FEDERAL COURT

BETWEEN

Heather Wong

Applicant

and

The Attorney General of Canada

Respondent

Notice of Application

TO THE RESPONDENT:

A PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the applicant. The relief claimed by the applicant appears below.

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 in Toronto.

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 file a notice of appearance in Form 305 prescribed by the *Federal Courts Rules* and serve it on the applicant's solicitor or, if 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.

January 19, 2023

Issued by: _____

Address of local office: Toronto Local Office

180 Queen Street West, Suite 200

Toronto Ontario, M5V 3L6

TO:

The Attorney General of Canada

Justice Building, 4th Floor

284 Wellington Street

Ottawa, Ontario K1A 0H8

Application

This is an application for judicial review in respect of:

Social Security Tribunal of Canada, Appeal Division.

File AD-22-898

Decision by tribunal member Pierre Lafontaine

Decision date December 21, 2022

The December 21, 2022 decision was that the Appeal Division of the Social Security Tribunal of Canada refused Leave to Appeal the decision of the General Division of the Social Security Tribunal of Canada, dated November 2, 2022, file GE-22-2781.

The applicant alleges that there are conflicting decisions that need to be resolved; that the decision was a conclusory decision in which the adjudicator did not properly analyze or rule on the grounds presented; and that the adjudicator made an error of law.

The decision was communicated to the applicant on December 21, 2022.

The applicant makes application for:

1. Primary relief, which would be to overturn the lower tribunal's decisions and award Employment Insurance;

2. Alternative relief, which would be to obtain a new hearing before another member of the lower tribunal;

and,

3. Such further and other relief that I may request.

The grounds for the application are:

1. The applicant worked for the Toronto Public Library This employment was terminated on January 2, 2022 by the employer.

2. The Canada Employment Insurance Commission denied EI to the applicant on May 3, 2022 due to a finding of misconduct related to the applicant's failure to disclose her vaccination status according to the employer's Covid-19 vaccination policy. The applicant's reconsideration request was dismissed on July 20, 2022. On November 2, 2022, the General Division of the SST dismissed the applicant's appeal. On December 21, 2022, the applicant was notified by the Appeal Division of the SST that her application for leave to appeal was refused.

3. There are conflicting decisions that need to be resolved.

4. On December 14, 2022, the General Division of the SST awarded employment insurance in the case of *AL v. Canada Employment Insurance Commission*.

5. The December 14, 2022 decision in *AL v. Canada Employment Insurance Commission* conflicts with the applicant's December 21, 2022 Appeal Division decision.

6. The case of *AL v. Canada Employment Insurance Commission* appeared before the General Division of the SST. The claimant A.L.'s employment had been terminated after her employer created a mandatory Covid-19 vaccination policy. The Canada Employment Insurance Commission denied employment insurance benefits to the claimant A. L. due to a finding of misconduct. The claimant A.L. stated that she did not commit misconduct. The General Division of the SST agreed with the claimant A. L. that there was no misconduct and that the claimant was not disqualified from receiving employment insurance benefits. The decision in *AL v. Canada Employment Insurance Commission* states that:

> *[1] The appeal is allowed. The Tribunal agrees with the Claimant.*

> *[2] The Canada Employment Insurance Commission (Commission) hasn't proven that the Claimant lost her job because of misconduct (in other words, because she did something wrong that caused her to lose her job). This means that the Claimant isn't disqualified from receiving Employment Insurance (EI) benefits.*

7. The December 14, 2022 decision of *AL v. Canada Employment insurance Commission* further states that there must be a breach of expressed or implied duty arising out of a claimant's employment contract in order to find misconduct, and that there is no breach of expressed or implied duty in a Covid-19 vaccination policy that has been unilaterally imposed outside of the contract:

> *[26] The Commission says that the Claimant willfully chose not to comply with the Employer's vaccination policy. It says that she knew or ought to have known that not taking the vaccination would result in her dismissal. It asserts that there must be a causal link between the "misconduct" and the employment and concludes that the "misconduct" must constitute a breach of an expressed or implied duty arising from the contract of employment. It quotes a Federal Court of Appeal (FCA) case in support of its decision regarding misconduct.*
>
> *[29] I find that the Commission hasn't proven that there was a breach of either an expressed or implied duty for the Claimant to get vaccinated arising out of her employment contract despite the Employer's Covid-19 vaccination policy.*
>
> *[30] The Commission submits that there was a breach of an expressed or implied duty arising out of the Claimant's employment contract. It says that this breach led to her suspension and ultimate dismissal and supports a finding of misconduct. Therefore, the Commission must prove a breach of this duty occurred in order for a finding of misconduct.*

