Federal Court  Cour fédérale

Date: 20240924

Docket: T-550-23

Citation: 2024 FC 1498

Ottawa, Ontario, September 24, 2024

PRESENT: Madam Justice Pallotta

BETWEEN:

MARIA LAURENCE

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] The applicant, Maria Laurence, seeks judicial review of a December 8, 2022 decision of the Social Security Tribunal's (SST) Appeal Division (Appeal Division). The Appeal Division denied Ms. Laurence'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 Ms. Laurence's non-compliance with her employer's mandatory COVID-19 vaccination policy.

[2] Ms. Laurence requested that her husband be permitted to assist in presenting her case, as English is not her first language and nervousness would further impede her ability to explain her arguments. The respondent did not object and I granted leave. Mr. Laurence made submissions and Ms. Laurence periodically confirmed and added to her husband's submissions during the hearing.

II. **Background**

[3] Ms. Laurence worked as a dining room server at a seniors' residence. In October 2021, her employer implemented a COVID-19 vaccination policy that required all employees to be fully vaccinated by November 30, 2021, unless they were granted an exemption.

[4] The policy stated that non-compliant employees would be placed on an unpaid leave of absence. Ms. Laurence was placed on leave effective December 1, 2021. The employer informed Ms. Laurence that she had to be vaccinated before returning to work. Ms. Laurence did not respond. Her employment was terminated on February 23, 2022.

[5] Ms. Laurence applied for EI benefits. The Commission decided that Ms. Laurence was not entitled to EI benefits because she lost her job due to misconduct, and it maintained that decision on reconsideration. The General Division dismissed Ms. Laurence's appeal of the Commission's decision. The Appeal Division denied leave to appeal.

[6] The General Division found that the reason Ms. Laurence was no longer working was because her employer had suspended and then dismissed her for failing to comply with its vaccination policy. This amounted to misconduct within the meaning of the *EI Act* because Ms. Laurence willfully and consciously chose not to comply with the employer's vaccination policy, knowing that the consequences would be suspension and then dismissal. The General Division disagreed with Ms. Laurence that her employer imposed a policy she did not agree to, and she complied with the contract she agreed to when she was hired. Ms. Laurence had a duty to comply with her employer's policy as a condition of continued employment. Her non-compliance led to her suspension and dismissal, so she did not lose her job involuntarily.

[7] The General Division rejected Ms. Laurence's arguments that: her job was not insured under the legislation, but rather her earnings were; the Commission breached its contract to provide EI benefits to her and breached the duty of care it owed to her; and Service Canada improperly advised her employer to use code "N", indicating an unpaid leave of absence, on her record of employment (ROE). The General division held that: while a claimant must show an interruption of earnings and enough hours of insured employment in order to be eligible for EI benefits, a claimant is not entitled to receive EI benefits while suspended for misconduct and disqualified from receiving EI benefits if they were terminated for misconduct (*EI Act*, ss 30-31); the Commission did not owe Ms. Laurence a fiduciary duty (*Berkiw v Canada (Attorney General)*, 2018 FC 1228); and a finding of misconduct is based on the facts of the case, not the ROE.

[8] Ms. Laurence sought leave to appeal to the Appeal Division, arguing that the General Division committed errors of fact, law, and jurisdiction when it concluded that she had lost her job because of misconduct. Ms. Laurence raised multiple alleged errors, including that the General Division erred by:

a. failing to apply section 29(c) of the *EI Act*, which describes when just cause exists for voluntarily leaving an employment, and finding that she did not voluntarily leave her job;

b. determining that the vaccination policy was part of her contract of employment, and that she had breached her contract of employment;

c. stating that the employer was acting under Alberta Health Services' guidelines, even though the employer's vaccination policy continued after the guidelines were no longer in effect; and

d. recognizing the employer's legislated obligations to ensure employee health and safety but failing to recognize her protected rights to refuse the policy based on the same occupational health and safety legislation as well as human rights legislation.

