Federal Court  Cour fédérale

Date: 20231228

Docket: T-800-23

Citation: 2023 FC 1764

Ottawa, Ontario, December 28, 2023

PRESENT: The Honourable Madam Justice McVeigh

BETWEEN:

REBECCA ABDO

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] The SST-GD decision in question found that the Applicant was terminated for misconduct from her job as a medical laboratory technician at Canada Blood Services (CBS). The misconduct at issue involved the Applicant's intentional voluntary choice not to comply with the CBS's COVID-19 vaccination policy (the "Policy"). The SST-GD upheld the Canada Employment Insurance Commission's (the "Commission") decision dated April 11, 2022, which

denied employment insurance (EI) benefits to the Applicant. This is an application for judicial review of a Social Security Tribunal (SST) Appeal Division (SST-AD) decision dated March 18, 2023. The SST-AD decided not to grant leave to appeal a General Division's (SST-GD) decision dated November 23, 2022.

II. Background

[2] The Applicant was employed as a medical laboratory technician by CBS between May 2011 and November 2021.

[3] On September 3, 2021, CBS implemented the Policy, requiring all employees to receive the COVID-19 vaccine, subject to "any medical or other human rights grounds (e.g. religious reasons)." For cases requiring workplace accommodation, the Policy indicated CBS would "accommodate, in accordance with the relevant human rights legislation and the Human Rights in the Workplace – Discrimination Policy, to the point of undue hardship."

[4] In late September, the Applicant submitted an accommodation request based on her religious beliefs. The Applicant provided a supporting letter (form letter with her name inserted in handwriting) from her pastor, Tim Stephens, of Fairview Baptist Church in Calgary. In early October, the Applicant met with the People, Culture and Performance department to discuss her accommodation request.

[5] On October 22, 2021, CBS denied the Applicant's request to be accommodated under the Policy on the basis of her religious beliefs. On November 1, 2021, the Applicant was placed on a 10-day unpaid leave. On November 16, 2021, the Applicant was terminated with cause.

[6] The Applicant subsequently applied for EI benefits, which are governed by the *Employment Insurance Act*, SC 1996, c 23 (the "EIA"). Under section 30(1) of the *EIA*, claimants are disqualified from receiving EI benefits if they voluntarily leave their position without just cause or due to their own misconduct.

[7] In April 2022, the Commission denied the Applicant's request because she lost her employment due to her own misconduct. The Applicant applied for reconsideration. On July 10, 2022, the Commission maintained its decision to deny the Applicant EI benefits. In August 2022, the Applicant appealed the Commission's decision to the SST-GD.

[8] On November 23, 2022, the SST-GD dismissed the Applicant's appeal after finding the Commission demonstrated that she lost her position due to misconduct. The SST-GD found the Applicant lost her position because she refused to comply with the Policy.

[9] On December 23, 2022, the Applicant applied for leave to appeal the decision to the SST-AD. On March 18, 2023, the SST-AD refused the Applicant's leave to appeal. In their decision, the SST-AD referred to the law regarding misconduct, noting, "It is well-established that a deliberate violation of the employer's policy is considered misconduct within the meaning of the EIA Act" (SST-AD Decision at para 42, citing *Canada (Attorney General) v Bellavance*, 2005

FCA 87 [*Bellavance*]; *Canada (Attorney General) v Gagnon*, 2002 FCA 460). Ultimately, the SST-AD found there was no arguable case that the SST-GD made any errors of law or based its decision on factual errors (SST-AD Decision at para 45).

III. Issue

[10] The sole issue in this application is whether the SST-AD reasonably denied the Applicant leave to appeal the SST-GD's decision.

IV. Standard of Review

[11] The standard of review is reasonableness: *Francis v Canada (Attorney General)*, 2023 FCA 217 [*Francis*] at para 4. The Court is not to decide the decision afresh: *Francis* at para 4. To assess whether the SST-AD's decision is reasonable, the Court must determine "whether the decision bears the hallmarks of reasonableness – justification, transparency and intelligibility – and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision": *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 99.

V. The Law

[12] Pursuant to section 58 of the *Department of Employment and Social Development Act*, SC 2005, c 34 (the "DESDA"), the SST-AD is empowered to set aside the SST-GD's decision only if it found the latter 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: see *Cecchetto v Canada (Attorney General)*, 2023 FC 102 [*Cecchetto*] at para 22, citing *Cameron v Canada (Attorney General)*, 2018 FCA 100 [*Cameron*] at para 2.