> *[31] An employment contract is just that, a contract. It is an agreement between parties that details the obligations both parties owe each other. Neither can unilaterally impose new conditions to the collective agreement without consultation and acceptance of the other. The only exception to this is where legislation demands a specific action by an employer and compliance by an employee*

8. The December 14, 2022 decision of *AL v. Canada Employment insurance Commission* further states:

> *[36] I find that the Commission has not shown that there is an expressed duty detailed in the Claimant's CA that would support an obligation upon the Claimant was to get vaccinated against Covid-19.*

and

> *[45] I find that the Commission has not shown that an implied duty existed within her collective agreement or other employment contract that the Claimant accept vaccination*

9. The December 14, 2022 decision of *AL v. Canada Employment insurance Commission* further states that the requirement to accept a medical treatment goes "far beyond a simple expectation to comply with health and safety protocols". The decision states that an essential condition of employment such as Covid-19 vaccination, which is unilaterally imposed by the employer, does not constitute an expressed or implied requirement within the collective agreement:

> *[49] The requirement to accept medical treatment in order to maintain employment goes far beyond a simple expectation to comply with health and safety protocols. This is not the same as expecting an employee to wash their hands before handling food or wearing a safety vest. To accept the premise that the employer can institute a policy demanding a specific type of medical treatment or face dismissal, changes a mere expectation of compliance with general health and safety protocols, into an essential condition of employment.*

Imposed New Essential Condition of Employment

[50] I find that the Employer unilaterally imposed a new condition of employment upon the Claimant without her agreement nor the agreement of her bargaining agent.

[51] An essential condition of employment is a condition that if not met at any time during the employment relationship can result in immediate dismissal. Usually, such conditions are established at the outset of the employment relationship. If a prospective 12 employee cannot meet the condition, they are not hired. When such a condition is to be established at a later time, it opens the employment contract to negotiation.

[52] In this case, the Employer unilaterally opened the Claimant's CA and imposed a new essential condition of employment without her consent nor the consent of the Bargaining Agent. It did this by instituting a policy without any consultation or regard to the employment contract, which it had previously signed. The change established a new essential requirement (vaccination or valid exemption) because failing to meet the vaccination requirement, or provide authorized exemption, would result in dismissal. There were no other options for the Claimant to maintain her employment other than meet the condition.

[53] There is no evidence that the Employer opened a negotiation with the bargaining agent, or specifically with the Claimant, to amend her CA to include a vaccination requirement as a condition of employment. There is no evidence that the Claimant explicitly agreed to the condition or accepted to work under the condition before she was dismissed.

[55] The requirement to be vaccinated or provide a valid exemption was not an essential condition of employment established at the time she was hired, nor agreed to by the Claimant at some time during her

employment but prior to her dismissal. It was not included in her CA. Therefore, it cannot be said that her CA (employment contract) contained a provision that established an expressed or implied duty to comply with the Employer's vaccination policy.

10. The December 14, 2022 decision of *AL v. Canada Employment insurance Commission* further states that common law confirms that employees have a right to not accept medical treatment, and that the rejection of medical treatment is not misconduct:

> *[76] The common law confirms that the Claimant has a legal basis or "right" to not accept any medical treatment, which includes vaccination. If vaccination is therefore voluntary, it follows that she has a choice to accept or reject it. If she exercises a right not to be vaccinated, then it challenges the conclusion that her actions can be characterized as having done something "wrong" or "something she should not have done," whether willfully or not, that would support misconduct and disqualification within the meaning of the EI Act?*
>
> *[77] Even the Claimant's employment contract (CA) acknowledges that she has the right to refuse any recommended or required vaccination.*
>
> *[78] The issue of the Covid-19 vaccinations and dismissals resulting from noncompliance is an emerging issue. No specific case law currently exists on the matter that guides decision makers.*
>
> *[79] 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.*
>
> *[80] In the absence of a FCA decision that provides such guidance, I am persuaded that the Claimant has a right to choose whether to accept any medical treatment.*