[9] The Appeal Division assessed whether Ms. Laurence had raised a reviewable error upon which an appeal might succeed, based on the permitted grounds for appealing a General Division decision that are outlined in subsection 58(1) of the *Department of Employment and Social Development Act*, SC 2005, c 34 [*DESDA*]. It paraphrased the permitted grounds of appeal as

follows: (i) the hearing process was not fair in some way; (ii) the General Division did not decide an issue that it should have decided or it decided something that it did not have the power to decide; (iii) the General Division based its decision on an important error of fact; or (iv) the General Division made an error of law when making its decision. The Appeal Division noted that Ms. Laurence did not have to prove her case, but in order to grant leave it had to be satisfied that at least one reason for appeal (falling within the permitted grounds) had a reasonable chance of success.

[10] After considering Ms. Laurence's arguments, the Appeal Division concluded that her leave application did not identify a reviewable error based on a permitted ground. Subsection 29(c) of the *EI Act* did not apply because Ms. Laurence did not leave her employment voluntarily—the employer ended her employment. It was not the General Division's role to judge the employer's penalty or determine whether the employer was justified in suspending or dismissing Ms. Laurence, and questions of whether the employer failed to accommodate her or violated her rights under occupational health and safety or human rights or legislation were matters for another forum. The question the General Division was required to decide was whether Ms. Laurence was suspended and dismissed from her employment because of misconduct within the meaning of sections 29-30 of the *EI Act*, and the Appeal Division saw no reviewable error in that determination. The employer followed Alberta Health Services recommendations to implement a vaccination policy, the employer's policy was in effect, the evidence that was before the General Division showed that Ms. Laurence made a personal and deliberate choice not to follow the policy, and this resulted in her suspension and then dismissal

from work. The Appeal Division stated it was well established that a deliberate violation of an employer's policy is considered employee misconduct within the meaning of the *EI Act*.

[11] Ms. Laurence argues the Appeal Division made a number of reviewable errors, which she characterized in oral argument as falling into three categories: errors of law, errors of fact, and errors of natural justice in refusing to hear her side on the issue of misconduct. A number of alleged errors are tied to Ms. Laurence's argument that there was no misconduct because the initiating cause of the interruption in her earnings was her employer's act of unilaterally implementing a new, unanticipated policy outside the employment contract she had agreed to. She states that, but for the employer's action, she would not have experienced an interruption of earnings.

[12] The respondent argues the Appeal Division reasonably found that Ms. Laurence had failed to raise any reviewable errors in the General Division's decision. The respondent contends that an employer's conduct is irrelevant to determining whether an employee was terminated for misconduct under the *EI Act*, and the SST is not the forum to challenge the employer's decision to implement the vaccination policy.

III. **Issues and Standard of Review**

[13] Ms. Laurence's memorandum of law lists a number of questions as the points at issue. These include whether: the *EI Act* protects workers against loss of earnings or the loss of a particular job; employer conduct is "outside the role" of SST consideration; the law prevents the SST from considering potential human rights violations; any of the decision makers erred in

determining the cause of interrupted earnings; the Commission interfered in the employer's reporting process so as to interfere with Ms. Laurence's claim; the decision makers inequitably decided disentitlement and misconduct, including by making a finding of misconduct based on whether the employer had grounds for dismissal, without considering her response to the same grounds. Ms. Laurence also asks the Court to address whether the SST conflated a newly introduced term of continued employment with the original employment contract, and what conditions constitute grounds for voluntarily leaving employment for just cause under section 29 of the *EI Act*.

[14] One of Ms. Laurence's arguments is that the decision makers reached their determination on the central question of misconduct without hearing her side. In this regard, Ms. Laurence argues the decision makers adopted a one-sided framework that considered her dismissal from the employer's perspective, without factoring her perspective into the equation. She states the decision makers considered and judged her employment contract, the vaccination policy, and the employer's actions, rights and duties from the employer's perspective alone. Her arguments in response, that addressed the same points but from her perspective, were said to be irrelevant and/or amount to labour dispute challenging her employer's actions in the wrong forum.

