ORIGINAL

JUDICIAL REVIEW

Court File No: T-1109-23

FEDERAL COURT

BETWEEN:

FEDERAL COURT
COUR FÉDÉRALE
FILED
MAI
MAY 26 2023
KELLY SHIMONEK
DÉPOSÉ
WINNIPEG, MB
-1-

Kerry Spears

Applicant

and

Attorney General of Canada

Respondents

Application Under Section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7

Application for Judicial Review

TO THE RESPONDENT: THE ATTORNEY GENERAL OF CANADA

A PROCEEDING HAS BEEN COMMENCED by the applicant. The relief claimed by the applicant appears on the following pages.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the applicant. The applicant requests that this application be heard at the Federal Court in Winnipeg, Manitoba.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or a solicitor acting for you must prepare a notice of appearance in Form 305 prescribed by the Federal Courts Rules and serve it on the applicant's solicitor, or where the applicant is self-represented, on the applicant, WITHIN 10 DAYS after being served with this notice of application.

Copies of the Federal Courts Rules information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

Date: _____

Issued by: _____
(Registry Officer)

TO: The Attorney General of Canada
Department of Justice
301-310 Broadway
Winnipeg, MB
R3C 0S6

Address of local office:

APPLICATION FOR JUDICIAL REVIEW

1. This is an application of a judicial review of the General Division of the Social Security Tribunal (SST) File No. AD-23-238 (SST File No. GE-22-1889), brought by Kerry Spears (the "Applicant"). On February 6, 2023, General Division member Candace Salmon, (the "Member") issued her decision (the "Decision") denying the Applicant's appeal of the Canada Employment Insurance Commission's decision to deny her EI benefits on the basis of misconduct.

2. On April 28, 2023, the Applicant was denied leave to appeal the Decision to the Appeal Division of the SST.

3. The Applicant submits the Member committed errors of fact, law and mixed fact and law in her Decision which attract the intervention of the Federal Court.

RELIEF REQUESTED

4. The Applicant seeks orders quashing the Decision and directing the Employment Insurance Commission to release to the Applicant the amount of employment insurance benefits to which she is entitled.

BACKGROUND

5. The Applicant was employed by the Government of Canada (GOC) between November 20, 2007 and November 15, 2021.

6. On October 6, 2021, GOC implemented a workforce COVID-19 Vaccination Policy (the "Policy"), which stated that all employees were required to received the COVID-19 vaccines unless unable due to "human rights grounds (e.g. religious or medical reasons)". The Policy further stated, "in all cases requiring workplace accommodation, GOC will accommodate, in accordance with the relevant human rights legislation and the Human Rights in the Workplace - Discrimination Policy, to the point of undue hardship".

7. On November 15, 2021, the Applicant was involuntarily placed on Leave Without Pay indefinitely.

8. On November 28, 2021, the Applicant applied for Employment Insurance benefits, which the Employment Insurance Commission (the "Commission") denied citing as its reason that the Applicant had lost her employment as a result of her own "misconduct".

9. On May 2, 2022, the Applicant applied for the Request for Reconsideration Decision. On July 5, 2022, the General Division of the SST dismissed the Applicant's request.

10. On August 4, 2022, the Applicant applied for leave to appeal to the Appeal Division of the SST. On December 8, 2022, the Applicant attended an in person hearing with the Appeal Division. On February 7, 2023, the Appeal Division denied the Applicant's appeal.

11. On March 5, 2023, the Applicant applied to the Appeal Division of the SST. On April 28, 2023, the Applicant was denied her application to appeal.

Decision to be Reviewed

12. In the Decision, the Member found the Commission had "proven the Claimant lost her job because of misconduct (in other words, because she did something that caused her to lose her job) because she refused to comply with her employer's mandatory COVID-19 vaccination policy".

13. The Member explained her understanding of misconduct in the employment insurance context, basing her exposition on case law, namely: *Mishibinijima v Canada (Attorney General),* 2007 FAC 36, *McKay-Eden v Her Majesty the Queen,* A-402-96, Minister *of Employment and Immigration v Bartone,* A-369-88, *Canada (Attorney General) v McNamara,* 2007 FAC 107 and *Pardis v Canada (Attorney General),* 2016 FC 1282.

14. The Member expounded on her understanding of EI law, stating:

> The law doesn't say I have to consider how the employer behaved. Instead, I have to focus on what the Claimant did or failed to do and whether that amounts to misconduct under the Act...Issues about whether the Claimant was wrongfully dismissed or whether the employer should have made reasonable arrangements (accommodations) for the Claimant aren't for me to decide. I can consider only one thing, whether what the Claimant did or failed to do is misconduct under the Act.

