

Federal Court of Appeal



Cour d'appel fédérale

Date: 20240425

Docket: A-232-23

Citation: 2024 FCA 81

**CORAM: STRATAS J.A.
MONAGHAN J.A.
HECKMAN J.A.**

BETWEEN:

CARMINE PALOZZI

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard by online video conference hosted by the Registry on April 25, 2024.

Judgment delivered from the Bench at Ottawa, Ontario on April 25, 2024.

REASONS FOR JUDGMENT OF THE COURT BY:

HECKMAN J.A.

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REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Ottawa, Ontario on April 25, 2024).

HECKMAN J.A.

[1] The applicant was dismissed by his employer because he failed to comply with the employer's COVID-19 vaccination policy. The General Division of the Social Security Tribunal (SST) found that he was disqualified from receiving Employment Insurance benefits under section 30 of the *Employment Insurance Act*, S.C. 1996, c. 23, because he had lost his job due to

his misconduct. The applicant now seeks judicial review of the August 7, 2023 decision of the Appeal Division of the SST (file number AD-23-193) affirming the General Division's decision.

[2] The applicant submits that his failure to respect the vaccination policy was not misconduct because the policy did not allow alternatives to the vaccine and was therefore unreasonable. He also submits that the policy did not form part of his employment contract because the employer introduced it after he had signed the contract. Therefore, he argues, by failing to comply with the policy, he had not breached an express or implied duty resulting from the employment contract and had committed no misconduct.

[3] The standard of review on the merits of the Appeal Division's decision is reasonableness: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65. A reasonable decision is based on internally coherent reasoning and is justified in light of the relevant legal and factual constraints: *Vavilov* at para. 99.

[4] In its reasons, the Appeal Division considered the General Division's findings of fact, including that the applicant was aware of his employer's vaccination policy and that he knew he could be terminated for not following it. It considered the applicable jurisprudence of this Court and of the Federal Court on the meaning of the term "misconduct", including *Canada (Attorney General) v. Lemire*, 2010 FCA 314; *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36; and *Paradis v. Canada (Attorney General)*, 2016 FC 1282. It held that the General Division had correctly decided that whether the employer's vaccination policy was reasonable or justifiable was irrelevant to its finding of misconduct under the Act.

[5] The Appeal Division decided that an employee who deliberately breaches an explicit policy set by his employer may be found to have committed misconduct under the Act whether or not compliance with the policy is expressly required by his employment contract, a conclusion consistent with decisions of this Court: *Nelson v. Canada (Attorney General)*, 2019 FCA 222 at paras. 25–26; *Lemire* at paras. 17, 19–20. It held that the General Division did not err when it concluded that by refusing to disclose his vaccination status in contravention of the employer’s explicit policy, the applicant committed misconduct under the Act.

[6] In our view, the Appeal Division’s decision is reasonable. It is supported by the evidentiary record and, as this Court has observed in recent decisions involving similar circumstances, by the applicable jurisprudence: see e.g. *Kuk v. Canada (Attorney General)*, 2024 FCA 74 at paras. 8–9; *Sullivan v. Canada (Attorney General)*, 2024 FCA 7 at paras. 4–6; *Lalancette v. Canada (Attorney General)*, 2024 FCA 58 at para. 2; and *Zhelkov v. Canada (Attorney General)*, 2023 FCA 240 at para. 5. The Appeal Division reasonably found that, in determining whether the applicant committed misconduct under the Act, it cannot assess the reasonableness of the employer’s vaccination policy that led to his dismissal. We note that the applicant can raise that issue by way of other avenues, such as a wrongful dismissal action or a human rights complaint.

[7] The applicant also submits that the Appeal Division treated him in a procedurally unfair manner. He observes that the summary of the test for misconduct set out by the General Division in its reasons did not match that provided by the Canada Employment Insurance Commission in its representations.

[8] He disputes the relevance of certain questions posed during the hearing by the Appeal Division member. He asserts that the Appeal Division's explanation of the applicable legal principles took him by surprise and went further than what was discussed at the hearing.

[9] Under the rules of procedural fairness, the applicant had the right to know the case he had to meet, the right to answer that case and the right to have his case considered fully and fairly by an impartial decision-maker: *Canadian Pacific Railway Company v. Canada (Attorney General)*, 2018 FCA 69, [2019] 1 F.C.R. 121 at para. 41. In our view, the applicant was afforded a fair hearing; his objections do not raise a reasonable apprehension of bias or a breach of procedural fairness.

[10] For the foregoing reasons, we will dismiss the application. As the respondent does not seek costs, we will not award any.

“Gerald Heckman”

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-232-23

STYLE OF CAUSE: CARMINE PALOZZI v.
ATTORNEY GENERAL OF
CANADA

PLACE OF HEARING: HEARD BY ONLINE VIDEO
CONFERENCE HOSTED BY
THE REGISTRY

DATE OF HEARING: APRIL 25, 2024

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

DELIVERED FROM THE BENCH BY: HECKMAN J.A.

APPEARANCES:

Carmine Palozzi THE APPLICANT

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