeglum's request for leave to appeal was that the General Division should have recognized and determined her entitlement to EI benefits for two, distinct periods—the period prior to June 1, 2022 when the religious exemption was in place, and the period beginning on June 1, 2022. In my view, the Appeal Division did not adequately address this argument.

[21] The Appeal Division relied on the Federal Court of Appeal's decision in *Mishibinijima* for the principle that an employer's failure to accommodate is not relevant to the question of misconduct. The respondent adds that this Court has recently affirmed that an employee's dismissal after failing to receive a religious exemption can constitute misconduct under the EI Act: *Abdo v Canada (Attorney General)*, 2023 FC 1764 at para 20 [*Abdo*]. However, Mrs. Jeglum's employer did grant her a religious exemption, and offered her accommodation that remained in effect until it determined that a vaccine that did not use fetal cells was available and its duty to accommodate had been fulfilled. In my view, the Appeal Division was required to address whether the principles expressed in *Mishibinijima*, or other cases such as *Abdo* (where Ms. Abdo's employer had denied her request for accommodation based on her religious beliefs),

were distinguishable on the basis that Mrs. Jeglum had been granted accommodation under a religious exemption to her employer's vaccination policy.

[22] The Appeal Division asserted that the differences between the periods before and after Mrs. Jeglum's accommodation would have made no difference to the result, but it did not explain why. Reading the reasons holistically and contextually in light of the record, I am unable to understand the Appeal Division's reasoning. Case law has established that there is misconduct within the meaning of subsection 30(1) of the *EI Act* when a claimant knew or ought to have known that their conduct could result in dismissal: *Mishibinijima* at para 14; *Guerrier v. Canada (Attorney General),* 2020 FCA 178 at para 16. It can include conscious contravention of a policy put in place by an employer: *Murphy v Canada (Attorney General),* 2024 FC 1356 at para 59. Since Mrs. Jeglum had submitted a request for a religious exemption that was granted, it would appear that she was not in contravention of her employer's policy or under a threat of dismissal while the religious exemption was in place.

[23] Consequently, at a minimum, the Appeal Division was required to grapple with the distinction between the period before June 1, 2022, when Mrs. Jeglum was being accommodated under a religious exemption to her employer's vaccination policy, and the period beginning on that date. In my view, the failure to do so gives rise to a sufficiently serious shortcoming that warrants setting aside the Appeal Division's decision.

[24] In view of my findings, it is not necessary or appropriate to address Mrs. Jeglum's further arguments regarding whether she was disqualified from EI benefits for the period beginning on

June 1, 2022. It is unclear to me if the Appeal Division will need to address those arguments in order to decide whether Mrs. Jeglum's appeal has a reasonable chance of success. The Appeal Division will make that determination, and I will say no more about it.

[25] This application for judicial review is granted. In terms of relief, Mrs. Jeglum requests an order directing the Commission to pay the EI benefits to which she is entitled, or alternatively, an order sending the decision back to the Appeal Division. There is no basis for this Court to direct the Commission to pay EI benefits. An order setting aside a decision and referring the matter back for redetermination is generally the appropriate remedy (*Vavilov* at paragraph 141) and it is the appropriate remedy in this case. The Appeal Division's decision will be set aside and the matter will be returned for redetermination.

[26] Neither party requested costs.

JUDGMENT IN T-2329-23

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is granted.

2. The October 6, 2023 decision of the Social Security Tribunal's Appeal Division is set aside and the matter is returned for redetermination.

3. There is no costs order.

"Christine M. Pallotta"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2329-23
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