11. The adjudicator's analysis and decision described in parts (6) - (10) above, taken from the December 14, 2022 decision of *AL v. Canada Employment insurance Commission*, conflict with the December 21, 2022 decision the applicant received from the Social Security Tribunal. The adjudicator in *AL v. Canada Employment Insurance Commission* states:

> *So, did the Claimant lose her job because of misconduct?*
>
> *[81] Based on my findings above, I find that the Claimant did not lose her job because of misconduct.*
>
> *[82] This case is not about whether the Employer's policy is legal or reasonable nor whether its decision to dismiss the Claimant is justified. The issue is whether the Claimant's decision not to be vaccinated, despite the Employer's policy, supports a conclusion of misconduct. The courts have detailed the test to make that determination and it is upon the Commission to prove the elements.*
>
> *[83] The Commission has not met the burden of proof to establish that the Claimant breached an expressed or implied duty arising out of her employment agreement.*
>
> *[84] Further, the Claimant had a right both expressed in Canadian case law and detailed in Article 19.02 of her collective agreement to refuse vaccination.*
>
> *[85]* ***Given those expressed rights, I find that the Claimant decision not to be vaccinated, despite her Employer's policy, is not misconduct under the Act.***
>
> (emphasis added)

12. The Appeal Division adjudicator gave a conclusory decision.

13. The Appeal Division did not conduct its own objective analysis on whether or not misconduct occurred.

14. The Appeal Division adjudicator did not properly analyze or rule on the grounds the applicant presented to reach a determination.

15. In the applicant's submission to the Appeal Division, the applicant listed grave errors of law and an error of fact made by the General Division of the Social Security Tribunal. However, in their decision, the Appeal Division stated that the applicant "has not identified errors in law nor identified any erroneous findings of fact, which the General Division may have made in a perverse or capricious manner or without regard for the material before it, in coming to its decision on the issue of misconduct."

16. The applicant's submission to the Appeal Division stated that the General Division of the SST made an error of law when the General Division did not consider the fact that misconduct must constitute a breach of a duty that is expressly noted or implied in the contract of employment. The applicant's submission also stated that there was no expressed or implied duty to be vaccinated arising out of the applicant's collective agreement. This criterion must be present to determine misconduct, according to *Paradis v. Canada (Attorney General), 2016 FC 1282* and *Canada (Attorney General) v. Lemire, 2010 FCA 314*. This criterion for misconduct was not present in the applicant's case.

17. The Appeal Division of the SST did not properly analyze or rule on this error of law described in (16), above.

18. The applicant's submission to the Appeal Division also stated that the General Division made an error of law when the General Division did not consider the fact that for misconduct to be found, the application of the policy to the employee must be reasonable within an employment context. See *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd., 2013 SCC 34, Electrical Safety Authority v Power Workers' Union, 2022 CanLII 343, Toronto (City) v Toronto Civic Employees' Union, CUPE, Local 416, 2022 CanLII 109503 (ON LA), Toronto*

Professional Fire Fighters' Association, I.A.A.F. Local 3888 v Toronto (City), 2022 CanLII 78809 (ON LA)

19. The Appeal Division of the SST did not properly analyze or rule on the error of law described in (18), above.

20. The applicant's submission to the Appeal Division also stated that the General Division made an error of law when the General Division did not consider the fact that misconduct must be a breach of such scope that its author could normally foresee that it would be likely to result in his dismissal. See *Canada (Attorney General) v. Cartier, 2001 FCA 274 (CanLII)*, *J. R. v. Canada Employment Insurance Commission, 2015 SSTGDEI 16* and *Electrical Safety Authority v Power Workers' Union, 2022 CanLII 343 (ON LA)*

21. The Appeal Division of the SST did not properly analyze or rule on the error of law described in (20), above.

22. The applicant's submission to the Appeal Division also stated that the General Division made an error of fact when the General Division concluded that the applicant met the conditions for misconduct

23. The General Division stated that the applicant met the conditions for misconduct because the applicant was unable to carry out her work duties after she was suspended. In their decision, the General Division stated that the applicant "was aware that if she failed to comply with the policy, she wouldn't be allowed to continue working." She would not be able to carry out her work duties because she would not be able to access the workplace after she was suspended. Due to the applicant's inability to access the workplace after being suspended, the General Division decision stated that the applicant met the condition for misconduct that "her conduct could get in the way of carrying out her duties toward her employer and there was a real possibility of getting dismissed from their job because of that."

