Notice of Appeal

Court File No.

FEDERAL COURT OF APPEAL

BETWEEN:

Heather Wong

Appellant

and

Attorney General of Canada

Respondent

Notice of Appeal

Notice of Appeal

TO THE RESPONDENT:

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the appellant. The relief claimed by the appellant appears below.

THIS APPEAL will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court directs otherwise, the place of hearing will be as requested by the appellant. The appellant requests that this appeal be heard at Toronto.

IF YOU WISH TO OPPOSE THIS APPEAL, to receive notice of any step in the appeal or to be served with any documents in the appeal, you or a solicitor acting for you must prepare a notice of appearance in Form 341A prescribed by the *Federal Courts Rules* and serve it on the appellant's solicitor or, if the appellant is self-represented, on the appellant, WITHIN 10 DAYS after being served with this notice of appeal.

IF YOU INTEND TO SEEK A DIFFERENT DISPOSITION of the order appealed from, you must serve and file a notice of cross-appeal in Form 341B prescribed by the *Federal Courts Rules* instead of serving and filing a notice of appearance.

Copies of the *Federal Courts Rules*, information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPEAL, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

June 3, 2024

Issued by: _____

Address of local office: Toronto Local Office

180 Queen Street West, Suite 200

Toronto Ontario, M5V 3L6

TO:

The Attorney General of Canada

Justice Building, 4th Floor

284 Wellington Street

Ottawa, Ontario K1A 0H8

Appeal

THE APPELLANT APPEALS to the Federal Court of Appeal from the order of James W. O'Reilly dated May 3, 2024 by which the Federal Court dismissed the application for a judicial review. That application was for a judicial review of a Social Security Tribunal of Canada Appeal Division decision by Pierre Lafontaine, file AD-22-898, dated December 21, 2022, in which the applicant was refused leave to appeal the decision of the General Division of the Social Security Tribunal, file GE-22-2781, dated November 2, 2022.

The Federal Court decision was communicated to the appellant on May 3, 2024.

THE APPELLANT ASKS that the decision of the Appeal Division of the Social Security Tribunal be overturned, and that Employment Insurance benefits be retroactively awarded to the applicant.

THE GROUNDS OF APPEAL are as follows:

1. The Federal Court did not correctly apply the standard of review of reasonableness to the Appeal Division Decision, as per Vavilov.

2. The Appeal Division made an error in their decision to deny leave to appeal in the applicant's case. The Appeal Division's decision was unreasonable.

3. Vavilov requires that a decision must be reasonable. To pass the test for reasonableness, a decision must be justified, intelligible, and transparent (Canada (Minister of Citizenship and Immigration) v Vavilov, 2019 SCC 65 at para 99).

4. The Appeal Division decision was unreasonable because it was not justified. A decision must be justified in relation to the constellation of law and facts that are relevant to the decision. The Appeal Division did not correctly apply the law.

5. The Appeal Division has a responsibility according to the law to allow appeal if the appeal has a reasonable chance of success.

6. The Appeal Division decision to refuse leave to appeal was not justified because the adjudicator made grave errors of law.

7. The Appeal Division made an error of law when it applied a narrow and incorrect definition of misconduct to justify the applicant's disqualification from Employment Insurance benefits. The Appeal Division and the Federal Court both failed to consider the definition of misconduct established in the case law, which was presented by the Applicant. The established definition of misconduct according to case law does not describe the Applicant's actions. According to the established decision in case law, the Applicant did not commit misconduct and therefore the applicant should be eligible for Employment Insurance benefits

8. The appeal had a reasonable chance of success due to the General Division's grave error of law regarding the definition of misconduct. The applicant raised an arguable case to the Appeal Division that the General Division erred in law in making its decision. The Appeal Division did not address this argument in their decision. The Appeal Division's decision to refuse leave to appeal was unreasonable, as it was not justified.

9. The Appeal Division decision to refuse leave to appeal was also not justified because the Appeal Division made an error of law when it stated that a violation of a policy is automatically considered misconduct. The Appeal Division decision states at paragraph [20] that "It is well established that a deliberate violation of the employer's policy is considered misconduct within the meaning of the Employment Insurance Act (EI Act)." To support this statement, the Appeal tribunal member referred to cases where EI Applicant's had committed illegal or immoral acts.

10. In fact, as the applicant presented to the Federal Court, a deliberate violation of an employer's policy is not automatically considered misconduct within the EI Act. According to Meunier v Canada, 1996, to be considered misconduct, the act must also be reprehensible. As the applicant proved to the General Division and Appeal Division, the act was not reprehensible.

11. This error of law of the Appeal Division, equating the failure to comply with ANY policy with misconduct, is a serious error relating to the central issue in this case, and warrants intervention from the higher court. If this error is allowed to stand, it creates a dangerous precedent where any employee who violates any policy, however misguided or extreme the policy, may be disqualified from the safety net of EI benefits, to which hardworking Canadians are entitled when they lose their job through no fault of their own.

12. Indeed the Appeal Division member for the Appellant's case has ruled on several other cases according to the same flawed interpretation of case law, and has denied applicants of the leave to appeal their case.

13. The Appeal Division decision was also not justified because the Appeal Division made a conclusory decision which did not follow recent precedent.

14. The Applicant's appeal case had a reasonable chance of success because three weeks prior to the Appeal Division's decision, leave to appeal had been granted in a similar case, AL v Canada Employment Insurance Commission, 2022 SST 1428. The AL decision was later appealed at the SST level and the decision was overturned. The AL decision is currently under appeal at the Federal Court of Appeal. At the time of the Appellant's decision, the AL decision stood, and this AL decision was ignored by the Appeal Division decision as a precedent.

