Court File #

FEDERAL COURT

BETWEEN

Adina Butu

Applicant

and

The Attorney General of Canada

Respondent

Notice of Application

TO THE RESPONDENT:

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

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the applicant. The applicant requests that this application be heard in Toronto, Ontario.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or a solicitor acting for you must file a notice of appearance in Form 305 prescribed by the Federal Courts Rules and serve it on the applicant's solicitor or, if the applicant is self-represented, on the applicant, WITHIN 10 DAYS after being served with this notice of application.

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 APPLICATION, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

Issued by: _____

Registry Officer

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, 4t Floor

284 Wellington Street Ottawa,

Ontario K1A 0H8

Application

This is an application for judicial review in respect of:

Social Security Tribunal of Canada, Appeal Division.

File AD -23-250

Decision by tribunal member Neil Nawaz

Decision date May 26, 2023

The May 26, 2023 decision was that the Appeal Division of the Social Security Tribunal of Canada refused Permission to Appeal the decision of the General Division of the Social Security Tribunal of Canada, dated January 15, 2023 file GE-22-2340.

The applicant alleges that there are conflicting decisions that need to be resolved; that the decision was a conclusory decision in which the adjudicator did not properly analyze or adjudicate on the grounds presented; and that the adjudicator made an error of law and an error of fact.

The decision was communicated to the applicant on May 26, 2023.

The applicant makes application for:

1. Primary relief, which would be to overturn the lower tribunal's decisions (EI and SST) and award Employment Insurance plus applicable interest;
2. Alternative relief, which would be to obtain a new hearing before another member of the lower tribunal;
3. The option to opt-out of Employment Insurance since it is a voluntary program

and,

4. Such further and other relief that I may request and be granted.

The grounds for the application are:

1. The applicant worked for the Toronto Public Library. This employment was terminated on January 2, 2022 by the employer.

2. The Canada Employment Insurance Commission denied EI to the applicant on May 11, 2022 due to a finding of misconduct related to applicant's failure to disclose her vaccination status according to the Employer's Covid-19 Vaccination Policy. The applicant's reconsideration request was dismissed on June 9, 2022. On January 15, 2023, the General Division of the SST dismissed the applicant's appeal. On May 26, 2023, the applicant was notified by the Appeal Division of the SST that her application for leave to appeal was refused.

3. **There are conflicting decisions that need to be resolved**.

4. On December 5, 2022 the General Division of the SST awarded employment insurance in the case of LN v Canada Employment Insurance Commission.

5. The December 5, 2022 decision in LN v Canada Employment Insurance Commission conflicts with the applicant's May 26, 2023 Appeal Division decision.

6. On December 14, 2022, the General Division of the SST awarded employment insurance in the case of AL v. Canada Employment Insurance Commission.

7. The December 14, 2022 decision in AL v. Canada Employment Insurance Commission conflicts with the applicant's May 26, 2023 Appeal Division decision.

8. On March 14, 2022 the General Division of the SST awarded employment insurance in the case of D.L. v. Canada Employment Insurance Commission.

9. The March 14, 2022 decision in D.L. v. Canada Employment Insurance Commission conflicts with the applicant's May 26, 2023 Appeal Division decision.

10. The case of AL v. Canada Employment Insurance Commission appeared before the General Division of the SST. The claimant A.L.'s employment had been terminated after her employer created a mandatory Covid-19 Vaccination Policy. The Canada Employment Insurance Commission denied employment insurance benefits to the claimant A.L. due to a finding of misconduct. The claimant A.L. stated that she did not commit misconduct. The General Division of the SST

agreed with the claimant A.L that there was no misconduct and that the claimant was not disqualified from receiving employment insurance benefits. The decision in A.L v. Canada Employment Insurance Commission states that:

> [1] The appeal is allowed. The Tribunal agrees with the Claimant.
> [2] The Canada Employment Insurance Commission (Commission) hasn't proven that the Claim ant lost her job because of misconduct (in other words, because she did something wrong that caused her to lose her job). This means that the Claim ant isn't disqualified from receiving Employment Insurance (EI) benefits.

11. The case of L.N v Canada Employment Insurance Commission appeared before the General Division of the SST. The claimant L.N's employment had been terminated after her employer created a mandatory Covid-19 Vaccination Policy. The Canada Employment Insurance Commission decided that the Claimant lost her employment by her own misconduct and .denied employment insurance benefits to the claimant L.N. The claimant L.N. stated that she did not commit misconduct. The General Division of the SST agreed with the claimant L.N. that there was no misconduct and that the claimant was not disqualified from receiving employment insurance benefits. The decision in LN v Canada Employment Insurance Commission states that:

> [1] The appeal is allowed. The Tribunal agrees with the Claimant.
> [2] The Canada Employment Insurance Commission (Commission) hasn't proven that the Claimant lost her job because of misconduct (in other words, because she did something wrong that caused her to lose her job). This means that the Claimant isn't disqualified from receiving Employment Insurance (EI) benefits.

