

Federal Court of Appeal



Cour d'appel fédérale

Date: 20240418

Docket: A-236-23

Citation: 2024 FCA 74

**CORAM: RENNIE J.A.
GLEASON J.A.
LOCKE J.A.**

BETWEEN:

WIESLAW KUK

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Toronto, Ontario, on April 18, 2024.
Judgment delivered from the Bench at Toronto, Ontario, on April 18, 2024.

REASONS FOR JUDGMENT OF THE COURT BY:

LOCKE J.A.

Federal Court of Appeal



Cour d'appel fédérale

Date: 20240418

Docket: A-236-23

Citation: 2024 FCA 74

CORAM: RENNIE J.A.
GLEASON J.A.
LOCKE J.A.

BETWEEN:

WIESLAW KUK

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Toronto, Ontario, on April 18, 2024).

LOCKE J.A.

[1] Wieslaw Kuk appeals a decision of the Federal Court (2023 FC 1134, *per* Justice Glennys L. McVeigh) that dismissed his application for judicial review of a decision of the Appeal Division of the Social Security Tribunal (SST). The Appeal Division decision in issue refused Mr. Kuk leave to appeal a decision of the General Division of the SST that found that he was not entitled to employment insurance (EI) benefits following his dismissal from employment

with University Health Network (UHN) for failure to comply with its COVID-19 vaccination policy (the Vaccination Policy).

[2] The General Division found that Mr. Kuk had been dismissed for misconduct (because his failure to comply with the Vaccination Policy was wilful) and, pursuant to section 30 of the *Employment Insurance Act*, S.C. 1996, c. 23, this disqualified him from receiving EI benefits. The Appeal Division noted the narrow scope of its jurisdiction to intervene (see subsection 58(1) of the *Department of Employment and Social Development Act*, S.C. 2005, c. 34) and concluded that Mr. Kuk's appeal had no reasonable chance of success.

[3] The Federal Court found the Appeal Division's decision to be reasonable and not tainted by any issue of procedural fairness.

[4] Since we are concerned with an appeal from a decision on an application for judicial review, the task of this Court is to determine whether the Federal Court (i) selected the correct standard of review, and (ii) correctly applied that standard of review: *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559 at para. 45.

Effectively, this Court must step into the shoes of the Federal Court, and focus on the Appeal Division's decision.

[5] The Federal Court selected the reasonableness standard of review, and was correct in doing so. Accordingly, we must defer to the Appeal Division's decision, and we can intervene

only if we are convinced that it was unreasonable in some respect. The only exception is in respect of procedural fairness, in respect of which we do not defer to the Appeal Division.

[6] Mr. Kuk argues on various grounds that he had no obligation to comply with the Vaccination Policy, and hence his failure to comply with it was not misconduct. However, Mr. Kuk did not take issue before the Appeal Division with the fact that he was dismissed because UHN concluded he had failed to comply with the Vaccination Policy (see paragraph 15 of the Appeal Division's decision).

[7] The Appeal Division made the following observations:

- A. Misconduct results from an act that is wilful, and does not require any wrongful intent (see paragraph 18 of the Appeal Division's decision).
- B. The General Division's role was not to determine whether Mr. Kuk's dismissal was unjustified, but rather (i) whether he was guilty of misconduct as defined, and (ii) whether that misconduct led to his dismissal (see paragraph 19 of the Appeal Division's decision).
- C. It was not for the SST to consider the merits of the Vaccination Policy (see paragraph 27 of the Appeal Division's decision).
- D. Any question of the employer's misconduct was a matter for another forum (see paragraph 30 of the Appeal Division's decision).

[8] The Appeal Division found that Mr. Kuk made a deliberate choice not to comply with the Vaccination Policy, and that this was misconduct that resulted in his dismissal (see paragraphs 33 and 35 of the Appeal Division's decision).

[9] In our view, this conclusion was entirely reasonable. Mr. Kuk has not convinced us that his case should be distinguished from at least four recent decisions of this Court in similar circumstances: *Lalancette v. Canada (Attorney General)*, 2024 CAF 58; *Sullivan v. Canada (Attorney General)*, 2024 FCA 7; *Zhelkov v. Canada (Attorney General)*, 2023 FCA 240, 2023 A.C.W.S. 6179; *Francis v. Canada (Attorney General)*, 2023 FCA 217.

[10] Mr. Kuk also argues various breaches of procedural fairness. However, the issues he raises do not concern procedural fairness, in which the ultimate question is whether Mr. Kuk knew the case he had to meet, had an opportunity to respond and had an impartial decision maker consider his case fully and fairly: see *Canadian Pacific Railway Company v. Canada (Attorney General)*, 2018 FCA 69, 291 A.C.W.S. (3d) 8 at para. 41. Mr. Kuk has given us no reason to doubt that he was given procedural fairness.

[11] For the foregoing reasons, we will dismiss the appeal. The respondent does not seek costs in this appeal, and we will not award any.

"George R. Locke"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-236-23

STYLE OF CAUSE: WIESLAW KUK v. ATTORNEY
GENERAL OF CANADA

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: APRIL 18, 2024

**REASONS FOR JUDGMENT OF THE COURT
BY:** RENNIE J.A.
GLEASON J.A.
LOCKE J.A.

DELIVERED FROM THE BENCH BY: LOCKE J.A.

DATED: April 18, 2024

APPEARANCES:

Wieslaw Kuk FOR THE APPELLANT
(ON HIS OWN BEHALF)

Jordan Fine FOR THE RESPONDENT

SOLICITORS OF RECORD:

Shalene Curtis-Micallef FOR THE RESPONDENT
Deputy Attorney General of Canada