[15] While Ms. Laurence argues that the decision makers' approach resulted in a breach of natural justice, her submissions actually relate to the legal test. She is challenging the factors that the General Division took into consideration in determining whether she was disentitled or disqualified from receiving EI benefits according to the *EI Act.* In terms of natural justice, Ms. Laurence was aware of the test to meet, she had full opportunity to present her case at all

levels of the process, and her arguments were heard. Therefore, there is no basis for finding that the process was unfair.

[16] I also point out that a number of Ms. Laurence's arguments are the same as, or similar to, the arguments she made to the General Division. However, the Appeal Division's decision is the decision that is under review. Its task was to decide whether Ms. Laurence's application for leave to appeal raised a reviewable error with the General Division's decision that had a reasonable chance of success—not to re-decide the issues that were before the General Division. Consequently, the sole issue for determination in this proceeding is whether Ms. Laurence has established that the Appeal Division's decision to deny leave to appeal was unreasonable.

[17] 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.

[18] For the reasons below, I am not persuaded that the decision to deny leave to appeal was unreasonable.

IV. **Analysis**

[19] Ms. Laurence states that she is not advancing a labour dispute. She does not dispute the employer's decision to implement the vaccination policy, the fact that she was informed about the policy and the consequences of non-compliance, or the employer's ability to terminate her

employment at will. Rather, her arguments relate to the concept of misconduct under the *EI Act*. She states the SST made fundamental errors in determining what constitutes misconduct.

[20] Ms. Laurence argues there is a fundamental distinction between earnings and "the job" in the context of EI benefits. The *EI Act* mitigates the loss of earnings, not the loss of a job, and Ms. Laurence submits the General Division erred by failing to consider her argument on this distinction and only determining the reason that she lost her job. She submits the Appeal Division erred in asserting that the failure to comply with the vaccination policy led to the interruption of earnings.

[21] Relying on *Canada (AG) v McNamara*, 2007 FCA 107 [*McNamara*] and *Paradis v Canada (Attorney General)*, 2016 FC 1282 [*Paradis*], Ms. Laurence asserts that misconduct must cause the interruption of earnings and it must be an operative cause. In her case, the initiating cause of the interruption of earnings was the employer's introduction of "a new, unanticipated policy to the employment contract". Her action of failing to comply with the policy was wholly dependent on her employer's prior action, and there could be no misconduct because she played no part in the initiating cause of the interruption of earnings.

[22] Ms. Laurence argues that she never consented to a change in the terms of her employment contract, the SST cannot assume that she had agreed to the new policy, and the Appeal Division's assertion that she did not comply with a condition of continued employment is unsubstantiated. Ms. Laurence states she was a good employee who adhered to the terms of her employment contract. She also argues that misconduct should relate to the terms of employment

she agreed to, and there was no evidence she committed any misconduct based on the contract she signed. Ms. Laurence states the General Division erred in law by failing to decide a clearly articulated evidentiary dispute about whether the employer imposed a policy that she did not agree to, thereby disposing of her initial contract and imposing a new one that created a new job.

[23] Furthermore, Ms. Laurence submits she was under no duty to comply with the vaccination policy because Alberta Health Services postponed the implementation of its vaccination mandate in November 2021 and offered an alternative of testing, which she never refused.

[24] Ms. Laurence submits the decision makers erred by claiming they could not consider her employer's actions. She submits the *EI Act* does not preclude the consideration of employer action when it is the operative cause of an interruption of earnings. She argues that statements in *Paradis, McNamara, Mishibinijima v Canada (Attorney General)*, 2007 FCA 36 [*Mishibinijima*], and *Canada (Attorney General) v Caul*, 2006 FCA 251 [*Caul*] that employer action cannot be considered, must be understood in light of the factual circumstances. In those cases, the employer action in question was taken after clear employee misconduct. Ms. Laurence contends that ignoring employer action when that action is what led to the employee's interruption of earnings constitutes an error of law.

