Federal Court of Appeal | Cour d'appel fédérale

**Date: 20240111**

**Docket: A-139-23**

**Citation: 2024 FCA 7**

**CORAM:** **STRATAS J.A.**
**LASKIN J.A.**
**GOYETTE J.A.**

**BETWEEN:**

**SKY SULLIVAN**

**Applicant**

**and**

**ATTORNEY GENERAL OF CANADA**

**Respondent**

Heard at Ottawa, Ontario, on January 11, 2024.

Judgment delivered from the Bench at Ottawa, Ontario, on January 11, 2024.

REASONS FOR JUDGMENT OF THE COURT BY: STRATAS J.A.

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**REASONS FOR JUDGMENT OF THE COURT**

**(Delivered from the Bench at Ottawa, Ontario, on January 11, 2024).**

**STRATAS J.A.**

[1] The applicant applies for judicial review of the decision dated April 25, 2023 of the Appeal Division of the Social Security Tribunal (file number AD-22-832).

[2] The applicant was denied benefits under section 30 of the *Employment Insurance Act*, S.C. 1996, c. 23. The Appeal Division, affirming a decision by the General Division delivered on November 7, 2022, held that the applicant was disqualified from receiving employment insurance benefits when he lost his job due to misconduct. He had failed to comply with his employer's COVID vaccination policy.

[3] The applicant argued before both Divisions that he did not engage in misconduct on the job. Among other things, he focused on the validity of the employer's vaccination policy.

[4] The Appeal Division rejected the applicant's argument. Following applicable court jurisprudence (*e.g.*, *Canada (Attorney General) v. McNamara*, 2007 FCA 107 at paras. 22-23, *Paradis v. Canada (Attorney General)*, 2016 FC 1282 at paras. 30-31 and *Cecchetto v. Canada (Attorney General)*, 2023 FC 102), the Appeal Division held that the test for misconduct focuses on the employee's knowledge and actions, not on the employer's behaviour or the reasonableness of its work policies. It added that the applicant could pursue remedies elsewhere if he considered that his employer treated him improperly.

[5] In our view, the Appeal Division's decision is reasonable. It is supported by the evidentiary record before it and applicable court jurisprudence.

[6] We would add that the court jurisprudence makes sense. Were the applicant's submissions to be upheld, the Social Security Tribunal would become a forum to question employer policies and the validity of employment dismissals. Under any plausible reading of the

legislation that governs the Tribunal, it is a forum to determine entitlement to social security benefits, not a forum to adjudicate allegations of wrongful dismissal. We note that the applicant in fact has pursued remedies elsewhere for wrongful dismissal and has made a human rights complaint.

[7] Before both Divisions of the Social Security Tribunal, the applicant raised the *Canadian Bill of Rights*, S.C. 1960, c. 44. He raises it again here to suggest that his "misconduct" did not legally constitute misconduct. Here again, as explained above, this submission is legally irrelevant to the Social Security Tribunal's task. Under its governing statute, the Social Security Tribunal cannot assess whether the applicant's dismissal from employment was wrongful.

[8] In this Court, the applicant has raised the Charter in support of his claim. In the General Division, he raised Charter arguments but expressly withdrew them. Thus, his Charter arguments in this Court are a new, inadmissible issue: *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654. We add that all Charter arguments, whether based on rights, freedoms or values must be supported by a rich evidentiary record, not by the "unsupported hypotheses of enthusiastic counsel" or judges: see the venerable, unquestioned case of *Mackay v. Manitoba*, [1989] 2 S.C.R. 357, 61 D.L.R. (4th) 385 at 362. We do not have that sort of evidentiary record here.

[9] Just a couple of weeks before the appeal hearing, the Supreme Court released its decision in *Commission scolaire francophone des Territoires du Nord-Ouest v. Northwest Territories (Education, Culture and Employment)*, 2023 SCC 31. In that decision, the Supreme Court held

that decision-makers, at least in some circumstances, must take into account values resident in the Charter and that reviewing courts can consider them even where administrators have not considered them. Out of fairness to the applicant, we invited him to make submissions on whether the Tribunal should have taken into account any Charter values in this case.

[10] The applicant submits that Charter values of "freedom" and "equality", as broad and unqualified as they are, should have been considered. He submits that the Appeal Division should have used "freedom" and "equality" to whittle down or eradicate the vaccination requirements that were enforced against him. We reject this submission.

[11] The text of the Charter and case law under it heavily qualifies "freedom" and "equality". And everything in the Charter is subject to reasonable limits prescribed by law under section 1. As well, it must also be remembered that section 1 of the Charter, in binding words that cannot be ignored, says that the Charter protects the "rights and freedoms set out in it", not other things such as "values". Thus, the "values" that administrative decision-makers are to take into account cannot be broader than, undercut or do an end run around the established scope of the "rights and freedoms set out" in the Charter determined in accordance with the seminal, binding Supreme Court authority of *Quebec (Attorney General) v. 9147-0732 Québec Inc.*, 2020 SCC 32, [2020] 3 S.C.R. 426. Undercutting the applicant's submission is the fact that there are no Charter cases recognizing a general, unqualified entitlement to "freedom" or "equality".

[12] It is worth adding that under *Commission scolaire*, Charter values cannot be used to invalidate legislative provisions that administrative decision-makers must follow, such as, in this

case, section 30 of the *Employment Insurance Act*. Only unjustified violations of rights and freedoms can strike down legislation. Here, as we have said, the Social Security Tribunal was reasonable in holding that the applicant was precluded under that section and related court jurisprudence from questioning the appropriateness of the termination of his employment.

[13] The applicant also submits that he has been treated in a procedurally unfair manner. He focuses on the Social Security Tribunal receiving unsworn testimony. The Appeal Division answered this at paras. 15-16 of its decision, holding that it does have the power to receive unsworn testimony. We agree with this conclusion and the reasons offered by the Appeal Division.

[14] The applicant is certain that he was wrongly dismissed. We sympathize with his plight but as a court of law we are bound to apply the law. As mentioned above, the law is that the Social Security Tribunal cannot delve into whether the dismissal was proper or the reasonableness of the employer's work policies that led to the dismissal.

[15] We thank the applicant for the skill, organizational ability and eloquence he displayed in making his submissions.

[16] Therefore, we will dismiss the application with costs.

"David Stratas"

J.A.

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

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| **DOCKET:** | A-139-23 |
| **STYLE OF CAUSE:** | SKY SULLIVAN v. ATTORNEY GENERAL OF CANADA |
| **PLACE OF HEARING:** | OTTAWA, ONTARIO |
| **DATE OF HEARING:** | JANUARY 11, 2024 |
| **REASONS FOR JUDGMENT OF THE COURT BY:** | STRATAS J.A.<br>LASKIN J.A.<br>GOYETTE J.A. |
| **DELIVERED FROM THE BENCH BY:** | STRATAS J.A. |

**APPEARANCES:**

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