15. The Member ruled that she had to determine why the Claimant lost her job, then determine whether the law considers that reason to be misconduct. She stated, "there is misconduct if the Claimant knew or should have known that her conduct could get in the way of carrying out her duties toward her employer and that there was a real possibility of being suspended because of that".

16. The Member pointed out the willfulness component of the test for misconduct and found the Applicant's conduct was wilful. The Member also pointed to the predictability the willful conduct would lead to suspension of the Applicant's employment and found the Applicant knew dismissal was a possibility. She therefore found the Applicant's dismissal was the result of her misconduct.

GROUNDS

17. Pursuant to *Agraira v Canada (Minister of Public Safety and Emergency Preparedness),* 2013 SSC 36, the proper approach to be taken by this court is a review of the administrative decision, as though it were "stepping into the shoes of the administrative body". The standard of review is reasonableness, pursuant to *Canada (Minister of Citizenship and Immigration) v Vavilov,* 2019 SSC 65.

18. While *Vavilov* court settled on reasonableness as the standard of review in all but the narrowest of exceptions, it made equally clear through paragraphs 99-135 how high the standard of reasonableness actually is.

19. A decision maker's decision will no be reasonable if the decision maker has failed to "meaningfully grapple with key issues or central arguments" raised by a party, "Justification and transparency require that an administrative decision maker's reasons meaningfully account for the central issues and concerns raised" in order to prove he has "actually listened to the part[y]". If the decision "cannot be said to exhibit the requisite degree of justification, intelligibility and transparency", the decision will be unreasonable:

> [A] reasonable decision is one that is justified in light of facts...The decision maker must take the evidentiary record and the general factual matrix that bears on its decision into account, and its decision must be reasonable in light of them... The reasonableness of a decision may be jeopardized where the decision maker has fundamentally misapprehended or failed to account for the evidence before it.

20. A decision will not be reasonable if the decision maker strayed from the purpose and intent of the statute: "It [is] impossible for an administrative decision maker to justify a decision that strays beyond the limits set by the statutory language it is interpreting.

21. A decision will not be reasonable if it is not "justified in relation to the **constellation of law and facts** that are relevant to the decision...Elements of the legal and factual contexts of a decision operate as constraints on the decision maker".

22. A decision will not be reasonable if it involves and "irrational chain of analysis": "The internal rationality of a decision may be called into question if the reasons exhibit clear logical fallacies, such as circular reasoning, false dilemmas, unfounded generalizations or an absurd premise".

23. A decision will not be reasonable if the decision maker reasoned backward from a conclusion: The decision maker "cannot adopt an interpretation it knows to be inferior-albeit plausible - merely because the interpretation in question appears to be available and is expedient. The decision maker's responsibility is to discern meaning and legislative intent, not to 'reverse-engineer' a desired outcome".

The Governing Statute: Employment Insurance Act

24. According to section 30(1) of the *Employment Insurance Act*, "A claimant is disqualified from receiving any benefits if the claimant lost any employment because of their misconduct of voluntarily left any employment without just cause".

25. Section 49(2) of the *Employment Insurance Act* states: "The Commission shall give the benefit of the doubt to the claimant on the issue of whether any circumstances or conditions exist that have the effect of disqualifying the claimant under section 30...if the evidence on each side of the issue is equally balanced."

Law of Misconduct

Digest of Benefit Entitlement Principles

26. The Digest of Benefit Entitlement Principles (the "Digest") by which decision makers are meant to govern themselves concerning an employee's entitlement to EI benefits elucidates the law of misconduct in the employment context at Chapter 7.

27. The Digest states: "In finding that a claimant has lost their employment by reason of misconduct, the Commission must show beyond the balance of probabilities, that the action...caused the claimant to **no longer meet** a required condition of employment" - the implication being that some **preexisting condition of employment in place at the time the employee entered into the employment relationship** has been breached.

28. The Digest further states: "To establish misconduct, it **must** be shown that the conduct in question constituted a breach of the employer-employee relationship" which the Digest goes on to make clear is connected to the **employment contract,** whatever form it takes: "Any employment relationship can be called a contract between employee and employer. Whether written, verbal or unstated, this contract is an agreement about the duties and responsibilities each party owes the other". Only **after** "the Commission establishes the existence of conduct that has caused a breach in the employment relationship for which the claimant is personally responsible" will the decision maker move into the inquiry concerning whether such breach was willful: "[T]o be considered misconduct under the *EI Act*, the actions must be...a breach of an obligation arising explicitly or implicitly from the contract of employment; **otherwise there is no misconduct"**.