[25] However, Ms. Laurence submits that her employer's motives and justification for its actions were irrelevant to determining whether she was disentitled or disqualified from receiving EI Benefits—if it were otherwise, her own motives and justification should have been considered

as well. Therefore, she contends the Appeal Division exceeded its role and jurisdiction, and acted unfairly, by justifying her employer's motivation for implementing the new vaccination policy as fulfilling an obligation to protect employee health and safety. Employer motivation cannot detract from the fact that her employer's unilateral action of implementing a new workplace policy led to the interruption of her earnings. Ms. Laurence submits the Appeal Division also erred by stating that her employer implemented the policy in response to "the exceptional circumstances created by the pandemic". The pandemic may have been a frustrating event, but it was not relevant to the question of misconduct.

[26] Finally, Ms. Laurence submits the General Division committed an error of law by rejecting human rights and occupational health and safety considerations as matters for another forum. Section 29 of the *EI Act* recognizes human rights violations and occupational health and safety considerations as grounds for voluntarily leaving employment. Ms. Laurence argues that her protected rights under occupational health and safety or human rights legislation cure any misconduct under the *EI Act*.

[27] The respondent submits the Appeal Division reasonably denied leave to appeal because Ms. Laurence did not raise an error under *DESDA* that had a reasonable chance of success. The respondent submits that the Appeal Division, like the General Division, identified the correct legal test for misconduct that accords with Federal Court of Appeal jurisprudence. The Appeal Division found that the General Division applied the test correctly, and it found that the evidence before the General Division showed that Ms. Laurence deliberately refused to follow her employer's COVID-19 vaccination policy and that she knew this would result in her suspension

and dismissal. Therefore, the respondent submits the Appeal Division correctly found that the conclusions made by the General Division were well founded.

[28] The respondent notes that most of Ms. Laurence's arguments relate to her employer's conduct, but the General Division and Appeal Division correctly noted that employer conduct is irrelevant when deciding misconduct. Any issues about whether Ms. Laurence was wrongfully dismissed or should have been accommodated are for another forum: *Paradis* at para 34. The Federal Court of Appeal has recently emphasized that the SST is a "forum to determine entitlement to social security benefits, not a forum to adjudicate allegations of wrongful dismissal": *Sullivan v Canada (Attorney General)*, 2024 FCA 7 at para 6.

[29] The respondent submits Ms. Laurence's argument that the employer's implementation of the vaccination policy was the true cause for her dismissal is misguided, and her argument regarding errors in the ROE are irrelevant because the ROE was issued before her termination, and her own application for EI benefits stated she was on a leave of absence.

[30] The respondent submits that the facts of this case are in line with other vaccination misconduct cases where this Court found that leave to appeal was reasonably denied, including *Matti v Canada (Attorney General)*, 2023 FC 1527 [*Matti*], and *Abdo v Canada (Attorney General)*, 2023 FC 1764 [*Abdo*]. Misconduct can be based on policies arising after the employment relationship begins (*Matti* at para 19), so the respondent submits that Ms. Laurence's arguments that she did not offend the employment contract she signed or that her employer's adoption of the vaccination policy unilaterally changed it are irrelevant to whether

she was disqualified due to misconduct under the *EI Act*. The only relevant question was whether Ms. Laurence knew that her voluntary decision not to be vaccinated might result in her termination: *Abdo* at para 29. The respondent submits the Appeal Division stated and applied the right test, Ms. Laurence failed to raise a reviewable error that had a reasonable chance of success, and leave to appeal was reasonably denied.

[31] In my view, for reasons that are substantially aligned with the respondent's arguments, Ms. Laurence has not established that the Appeal Division unreasonably refused leave to appeal.

[32] As noted above, the decisions made by the Commission and the General Division are not under review. The errors Ms. Laurence raises with respect to these decisions are only relevant to the extent that she raised them as reviewable errors before the Appeal Division. Generally, the Court will not consider new issues on judicial review that could have been, but were not raised, before the decision maker: *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 at paras 23-26.