[13] To do so, the SST-AD is first required to decide whether to grant the Applicant leave to appeal. Pursuant to subsection 58(2) of the *DESDA*, leave can only be granted where the claimant satisfies the SST-AD that the proposed appeal has a reasonable chance of success on one of the three grounds listed above: see *O'Rourke v Canada (Attorney General)*, 2019 FCA 60 at para 9; *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36 at para 14. As this Court stated in *Osaj v Canada (Attorney General)*, 2016 FC 115: "having a 'reasonable chance of success' in this context means having some arguable ground upon which the proposed appeal might succeed" (see para 12).

VI. Applicant's Arguments

[14] On judicial review, the Applicant predominantly argues that the SST-GD and SST-AD failed to meaningfully grapple with the key issue she raised: that religion is not misconduct. Amongst other considerations, the Applicant asserts religion is protected, is not reprehensible conduct, and is an immutable characteristic. Accordingly, the Applicant claims that the SST-AD made several errors, including approving the SST-GD's findings on the reason for her termination, her belief that all exemption requests would be approved, and that she knew or ought to have known she could be dismissed. The Applicant states that the SST-AD further erred by simply approving the SST-GD's failure to consider whether the Applicant breached a duty to her employer, and failing to decide whether the Applicant's religion could possibly constitute misconduct within the meaning of the *EIA*.

[15] In her written submissions, the Applicant raised several arguments relating to how the SST-AD and SST-GD disregarded, misapprehended or misrepresented both crucial facts and the applicable law. Amongst these assertions, the Applicant claims that the SST-AD and SST-GD discounted her testimony and the available record, failed to grapple with the *EIA*, did not engage with analogous cases like *Astolfi v Canada (Attorney General)*, 2020 FC 30 [*Astolfi*] and *Canada (Attorney General) v MacDonald*, [1997] FCJ No 499, 71 ACWS (3d) 196 [*MacDonald*], and failed to meaningfully consider the jurisprudence on religion and immutable characteristics.

[16] Moreover, the Applicant asserts that the SST-AD and SST-GD failed to consider legislative intent, or, in the alternative, the constitutionality of section 30 of the *EIA*. The Applicant states the "implication of the SST's interpretation of section 30 of the [EIA], being the "misconduct" disqualification section, is that the legislators intended to draft a statute which discriminates against a religious minority on the basis of an immutable characteristic." The Applicant claims that the SST-AD and SST-GD failed to consider whether this was, in fact, the legislator's intention, noting decision-makers are not allowed to "ignore the legislative intent of [their] governing statute(s), as *Vavilov* instructs."

[17] Additionally, the Applicant argues that the SST-AD's position, that a policy's lawfulness is not relevant to the analysis, is "erroneous, logically and at law." The Applicant contends that the SST has the authority and responsibility to decide questions of law brought by the Applicant, which relate to key issues, and with regard to legislative intent and legal precedent. The Applicant asserts that the SST-AD and SST-GD failed to grapple with whether the Applicant owed her employer a duty at law to renounce her religion.

[18] The preceding paragraphs represent a condensed version of the Applicant's detailed arguments. However, as will be seen from the reasons below, a number of these arguments are best made in another forum. The Applicant raised many issues on judicial review which were based on the employer's policy or other labour law related issues, and these are matters outside the scope of the Social Security Tribunal.

VII. Analysis

[19] In the recent decision of *Francis*, the FCA reviewed a similar set of arguments by an applicant. In that case, the applicant was denied EI benefits under section 30 of the *EIA*. The applicant was denied EI benefits after losing their employment due to misconduct, as he refused to comply with his employer's mandatory COVID-19 policy. The SST-AD agreed with the SST-GD that this was appropriate. The employee previously applied for an exception based on creed, but his employer rejected this request. On judicial review, the FCA disagreed that the test for misconduct should be revised, noting this was not available on a reasonableness review. The FCA confirmed that the SST-AD grounded its decision on reasonable interpretations of the law, and appropriately deferred to the factual findings of the SST-GD. The FCA noted the SST-AD was limited in how it could interfere with the SST-GD's factual determinations, unless the finding was perverse, capricious or without regard to the material before it. Accordingly, the FCA upheld the SST-AD's decision, including its findings on procedural fairness.

[20] *Francis* is not distinguishable from the case before this Court. In that decision, the exemption sought was for the same reason. Moreover, like in this case, it was not an issue of whether the request was genuine or not. Therefore, the FCA's reasoning must be followed. The

FCA has endorsed that a voluntary refusal of an employer's mandatory COVID vaccine policy, which leads to the employee's dismissal after failing to receive an exemption for religious reasons, can constitute misconduct under the *EIA*.

[21] Even if *Francis* was distinguishable, which it is not, this judicial review must still fail.

