Federal Court  Cour fédérale

Date: 20240503

Docket: T-166-23

Citation: 2024 FC 686

Ottawa, Ontario, May 3, 2024

PRESENT: Mr. Justice O'Reilly

BETWEEN:

HEATHER WONG

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Ms Heather Wong began working as a librarian at the Toronto Public Library in 2019. During the COVID-19 pandemic, the library imposed a mandatory vaccination policy requiring employees to be fully vaccinated and to provide proof of vaccination. Those who failed to comply could be disciplined or even dismissed. Ms Wong did not comply with the policy because, based on her own research and scientific knowledge, she did not believe that vaccination mandates were effective.

[2] The deadline for compliance with the library's policy was October 30, 2021. Ms Wong was placed on unpaid leave on November 1, 2021 and was informed that she would be dismissed if she did not comply by December 13, 2021. That deadline was extended until January 2, 2022, at which point Ms Wong's employment was terminated.

[3] Ms Wong then applied for employment insurance. The Canada Employment Insurance Commission denied her application because she had lost her job through misconduct. Ms Wong asked the Commission to reconsider her application, but the Commission maintained its original decision.

[4] Ms Wong appealed the Commission's decision to the Social Security Tribunal. The Tribunal's General Division considered Ms Wong's position – that the library's policy was unreasonable, intrusive, and ineffective; that the vaccine was dangerous; that vaccination was not a condition of her employment under the collective agreement; that she could do her job effectively without vaccination; that dismissal was not a necessary response to her non-compliance; and that she genuinely believed that the library would not dismiss her. The General Division concluded that Ms Wong's behaviour amounted to misconduct because it was wilful, she knew that her conduct was likely to interfere with her ability to carry out her duties, and she was, or at least ought to have been, aware that she could be dismissed.

[5] Ms Wong then sought leave to appeal the General Division's decision to the Tribunal's Appeal Division. In order to be granted leave, Ms Wong had to show that the General Division had erred in one of four respects: (i) by failing to observe a principle of natural justice; (ii) by

failing to decide an issue it should have decided (or deciding an issue it did not have the power to decide); (iii) by making an error of law; or (iv) by basing its decision on a serious error of fact (*Department of Employment and Social Development Act*, SC 2005, c 34, s 58(1)). The Appeal Division can only grant leave if it is satisfied that the appeal has a reasonable chance of success. The Appeal Division denied leave, finding that the General Division had not made any of these reviewable errors. Therefore, Ms Wong's appeal had no reasonable chance of success.

[6] Ms Wong now argues that the Appeal Division rendered an unreasonable decision because it failed to thoroughly consider all the factors that were relevant to the question of whether her behaviour amounted to misconduct. She asks me to quash the Tribunal's decisions and award EI retroactively.

[7] The sole issue is whether the Appeal Division's decision was unreasonable.

[8] I can find no basis for overturning the Appeal Division's decision. The Appeal Division's role is to determine whether an appeal has a reasonable chance of success in respect of one or more of the four grounds for appeal. Its task is not to reconsider the appellant's arguments afresh, but to decide if a reviewable error had been made by the General Division. I cannot conclude that the Appeal Division's finding to the contrary was unreasonable. I must, therefore, dismiss this application for judicial review.

II. The Appeal Division's Decision

[9] The Appeal Division correctly noted that leave to appeal can be granted only if the claimant has shown that the General Division made a reviewable error and that the appeal stands a reasonable chance of success.

[10] Ms Wong had urged the Appeal Division to find that the General Division had made a number of errors of fact and law when it concluded that her behaviour amounted to misconduct. The Appeal Division observed that it was not the General Division's role to rule on the severity of the library's penalty for non-compliance with its vaccination policy or on the question of whether the library had acted properly in dismissing her. Further, it was not the forum to consider whether the employer had sufficiently accommodated Ms Wong, the policy conflicted with the collective agreement, or the policy impinged upon Ms Wong's civil rights. Rather, the sole question was whether Ms Wong had engaged in misconduct that led to her dismissal.

[11] The Appeal Division stated that a deliberate violation of an employer's policy amounts to misconduct, and it noted that employers have an obligation to enact policies to protect the health and safety of their employees. Here, the library developed a policy that conformed with the recommendations of Toronto Public Health during the pandemic. Ms Wong, said the Appeal Division, deliberately chose not to follow that policy. Therefore, the General Division made no reviewable error when it found that her behaviour constituted misconduct, and Ms Wong's appeal had no reasonable chance of success.