29. The Digest discloses that "[t]he officer's decision is not arbitrary, nor is it based on assumptions or vague allegations. To determine entitlement, the officer follows a specific process" which includes "evaluat[ing] the evidence without prejudice", "mak[ing] a decision based on the weight of evidence", and giving "the benefit of the doubt" to the claimant where "the evidence presented by the claimant and by the employer are equally balanced."

30. The Digest promises the decision maker "will adapt their fact-finding to the **specific circumstances** of the case".

Misconduct Case Law Relied on by the Member

31. Each of the Member's exemplar cases in which the Federal Court upheld a finding of employee misconduct reveals that the employee was found not only to have acted willfully, but also to have breached an *existing* term of employment contract, all involving substance abuse: *McNamara; Paradis; Mishibinijima.*

32. Prior to the advent of COVID, cases in which the SST, the court, or both routinely found misconduct involved not only willfulness, and not only the breach of an existing term of employment, but also *objectively* sanctionable behaviour; failure to report fraud contrary to an existing policy (*Canada (Attorney General) v Gagnon,* 2002 FCA 460), conflict of interest (*Canada (Attorney General) v Bellavance,* 2005 FCA 87), manual alteration of a time card contrary to company policy (*Attorney General of Canada v Secours,* A-352-94), absenteeism (*Mishibinijima)*, failure of drug tests contrary to existing company policy (*McNamara and Paradis)*,

Argument

33. The Member erred both in fact and in law, both in her assessment of "why the [Applicant] lost her job", and in the determination her dismissal was on account of her own misconduct.

34. The Member conflated her directive to focus on the Applicant's misconduct with a purported obligation to remain completely blind to the employer's conduct - the latter of which is not the requirement, as is maid plain in the case law cited by the Member, the legislation, and the Digest's guidance.

35. In its discussion of how misconduct might be established, the Digest points to a decision of the Federal Court of Appeal, *The Attorney General of Canada v MacDonald, J; Laurie,* A-152-96, which upheld the decision of the umpire, who stated the Commission is not at liberty to condone the employer's misconduct by depriving the claimant of benefits. In conflating the requirement to focus on the Applicant's conduct with an absolute prohibition on noticing the employer's conduct, the Member failed to "adapt [her] fact-finding to the specific circumstances of the case.

36. While the role of the Member is not to make any finding concerning an employer's misconduct, she is not obligated to completely ignore the employer's error, and she is not obligated to hold a claimant responsible for an employer's error. The Member's misapprehension of the issue comes into sharp relief when she pointed, in support of her assertation "the law doesn't say I have to consider how the employer behaved", to section of the *Act* which in fact says nothing on the topic whatsoever. The legislation itself is, in fact, silent on how far the Member might delve into the actions of the employer.

37. Insofar as the jurisprudence speaks to the matter, it does so in a much more nuanced way than the Member appreciates. For example, the member cites *Mishibinijima* for the proposition that "the focus is on what the employee did or did not do, and the fact that the employer did not accommodate its employee is not a relevant consideration"; however, that is only half of what the *Mishibinijima* court said. In fact, the *Mishibinijima* court stated that "the measures which an employer takes or could have taken with respect to an employee's alcohol problem *may be relevant to the determination of*

whether there is misconduct." The Member failed to account for this portion of the court's statement immediately preceding the portion the Member employed to give the opposite impression. Beyond this, the Digest, in recognition of the nuances of the jurisprudence, also instructs *against* the approach of refusing to consider the relevant circumstances.

38. Even had the Member been correct in her assessment that the Applicant had not taken proper steps to comply with the policy, however, she would still have failed to demonstrate that her conduct met the first step of the test, according to the case law and the Digest: "[T]o be considered misconduct under the *EI Act,* the actions must be...a breach of an obligation arising explicitly or implicitly from the contract of employment; otherwise there is no misconduct".

39. Implicit in the Member's statement, "There is misconduct if the Claimant knew or should have known that her conduct could get in the way of carrying out her duties toward her employer and that there was a real possibility of being suspended because of that" is the idea that in order to ground a finding of misconduct, a duty must be owed in the first place. The Member failed to address whether the Applicant actually owed a duty to her employer. The Member appears to simply assume this duty, but has not demonstrated any such duty actually exists. If there is no duty to begin with, the first step of the test for misconduct, the step on which all other steps depend, is not met.

