

**Federal Court of Appeal**



**Cour d'appel fédérale**

**Date: 20240515**

**Docket: A-269-23**

**Citation: 2024 FCA 96**

**CORAM: WOODS J.A.  
LASKIN J.A.  
LOCKE J.A.**

**BETWEEN:**

**ALEXEY KHODYKIN**

**Applicant**

**and**

**ATTORNEY GENERAL OF CANADA**

**Respondent**

Heard at Toronto, Ontario, on May 15, 2024.

Judgment delivered from the Bench at Toronto, Ontario, on May 15, 2024.

**REASONS FOR JUDGMENT OF THE COURT BY:**

**WOODS J.A.**

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**REASONS FOR JUDGMENT OF THE COURT**

**(Delivered from the Bench at Toronto, Ontario, on May 15, 2024).**

**WOODS J.A.**

[1] The applicant, Alexey Khodykin, applies for judicial review of the decision of the Appeal Division of the Social Security Tribunal dated August 31, 2023.

[2] The applicant was denied employment insurance benefits after he was suspended from employment without pay in 2021 as a result of failing to comply with his employer's COVID vaccination policy. The *Employment Insurance Act*, S.C. 1996, c. 23, at section 31, provides that benefits are not payable during a period of suspension where the suspension is due to the claimant's misconduct. At the time of the applicant's suspension, he was employed by GardaWorld as a screening officer at Pearson International Airport in Toronto.

[3] The applicant appealed the matter to the General Division of the Social Security Tribunal. In a decision dated March 8, 2023, the General Division concluded that the applicant was properly denied employment insurance benefits because he was suspended as a result of misconduct. The conclusion was based on three findings: (1) the actions of the applicant led to his suspension; (2) he acted deliberately; and (3) the applicant knew that refusing to say whether he was vaccinated was likely to result in the suspension.

[4] The applicant further appealed to the Appeal Division which upheld the decision of the General Division. The Appeal Division determined that the General Division applied the right test of misconduct. It also determined that the General Division did not err by not considering the applicant's collective bargaining agreement or whether the employer could impose new conditions of employment.

[5] The applicant filed an application for judicial review in this Court where he raised several arguments.

[6] The applicant submits that his actions did not amount to misconduct, because the conduct was not deliberate and the vaccination policy did not have any bearing on his ability to perform job functions. It appears that these issues were not raised before the Appeal Division because it did not mention them in its reasons which were detailed. In these circumstances, it is not appropriate for this Court to consider them on judicial review (*Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61 at para. 23).

[7] The applicant also suggests that the Appeal Division erred by failing to consider Charter protections. The Appeal Division found that there were several flaws with this submission. We will simply mention two.

[8] First, the Appeal Division found that the Social Security Tribunal did not have the authority to consider the constitutionality of the vaccination policy. This conclusion is supported by court authorities and is reasonable. In a recent decision of this Court, *Sullivan v. Canada (Attorney General)*, 2024 FCA 7, at paragraph 12, the Court commented that “Charter values cannot be used to invalidate legislative provisions that administrative decision-makers must follow, such as, in this case, section 30 of the Employment Insurance Act. ... [T]he Social Security Tribunal was reasonable in holding that the applicant was precluded under that section and related court jurisprudence from questioning the appropriateness of the termination of his employment.” The same principle applies to section 31 of the Employment Insurance Act which is applicable here.

[9] Second, the Appeal Division found that the applicant had not detailed his constitutional arguments. Such detail is required. As noted in *Sullivan*, at paragraph 8, “[A]ll Charter arguments, whether based on rights, freedoms or values must be supported by a rich evidentiary record ...”

[10] In light of these principles, the Appeal Division’s decision concerning constitutional arguments was reasonable.

[11] Further, the applicant submits that there was no misconduct because the employer’s vaccination policy was invalid for failure to comply with employment-related law. We are of the view that the Appeal Division’s rejection of this submission was reasonable. The Appeal Division concluded that issues of wrongful dismissal were not relevant in determining whether there has been misconduct for purposes of the *Employment Insurance Act*. In making this finding, the Appeal Division properly relied on the decision of this Court in *Karelia v. Canada (Human Resources and Skills Development)*, 2012 FCA 140. The principle is well-established (*Karelia* at para. 20) and continues to be regularly applied by this Court in cases similar to this (*Kuk v. Canada (Attorney General)*, 2024 FCA 74, at para.9).

[12] The applicant also submits that the common law test of misconduct must evolve. However, this issue is not available on this judicial review which is subject to reasonableness review (*Francis v. Canada (Attorney General)*, 2023 FCA 217 at para. 14).

[13] Finally, at this hearing the applicant raised for the first time some additional issues that are not relevant to the judicial review application because the issues were not discussed in the decision under review and it appears that they were not raised in that forum. We decline to comment on these issues.

[14] In conclusion, we are all of the view that there is no reason to interfere with the decision of the Appeal Division. The application will be dismissed, without costs.

“Judith Woods”

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J.A.

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** A-269-23

**STYLE OF CAUSE:** ALEXEY KHODYKIN v.  
ATTORNEY GENERAL OF  
CANADA

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** MAY 15, 2024

**REASONS FOR JUDGMENT OF THE COURT  
BY:** WOODS J.A.  
LASKIN J.A.  
LOCKE J.A.

**DELIVERED FROM THE BENCH BY:** WOODS J.A.

**APPEARANCES:**

Alexey Khodykin FOR THE APPLICANT

Érélégna Bernard FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

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