24. The General Division concluded that misconduct occurred because the employee was suspended, and was then unable to carry out her work duties. The General Division made an error of fact because misconduct

occurs when one is not able to carry out their work duties **before** being suspended, not when one is not able to carry out their work duties **after** being suspended. See *Mishibinijima v Canada (Attorney General), 2007 FCA 36*.

25. The Appeal Division of the Social Security Tribunal did not properly analyze or rule on the General Division's error of fact described in parts (22), (23) and (24), above.

26. The Appeal Division adjudicator made an error of law.

27. The Appeal Division of the Social Security Tribunal has a legal obligation according to the Department of Employment and Social Development Act (S.C. 2005, c. 34) as follows:

> *Leave*
>
> *56 (1) An appeal to the Appeal Division may only be brought if leave to appeal is granted.*
>
> *Grounds of appeal — Employment Insurance Section*
>
> *58 (1) The only grounds of appeal of a decision made by the Employment Insurance Section are that the Section*
>
> *(a) failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;*
>
> *(b) erred in law in making its decision, whether or not the error appears on the face of the record; or*
>
> *(c) based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.*
>
> *Criteria*
>
> *(2) Leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success.*

28. It is required by law that the Appeal Division consider the grounds of appeal listed within section 58 of the Department of Employment and Social Development Act. The Appeal Division did not properly analyze or rule on the errors of law and error of fact raised by the applicant which were the grounds for the applicant's appeal.

29. It is required by law, according to the Department of Employment and Social Development Act, that the Appeal Division only refuse leave to appeal when the appeal has no reasonable chance of success.

30. The appeal to the Appeal Division had a reasonable chance of success, as it raised grounds evidenced by the decision in *AL v Canada Employment Insurance Commission*, dated December 14, 2022.

31. The appeal to the Appeal Division had a reasonable chance of success, as it raised grave errors of law and fact made by the General Division of the Social Security Tribunal.

32. The Appeal Division should not have refused leave to appeal, as the appeal had a reasonable chance of success.

33. Such further and other grounds as I may present and the Honourable Court permit.

This application will be supported by the following material:

1. Applicant's Request for Reconsideration submitted to the Canada Employment Insurance Commission for reconsideration, dated June 1, 2022;
2. Decision, applicant's Reconsideration application, Canada Employment Insurance Commission, dated July 20, 2022;
3. Applicant's Notice of Appeal to the General Division of the Social Security Tribunal, dated August 20, 2022;

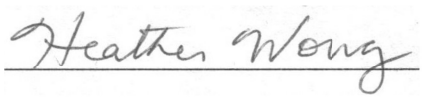
4. Applicant's supplementary submission to the General Division of the Social Security Tribunal, dated October 25, 2022;
5. Decision for applicant's appeal to the General Division of the Social Security Tribunal, dated November 2, 2022;
6. Notice of applicant's appeal to the Appeal Division of the Social Security Tribunal, dated November 30. 2022;
7. Decision, applicant's application for Leave to Appeal to the Appeal Division of the Social Security Tribunal, dated December 20, 2022;
8. Department of Employment and Social Development Act (S.C. 2005, c. 34);
9. And such further and other materials that I may present.

Authorities

10. Decision, AL v Canada Employment Insurance Commission, December 14, 2022;
11. Paradis v. Canada (Attorney General), 2016 FC 1282
12. Canada (Attorney General) v. Lemire, 2010 FCA 314.
13. Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd., 2013 SCC 34;
14. Electrical Safety Authority v Power Workers' Union, 2022 CanLII 343;
15. Toronto (City) v Toronto Civic Employees' Union, CUPE, Local 416, 2022 CanLII 109503 (ON LA);
16. Toronto Professional Fire Fighters' Association, I.A.A.F. Local 3888 v Toronto (City), 2022 CanLII 78809 (ON LA)
17. Canada (Attorney General) v. Cartier, 2001 FCA 274 (CanLII);

18. J. R. v. Canada Employment Insurance Commission, 2015 SSTGDEI 16
19. Mishibinijima v Canada (Attorney General), 2007 FCA 36
20. And such further and other authorities that I may present.

Dated at Toronto Ontario this 19 day of January, 2023



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