40. Similarly, the Member failed to consider whether the conduct was objectively sanctionable, even though the case law she cited in support of her findings consistently acknowledges breaches of employment contracts and/or objectively sanctionable behaviour as a necessary ingredient for a finding of misconduct.

41. Further, the other cases in which the Tribunal and the courts have found misconduct have involved conduct which breaches the employment contract and/or objectively sanctionable behaviour, for example: *Gagnon, Bellavance, Secours and Marion.* Conspicuously absent from the list, is for example, declining to act contrary to submit to an unwanted medical treatment. The Member in the present case failed to acknowledge the Applicant's conduct was neither in breach of her employment contract nor objectively sanctionable.

42. Not only does the necessity of objectively sanctionable behaviour to ground a finding of misconduct appear in the case law; it is a matter of logic that not all willful behaviour that happens to lead to dismissal can be misconduct. Were it otherwise, an employee could be denied benefits because she willfully refused an employer's sexual advances or willfully refused to engage in fraudulent activity. In this light, it is obvious the law cannot countenance a finding of misconduct premised on willfulness and predictable dismissal alone. Yet, that is precisely how the Member found misconduct in the present case.

43. The Member having pointed to no existing term of employment contract which the Applicant breached, the willfulness element of her considerations, upon which she heavily relied in finding misconduct, is somewhere between premature and irrelevant.

44. The Member's statement, "I find the Claimant committed the actions that led to her dismissal, as she knew her employer had a mandatory COVID-19 vaccination policy and what she had to do to follow it" not only reveals her failure to account for the fact vaccination at no time formed a part of the employment agreement and accordingly a declination to be vaccinated could not constitute a breach necessary to ground misconduct.

Recent Tribunal Decisions

45. While the Member is not alone in her misapprehension of the legal principles surrounding denial of EI benefits, as several recent decisions reveal, one decision of particular interest does address some of the issues explored herein: *Lance v Canada,* GE-22-1889.

46. In the words of SST General Division Member Mark Leonard:

> The issue of the Covid-19 vaccination and dismissals resulting from noncompliance is an emerging issue. No specific case law currently exists on the matter that guides decision makers.
>
> Indeed, I could not find a single case where a claimant did something for which a specific right, supported in law, exists, and subsequently that action was still found to be misconduct simply because it was deemed willful.
>
> In the absence of a [Federal Court of Appeal] decision that provides such guidance, I am persuaded that the Claimant has a right to choose whether to accept any medical treatment. Despite that fact that her choice contradicts her Employer's policy, and lead to her dismissal, I find that exercising that "right" cannot be characterized as a wrongful act or undesirable conduct sufficient to conclude misconduct worthy of the punishment of disqualification under the *EI Act*.

47. The Claimant in Mr. Leonard's decision had, in his view, a good reason for declining to be vaccinated against COVID. Mr. Leonard found that declining vaccination could not be seen as objectively sanctionable - which is what conduct must be in order to constitute misconduct. The Applicant submits Mr. Leonard has properly articulated what the law on this "emerging issue" ought to be and commends his brief analysis to this Court.

Conclusion

48. The question is whether the Applicant engaged in anything that can be objectively characterized as "undesirable conduct" and therefore as "misconduct" pursuant to the *Act.* However, in order to determine whether the Applicant engaged in objective misconduct, it is necessary to determine, at a minimum, whether the Applicant owed such a duty particularly in light of the fact the new policy was a novel condition of employment unilaterally imposed upon her and appearing nowhere in the contract of employment to which she had agreed upon commencing the employment.

49. The Member's focus on the willfulness and predictability requirements for the test for misconduct to the exclusion of the most obvious component of any test for misconduct - whether the behaviour objectively attracted sanction - fails on the *Vavilov* standard.

50. Neither can the decision maker adopt and impoverished interpretation of the facts before her. Since the Member is charged with determining whether the Applicant committed misconduct and can plainly see: that the Policy constitutes a novel term of employment unilaterally imposed upon the Applicant; that the component of objectively sanctionable conduct is missing; and that in general there is doubt the employer's dismissal designation sufficient to trigger section 49(2) of the *EIA,* she has an obligation to fully consider those facts and not to " 'reverse-engineer' a desired outcome". Stating that all the evidence shows the Applicant was fired for refusing to comply with her employer's policy is disingenuous and raises the spectre of a reverse-engineered outcome.

Evidence to be Relied on

51. Affidavit of Kerry Spears.

52. Certified copy of Tribunal record(s)

The Applicant requests the Social Security Tribunal of Canada to send a certified copy of the full Tribunal records to the applicant and to the Registry.

Dated: May 26, 2023 at Winnipeg, MB

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