[22] The Applicant submits that the SST-AD misinterpreted the term "misconduct" and, consequently, erred in concluding that her refusal to be vaccinated amounted to misconduct under the *EIA*. The Applicant argues that her decision not to get vaccinated for COVID is not voluntary misconduct. In *Nelson v Canada (Attorney General),* 2019 FCA 222 [*Nelson*], at paragraph 21, the FCA is clear 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" (see also *Bellavance* at para 9). Here, as in *Nelson*, the Applicant was aware of the policy and made a deliberate voluntary choice not to follow the policy, even after being notified that her exemption was denied and her employment would be terminated without the COVID vaccine.

[23] Given this, it was reasonable for the SST-AD to uphold the SST-GD's findings that the Applicant's deliberate voluntary decision not to get vaccinated constituted a breach of the express duty set out in the Policy.

[24] The Applicant argues *Astolfi* is the precedent most analogous to the case at bar. In *Astolfi*, the employee stopped coming to work after alleging harassment from his employer. The Court

found the SST-GD erred, as their decision did not consider the harassment allegations in the full context. Instead, the SST-GD focused on the post-harassment misconduct, determining the employer's conduct was irrelevant.

[25] The Applicant argues *Astolfi* stands for the proposition that, where an employer's conduct has caused the employee's conduct leading to dismissal, a finding of employee misconduct is not reasonable. On this point, the Applicant contends she did not comply with the Policy because her employer failed to issue her an exemption; therefore, her employer triggered the misconduct by unlawfully denying her an exemption.

[26] In *Astolfi*, the actions of the employer raised concerns about whether the employee's conduct was intentional or not. That is distinguishable from the present circumstances. In this case, the SST-GD found the Applicant intentionally chose not to comply. The SST-GD noted the Applicant was not entitled to an exemption under the Policy, finding that it only said the employer "reserves the right to make appropriate enquiries to verify the authenticity of a religious-based request by an employee." After her request was denied, the Applicant still refused to get vaccinated. Therefore, it was reasonable for the SST-GD to conclude the Applicant made a conscious choice not to comply with the Policy.

[27] While this Policy is not explicitly in her employment contract, it is a workplace safety policy that the employer imposed to protect the health and safety of all of its employees. Given this, the Policy imposes obligations on all of its employees, further distinguishing the facts in this case from *Astolfi*, where one employee was targeted. The SST-GD found that the Applicant was

aware of the Policy and was given time to comply. The Policy provided exemptions for religious or medical reasons. The Applicant applied for an exemption; it was not granted to her.

[28] In their reasons, CBS stated, "we have concluded that the reason for your refusal to be vaccinated is due to a personal belief and not a belief imposed by your religion. In other words, we have not been provided with any information suggesting that becoming fully vaccinated is prohibited by your religion." CBS made this determination on the basis that:

A. The Applicant was unable to offer any proof that her religion prevented her from becoming vaccinated with the COVID-19 vaccine; and

B. The spiritual leader of her Christian denomination did not demonstrate a legitimate religious basis for exemption from vaccine mandates in any established stream of Christianity. Additionally, the letter from the Applicant's church indicated it was the responsibility of its members to make reasonable medical decisions for themselves; therefore, it was ultimately her choice.

[29] Even though it was clear that the Applicant disagreed with the Policy, the only relevant question before the SST-GD was whether the Applicant knew that her voluntary decision not to get vaccinated might result in her termination. Given this, it was reasonable for the SST-AD to uphold the SST-GD's finding that the Applicant knew about the Policy, including the consequences of non-compliance.

[30] Recently, Justice Pentney released an analogous decision, where he found that an employee who was terminated for misconduct because of refusing to get a COVID vaccine, contrary to an employer's vaccination policy, was not entitled to receive EI benefits: *Cecchetto* at paras 32-33.

[31] Like in *Cecchetto*, this Applicant was aware of the consequences of non-compliance with the Policy. The Applicant had the opportunity to remedy her situation after she was not given an accommodation. Her voluntary decision not to comply with the Policy constituted voluntary misconduct in this context.

[32] Moreover, as noted in *Matti v Canada (Attorney General)*, 2023 FC 1527, arguments concerning whether an employee has been wronged by an employer's policy are best addressed in another forum (at para 21).

[33] Therefore, I find it was reasonable for the SST-AD to conclude that the Applicant had no reasonable chance of success in arguing that her actions did not constitute misconduct under the *EIA* framework.

[34] Neither party sought costs. Accordingly, none are awarded.

VIII. Conclusion

[35] I am not persuaded that the SST-AD made any errors that would justify granting this application for judicial review. In denying leave to appeal, the SST-AD reasonably 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). The SST-AD grounded its decision in interpretations of the law which are reasonable, and gave appropriate deference to the SST-GD's factual findings.

[36] For these reasons, this application should be dismissed without costs.

JUDGMENT in T-800-23

THIS COURT'S JUDGMENT is that:

1. The application is dismissed.

2. No costs are awarded.

"Glennys L. McVeigh"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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