15. The Appellant had argued the same grounds as the winning case, AL, the argument that the Applicant did not breach an implied or expressed duty arising from the employment contract. The Appeal Division did not address this argument in their decision. It was unreasonable for the Appeal Division to deny leave to appeal to the Applicant, when a similar case was awarded leave to appeal on the same grounds argued by the Applicant,

16. **The Appeal Division decision was also unreasonable because it was not transparent. The Appeal Division did not properly analyze or rule upon the grounds presented, and the decision-maker's reasons did not respond to the central issues and concerns raised by the Applicant.** According to Valivov, the need for transparency is particularly important when the decision results in "harsh consequences for an affected individual". At these times, the decision-maker comes under heightened responsibility to respond to arguments and demonstrate that they are have considered the consequences of their decision.

17. In this case, the Appellant faced harsh financial consequences if her Leave to Appeal was denied. The Appeal Division member had a duty to respond to the Appellant's arguments in his decision, but many of her arguments were not addressed in the decision. The Appeal

Division decision failed to pass Valivov's test of reasonableness because the decision was not transparent.

18. The Appellant argued to the Appeal Division that the General Division decision did not mention, analyze, address, or rule upon the fact that the Appellant's actions did not constitute a breach of expressed or implied duty arising from the Appellant's contract of employment, and therefore there was no misconduct. **The Appeal Division did not address this argument. The Appeal Division did not present a transparent decision**. This decision did not meet the standard of reasonableness, as the decision-maker did not respond to the Appellant's argument.

19. The Appellant also argued to the Appeal Division that the General Division decision followed an illogical chain of circular reasoning. In the General Division submissions, the Appellant had argued to the General Division that no misconduct occurred because a key element of misconduct was not present: There was no negative effect on the appellant's work duties. The General Division decision contained a circular argument claiming that the Appellant committed misconduct. The General Division member argued that the Appellant's actions had a negative effect on her work duties. The member argued that because the appellant was fired and then couldn't come to work, there was a negative effect on her work duties; therefore she committed misconduct. The presence of this circular argument in the General Division decision showed a lack of expertise and understanding of the law, and presented an irrational and incoherent chain of analysis. At the Appeal Division level, **the Appeal Division failed to address the Applicant's argument regarding ability to perform work duties, and failed to address the Applicant's concern about the General Division's illogical chain of reasoning.** The Appeal Division decision was not transparent, as it did not respond to the Appellant's argument. This decision did not meet the standard of reasonableness.

20. The Appeal Division decision was also unreasonable because it was unintelligible. At paragraph 16 of the Appeal Division decision, the Appeal Division member argues that the tribunal should not take into consideration whether or not the policy in question is reasonable, intrusive or necessary, but elsewhere, at paragraph 22, the tribunal member provides his opinion that the policy IS reasonable and necessary. The tribunal member also commits an error of fact when he erroneously states that the policy was approved by a government or industry.

This application will be supported by the following material:

1. Applicant's Request for Reconsideration submitted to the Canada Employment Insurance Commission for reconsideration, dated June 1, 2022;

2. Decision, applicant's Reconsideration application, Canada Employment Insurance Commission, dated July 20, 2022;

3. Applicant's Notice of Appeal to the General Division of the Social Security Tribunal, dated August 20, 2022;

4. Applicant's supplementary submission to the General Division of the Social Security Tribunal, dated October 25, 2022;

5. Decision for applicant's appeal to the General Division of the Social Security Tribunal, dated November 2, 2022;

6. Notice of applicant's appeal to the Appeal Division of the Social Security Tribunal, dated November 30. 2022;

7. Decision, applicant's application for Leave to Appeal to the Appeal Division of the Social Security Tribunal, dated December 20, 2022;

8. Applicant Record, Application for Judicial Review, dated June 10, 2023;

9. Statement to Justice O'Reilly at Judicial Review Hearing, dated March 13, 2024;

10. Decision, Application for Judicial Review, dated May 3, 2024;

11. Department of Employment and Social Development Act (S.C. 2005, c. 34);

12. And such further and other materials that I may present.

Authorities

13. AL v Canada Employment Insurance Commission, 2022 SST 1428,

14. AM v Canada Employment Insurance Commission, 2022 SST 1339,

15. Canada (Attorney General) v. Lemire, 2010 FCA 314,

16. Canada (Minister of Citizenship and Immigration) v. Vavilov, 2019 SCC 65

17. Cecchetto v. Canada (Attorney General), 2023 FC 102,

18. CG v Canada Employment Insurance Commission, 2022 SST 356,

19. Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd., 2013 SCC 34

20. DH v Canada Employment Insurance Commission, 2022 SST 1624

21. Electrical Safety Authority v Power Workers' Union, 2022 CanLII 343

22. J. R. v. Canada Employment Insurance Commission, 2015 SSTGDEI 16

23. Meunier v. Canada (Employment and Immigration Commission), 1996 CanLII 3983

24. Mishibinijima v Canada (Attorney General), 2007 FCA 36

25. Paradis v. Canada (Attorney General), 2016 FC 1282,

26. Parmar v Tribe Management Inc., 2022 BCSC 1675

27. RK v Canada Employment Insurance Commission, 2022 SST 1628

28. TH v Canada Employment Insurance Commission, 2023 SST 63

29. Toronto Professional Fire Fighters' Association, I.A.A.F. Local 3888 v Toronto (City), 2022 CanLII 78809

30. Canada (Attorney General) v. Tucker (Tucker A-381-85), 1986 CanLII 6794 (FCA)

June 3, 2024

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