III. Was the Appeal Division's Decision Unreasonable?

[12] Ms Wong contends that the Appeal Division's decision was unreasonable, essentially for the same reasons that she had characterized the General Division's decision as unreasonable. But, on this judicial review, the question is not whether there was an error in finding that Ms Wong's behaviour amounted to misconduct. That finding was made by the General Division. In turn, the Appeal Division considered whether that finding had been reached by way of a reviewable error, and found that it had not. Here, the question is whether the Appeal Division's conclusion that there had been no reviewable error by the General Division was itself unreasonable in the sense that it was not justified, intelligible, or transparent (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 99).

[13] The burden falls on the person alleging that a decision was unreasonable to show that the decision contained "sufficiently serious shortcomings" that it could not be considered justified, intelligible, or transparent (*Vavilov* at para 100). A decision has serious shortcomings if it is untenable in some way, or if it manifests a failure of rationality (*Vavilov* at para 101).

[14] In considering whether a decision is reasonable, the factual and legal constraints that bear on the decision must be considered (*Vavilov* at para 99). In this context, that means that the role of the Appeal Division must be taken into account. As mentioned, its role was simply to determine whether the General Division had made a reviewable error, one which might give rise to a reasonable chance of success on appeal. The Appeal Division cannot be faulted for failing to address arguments that were extraneous to its statutory responsibility, and that had already been considered and rejected by the General Division.

[15] Arguments similar to Ms Wong's have already been addressed in another decision of this Court by Justice Catherine Kane in *Butu v Canada (Attorney General)*, 2024 FC 321. Justice Kane concluded that the applicant in that case – also an employee of the Toronto Public Library who had been dismissed for failure to comply with the library's vaccination policy – had failed to show that the Appeal Division's decision denying her leave to appeal was unreasonable. Like Ms Wong, the applicant there argued that the Appeal Division failed to consider whether her actions amounted to misconduct, whether lack of compliance with the vaccination policy interfered with her ability to perform her duties at the library, whether the policy was unreasonable, and whether her dismissal was foreseeable. Justice Kane rejected all of those arguments (see paras 82-87). She emphasized that the Appeal Division's role was confined to determining whether the applicant's appeal stood a reasonable chance of success (paras 88-90).

[16] Similarly, Justice David Stratas has observed that the Social Security Tribunal's role is solely to decide eligibility for benefits, not to rule on other employment-related grievances:

> 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's policies and the validity of employee dismissals. Under any plausible reading of the legislation, it 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

[17] In addition to *Sullivan*, a number of other cases have found that a failure to comply with an employer's vaccination policy amounts to misconduct, including *Zhelkov v Canada (Attorney General)*, 2023 FCA 240; *Abdo v Canada (Attorney General)*, 2023 FC 1764; *Matti v Canada (Attorney General)*, 2023 FC 1527; and *Cecchetto v Canada (Attorney General)*, 2023 FC 102.

[18] Accordingly, I cannot conclude that the Appeal Division's decision was so seriously deficient that it cannot be considered to be justified, intelligible, or transparent. Indeed, Ms Wong does not explicitly argue that it was. Rather, she impugns the Appeal Division's decision because it failed to engage with the issues of misconduct, ability to work, foreseeability of dismissal, the reasonableness of the policy, and the harsh consequences of characterizing a failure to comply with a vaccination policy as misconduct. She also contends that the Appeal Division made an error of law by not following the decision of *AL v Canada Employment Insurance Commission* in which the General Division concluded that refusal to abide by an employer's vaccination policy did not amount to misconduct (2022 SST 1428).

[19] As mentioned, however, it was simply not the role of the Appeal Division to re-determine the issues that had already been decided by the General Division. It had a different responsibility – to decide whether the General Division had made any reviewable errors. With respect to the *AL* case on which Ms Wong relies heavily, that decision was subsequently overturned. The Appeal Division concluded that the General Division had erred and that failure to comply with a vaccination policy does, indeed, amount to misconduct (2023 SST 1032).

[20] Taking account of the Appeal Division's role, I cannot conclude that its decision was unreasonable.

IV. Conclusion and Disposition

[21] In good faith, Ms Wong presented well-organized oral and written submissions in support of her position, for which I commend her. Nevertheless, for the reasons above, I must dismiss this application for judicial review. There is no order as to costs.

JUDGMENT IN T-166-23

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. There is no order as to costs.

"James W. O'Reilly"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-166-23
STYLE OF CAUSE:	HEATHER WONG v. THE ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	MARCH 13, 2024
JUDGMENT AND REASONS:	O'REILLY J.
DATED:	MAY 3, 2024

APPEARANCES:

Heather Wong	FOR THE APPLICANT (ON HER OWN BEHALF)
Rebekah Ferris	FOR THE RESPONDENT

SOLICITORS OF RECORD:

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