12. The December 14, 2022 decision of AL v. Canada Employment insurance Commission further states that there must be a breach of expressed or implied duty arising out of a claimant's employment contract in order to find misconduct, and that there is no breach of expressed or implied duty in a Covid-19 Vaccination Policy that has been unilaterally imposed outside of the contract:

> [26] The Commission says that the Claimant willfully chose not to comply with the Employer's Vaccination Policy. It says that she knew or ought to have known that not I taking the vaccination would result in her dismissal. It asserts that I there must be a causal link between the "misconduct" and the employment I and concludes that the "misconduct" must constitute a breach of an expressed or implied duty arising from the contract of

> employment. It quotes a Federal Court of Appeal (FCA) case in support of its decision regarding misconduct.
>
> [29] I find that the Commission hasn't proven that there was a breach of either an expressed or implied duty for the Claimant to get vaccinated arising out of her employment contract despite the Employer's Covid-19 Vaccination Policy.
>
> [30] The Commission submits that there was a breach of an expressed or implied duty arising out of the Claimant's employment contract. It says that this breach led to her suspension and ultimate dismissal and supports a finding of misconduct. Therefore, the Commission must prove a breach of this duty occurred in order for a finding of misconduct.
>
> (31) An employment contract is just that, a contract. It is an agreement between parties that details the obligations both parties owe each other. Neither can unilaterally impose new conditions to the collective agreement without consultation and acceptance of the other. The only exception to this is where legislation demands a specific action by an employer and compliance by an employee

13. The December 14, 2022 decision of AL v. Canada Employment insurance Commission further states:

> (36) I find that the Commission has not shown flat there is an expressed duty detailed in the Claimant's CA that I would support an obligation upon the Claimant was to get vaccinated against Covid-19.

and

> (45) I find that the Commission has not shown flat an implied duty existed within her collective agreement or other employment contract that the Claimant accept vaccination

14. The December 5, 2022 decision of LN v Canada Employment Insurance Commission further states that there must be a breach of expressed or implied duty arising out of a claimant's employment contract in order to find misconduct, and that there is no breach of expressed or implied duty in a Covid-19 Vaccination Policy that has been unilaterally imposed outside of the contract:

> [34] An expressed duty is something specifically noted in an employment contract or of such a fundamental nature, it is obvious that it exists. In other words, the employment agreement would need to contain an explicit

> expectation that the Claimant be vaccinated against specific ailments and that the Claimant agreed to the requirement at her hiring or at some time later during her employment prior to her dismissal.
>
> [35] The Claimant worked in a hospital as a nurse. She confirmed that she was unionized employee working under a collective agreement. She stated that there was no provision within her Collective Agreement that requires her to be vaccinated against Covid-19. She says she never agreed to be vaccinated.
>
> [36] The Commission submitted a copy of the Employer's Vaccination Policy and submits that non-compliance with the Vaccination Policy constitutes a breach of a duty owed the Employer arising from her employment contract.
>
> [40] An implied duty would be something one can infer from an employment agreement that would cover instances not specifically (expressly) detailed. There was no evidence presented by the Commission that the Claimant was required by a blanket requirement or expectation to accept all the Employer's policies that one could reasonably infer covered a vaccination requirement.

15. The December 5, 2022 decision of LN v Canada Employment Insurance Commission further states:

> [33] I find that the Commission has not shown that an expressed duty detailed in an employment contract existed that would support the premise that the Claimant was obligated to get vaccinated against Covid-19.
>
> [39] I find that the Commission has not shown that an implied duty existed within her collective agreement or other employment contract that the Claimant accept vaccination.
>
> [58] Regardless of whether the Claimant's action can be characterized as willfully or that she knew her decision would likely lead to her dismissal, the Commission has not proven that she owed her Employer a duty to accept vaccination to remain employed. In fact, the Claimant had every right not to consent to the Employer's unilateral demand.

16. The December 14, 2022 decision of AL v. Canada Employment Insurance Commission further states that the requirement to accept a medical treatment goes "far beyond a simple expectation to comply with health and safety protocols". The decision states that an essential condition of employment such as

Covid-19 vaccination, which is unilaterally imposed by the employer, does not constitute an expressed or implied requirement within the collective agreement:

