Federal Court of Appeal | Cour d'appel fédérale

Date: 20250227

Docket: A-37-24

Citation: 2025 FCA 47

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

BETWEEN:

MELICK BESLEY

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

Heard at Toronto, Ontario, on February 27, 2025.
Judgment delivered from the Bench at Toronto, Ontario, on February 27, 2025.

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

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REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Toronto, Ontario, on February 27, 2025).

MONAGHAN J.A.

[1] Melick Besley was terminated by the Toronto Transit Commission because he failed to comply with its mandatory COVID-19 vaccination policy.

[2] Accordingly, the Canada Employment Insurance Commission decided that he was terminated for "misconduct" and thus disqualified from receiving employment insurance benefits

by virtue of section 30 of the *Employment Insurance Act*, S.C. 1996, c. 23. Mr. Besley asked the General Division of the Social Security Tribunal of Canada to reconsider that decision. However, it came to the same conclusion—Mr. Besley lost his employment due to "misconduct": *MB v. Canada Employment Insurance Commission*, 2023 SST 1148 at paras. 32-34.

[3] Mr. Besley unsuccessfully appealed that decision to the Appeal Division of the Social Security Tribunal. The Appeal Division said the General Decision made an error of law but, on a review of the record, and correcting the error it identified, the Appeal Division agreed that Mr. Besley was terminated for "misconduct": *MB v. Canada Employment Insurance Commission*, 2023 SST 1147 at para. 40. Mr. Besley now seeks judicial review of that decision.

[4] We are agreed that the application must be dismissed. The Appeal Division's decision was reasonable, which is the standard on which we must review it: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65.

[5] The test for "misconduct" for the purpose of subsection 30(1) of the *Employment Insurance Act* is well-established: whether the claimant knew or ought to have known their conduct—in this case, Mr. Besley's decision not to become vaccinated—would result in dismissal. "Misconduct" under this test does not require malicious or "wrong" behaviour. Consistently and repeatedly this Court has said that whether, under applicable labour laws, the employer was justified in dismissing the employee is irrelevant to a finding of "misconduct" for that purpose: see, for example, *Mishibinijima v. Canada (Attorney General)*, 2007 FCA 36 at para. 21, leave to appeal to SCC refused, 31967 (27 September 2007), citing *Canada (Attorney*

General) v. Marion, 2002 FCA 185 at para. 3 [*Marion*]; *Canada (Attorney General) v. McNamara*, 2007 FCA 107 at para. 22, citing *Marion*, *Canada (Attorney General) v. Caul*, 2006 FCA 251 and others; *Canada (Attorney General) v. Lemire*, 2010 FCA 314 at para. 15, citing *Meunier v. Canada (Employment and Immigration Commission)* (1996), 208 N.R. 377, 69 A.C.W.S. (3d) 1163 (F.C.A.) at para. 2; *Sullivan v. Canada (Attorney General)*, 2024 FCA 7 at para. 6 [*Sullivan*]; and *Zagol v. Canada (Attorney General)*, 2025 FCA 40 at para. 28 [*Zagol*].

[6] Mr. Besley suggests that his case is different because he has been reinstated by his employer. We disagree. Neither a finding that the termination was unjustified nor the employer's agreement to reinstate the employee is relevant to determining whether there has been "misconduct" for purposes of subsection 30(1) of the *Employment Insurance Act*.

[7] Indeed, this Court and the Federal Court have dismissed many judicial review applications brought by individuals terminated from employment, and then disqualified for employment insurance, because their failure to comply with COVID-19 vaccination policies was found to constitute "misconduct" for purposes of subsection 30(1) of the *Employment Insurance Act*: see, for example, *Lance v. Canada (Attorney General)*, 2025 FCA 41; *Cecchetto v. Canada (Attorney General)*, 2024 FCA 102, leave to appeal to SCC refused, 41441 (13 February 2025); *Khodykin v. Canada (Attorney General)*, 2024 FCA 96; *Palozzi v. Canada (Attorney General)*, 2024 FCA 81; *Kuk v. Canada (Attorney General)*, 2024 FCA 74; *Zhelkov v. Canada (Attorney General)*, 2023 FCA 240; *Francis v. Canada (Attorney General)*, 2023 FCA 217, leave to appeal to SCC refused, 41064 (16 May 2024); *Sullivan*; and *Zagol*. In each case, as here, the decision under review was found reasonable.

[8] Mr. Besley asserts that the Appeal Division hearing was procedurally unfair, and that the Appeal Division's tribunal member was biased or made the decision in bad faith. These submissions are without merit. A court assessing procedural fairness must ask "whether the procedure was fair having regard to all of the circumstances", including "whether the party knew the case they had to meet, had an opportunity to respond and had an impartial decision maker": *Canadian Pacific Railway Company v. Canada (Attorney General)*, 2018 FCA 69 at paras. 41, 54 (emphasis in original).

[9] We see nothing unfair in the process the Appeal Division followed, including the addition of the employer as an "Added Party" on the face of the decision despite the employer not participating. Moreover, a misstatement about the source of the evidence concerning the employer's vaccination policy, or mere disagreement with the General Division's decision, does not establish bias or bad faith.

[10] Mr. Besley claims that, in similar cases, presented with evidence that the relevant individual had grieved their termination, the same tribunal member found the General Division should have considered that evidence and therefore allowed those appeals. This, he suggests, demonstrates bias. While we appreciate Mr. Besley's frustration, the circumstances of those decisions are not the same. In each case, the Canada Employment Insurance Commission agreed that the matter should be sent back to the General Division. Accordingly, the reasonableness of those decisions has not been considered by this Court and we cannot speculate what conclusion this Court might have reached had judicial review of those decisions been sought.

[11] Finally, in oral submissions, Mr. Besley alleged that subsection 30(1) of the *Employment Insurance Act* was unconstitutional because it is contrary to his freedom of religion. However, to do so, Mr. Besley had to launch a constitutional claim, but he did not. Nor did he give notice to the Attorneys General of Canada and the provinces and territories as required: *Federal Courts Act*, R.S.C. 1985, c. F-7, s. 57.

[12] Therefore, we will dismiss the application for judicial review without costs.

"K.A. Siobhan Monaghan"
J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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