[33] Before the Appeal Division, Ms. Laurence raised errors with the General Division's decision that related to (i) the scope of her employment contract and whether she breached that contract; (ii) the duty owed by Ms. Laurence to her employer; (iii) the findings of misconduct; (iv) the applicability of human rights legislation or occupational health and safety legislation; (v) the employer's conduct, including issues with her ROE; and (vi) the applicable legal principles.

[34] The Appeal Division set out the applicable legal principles correctly, including the grounds of appeal under section 58 of the *DESDA* and the requirements of sections 29-31 of the *EI Act*. The Appeal Division correctly stated the test for misconduct under the *EI Act,* which is "where a 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": *Nelson v Canada (Attorney General),* 2019 FCA 222 at para 21, citing *Mishibinijima* at para 14. The Appeal Division noted the jurisprudence establishing that employer conduct is not a relevant consideration under section 30 of the *EI Act,* and that the analysis must focus on Ms. Laurence's actions: *Paradis* at para 31, among other cases.

[35] The Appeal Division reviewed the record and concluded the evidence established that Ms. Laurence was suspended and then dismissed because she refused to follow her employer's mandatory vaccination policy. The evidence showed that Ms. Laurence was given time to comply with the employer's policy and refused to comply intentionally, which was a direct cause of her suspension and dismissal. Based on the evidence, the General Division had found that Ms. Laurence knew her refusal to comply could lead to her suspension and dismissal, and her behaviour constituted misconduct. The Appeal Division found it was well established that a deliberate violation of an employer's policy is considered misconduct within the meaning of the *EI Act*, relying on *Canada (Attorney General) v Bellavance*, 2005 FCA 87 and *Canada (Attorney General) v Gagnon*, 2002 FCA 460.

[36] I do not agree with Ms. Laurence that the SST should have considered her employer's act of introducing the policy as an initiating cause of her suspension and dismissal. The test for

misconduct is focused on the employee's act or omission, and this principle, stated in *Paradis*, *McNamara*, *Mishibinijima*, and *Caul*, has been repeatedly followed in cases where the employee's misconduct was the failure to comply with a newly introduced vaccination policy. In addition to *Matti* and *Abdo* noted above, see, for example, *Palozzi v. Canada (Attorney General)*, 2024 FCA 81 at para 4; *Cecchetto v. Canada (Attorney General)*, 2023 FC 102 at para 48; *Spears v. Canada (Attorney General)*, 2024 FC 329 at para 27.

[37] I am not persuaded that statements by the Appeal Division, such as "[i]t is not really in dispute that an employer has an obligation to take all reasonable precautions to protect the health and safety of its employees in their workplace" and "[e]mployees cannot change a policy, amend or ignore it, because of their personal view on the safety guidelines", were justifying the employer's actions. In my view, the Appeal Division was simply noting that Ms. Laurence's case was like other cases where an employer introduced a vaccination policy, and the employee's failure to comply amounted to employee misconduct under the *EI Act*.

[38] Ms. Laurence states the decision makers failed to consider or address a number of issues. These included a failure to consider her arguments in response to the employer's grounds for dismissal and a failure to decide whether the employer disposed of her initial contract and imposed a new one that created a new job. In my view, the issues were not relevant to the core question and/or they exceeded SST's jurisdiction under the *EI Act*. The decision makers did not err in failing to address them.

[39] The Appeal Division was tasked with determining whether Ms. Laurence had raised a reviewable error with a reasonable chance of success, and it determined that she had not. The Appeal Division considered the parties' submissions and the evidence in the record, and reached a conclusion that was in line with the relevant legal principles. It is not a reviewing court's role to reweigh or reassess evidence or to decide the issues for itself. Ms. Laurence has not established any failure of transparency, intelligibility or justification that would warrant setting aside the Appeal Division's decision.

V. **Conclusion**

[40] This application for judicial review is dismissed. Ms. Laurence has not established that the Appeal Division's decision refusing leave to appeal the General Division's decision was unreasonable.

[41] The respondent does not seek costs. Each party shall bear its own costs.

JUDGMENT IN T-550-23

THIS COURT'S JUDGMENT is that the application is dismissed without costs.

"Christine M. Pallotta"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

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