> [49] The requirement to accept medical treatment in order to maintain employment goes far beyond a simple expectation to comply with health and safety protocols. This is not the same as expecting an employee to wash their hands before handling food or wearing a safety vest. To accept the premise that the employer can institute a Vaccination Policy demanding a specific type of medical treatment or face dismissal, changes a mere expectation of compliance with general health and safety protocols, into an essential condition of employment.
>
> Imposed Now Essential Condition of Employment
>
> (50) I find that the Employer unilaterally imposed a new condition of employment upon the Claimant without her agreement nor the agreement of her bargaining agent.
>
> (51) An essential condition of employment is a condition that if not met at any time during the employment relationship can result in immediate dismissal. Usually, such conditions are established at the outset of the employment relationship. If a prospective 12 employee cannot meet the condition, they are not hired. When such a condition is to be established at a later time, it opens the employment contract to negotiation.
>
> [52] In this case, the employer unilaterally opened the Claimant's CA and imposed the new essential condition of employment without her consent nor the consent of the Bargaining Agent. It did this by instituting a Vaccination Policy without any consultation or regard to the employment contract, which it had previously signed. The change established a new essential requirement (vaccination or valid exemption) because failing to meet the vaccination requirement, or provide authorized exemption, would result in dismissal. There were no other options for the Claimant to maintain her employment other than meet the condition.
>
> [53] There is no evidence that the employer opened a negotiation with the bargaining agent, or specifically with the Claimant, to amend her CA to include a vaccination requirement as a condition of employment. There is no evidence that the Claimant explicitly agreed to the condition or accepted to work under the condition before she was dismissed.

> [55] The requirement to be vaccinated or provide a valid exemption was not an essential condition of employment established at the time she was hired, nor agreed to by the Claimant at sometime during her employment but prior to her dismissal. It was not included in her CA. Therefore, it cannot be said that her CA (employment contract) contained a Provision that established an expressed or implied duty to comply with the Employer's Vaccination Policy.

17. The December 5, 2022 decision of LN v Canada Employment Insurance Commission further states that the requirement to accept a medical treatment goes "far beyond a simple expectation to comply with health and safety protocols". The decision states that an essential condition of employment such as Covid-19 vaccination, which is unilaterally imposed by the employer, does not constitute an expressed or implied requirement within the collective agreement:

> [37] The Commission did not submit a copy of an employment contract. As a unionized and represented employee, the Claimant worked under the provisions of a negotiated collective agreement. The Commission did not submit a copy of that collective agreement nor make any reference to a provision within that collective agreement that supports the obligation imposed by the Vaccination Policy. There is no evidence of a resolution between the Employer and the Bargaining Agent (Union) that suggests it agreed to a new essential condition of employment imposed upon the Claimant and others within the bargaining unit.
>
> [38] To that end, there is no evidence that there existed any expressed (explicit) requirement that the Claimant accept vaccination for Covid-19, nor any other type of vaccination or medical treatment that the Employer might require. It offered no evidence in the form of an employment contract or memorandum of understanding from which to draw a conclusion there was an expressed duty.
>
> There is no evidence that the Claimant agreed to be bound within her employment agreement by a vaccination requirement. There is no evidence that the Claimant's bargaining agent negotiated with the employer and agreed to the Employer's Vaccination Policy.
>
> [41] The requirement to accept medical treatment in order to maintain employment goes far beyond a simple expectation to comply with health and safety protocols. This is not the same as expecting an employee to wash their hands before handling food or wearing a safety vest. To accept the premise that the employer can institute a Vaccination Policy

demanding a specific type of medical treatment or face dismissal, changes a mere expectation of compliance with general health and safety protocols, to an essential condition of employment.

[42] There is no evidence that the Employer opened a negotiation with the bargaining agent, or specifically with the Claimant, to amend her employment agreement to include a vaccination requirement. There is no evidence that the Claimant explicitly agreed to the change or accepted to work under the Vaccination Policy before she was dismissed.

[44] Essentially, the Employer unilaterally reopened the Claimant's employment agreement and imposed a new essential condition of employment without her consent. It is a change to the Claimant's employment contract that established a new essential requirement (vaccination or valid exemption) in order to remain employed.

[45] In its submissions, the Commission specifically states that, "Since the Claimant was no longer meeting a condition of employment the Employer could not keep the Claimant employed."The Commission clearly agrees that the requirement to be vaccinated to remain employed became a condition of the Claimant's employment.

[46] The requirement to be vaccinated or provide a valid exemption was not an essential condition of employment established at the time she was hired, nor agreed to by the Claimant at some time during her employment but prior to her dismissal. Therefore, it cannot be said that her employment contract contained a provision that established an expressed or implied duty to comply with the Employer's Vaccination Policy.

[47] The Commission submitted that the mere existence of a Vaccination Policy, which the Claimant failed to comply with, is enough to be a breach of a duty owed her employer. It supports its claim quoting FCA case "*Lemire*."

[48] I am not satisfied that the circumstances upon which the Justices relied in "*Lemire"* are consistent with those in the Claimant's case. In that case, the employee sold contraband cigarettes wearing his employment uniform on the employer's premises in violation of the Employer's Vaccination Policy. While it is not specifically stated that the Vaccination Policy existed at the time of his hiring, the dismissed employee admitted he was aware of the Vaccination Policy, and it is apparent that he had willingly accepted and worked under that Vaccination Policy when he was

caught. In other words, the Vaccination Policy existed as part of an employment contract he agreed to prior to the contravention that led to his dismissal.

[49] Further, it is evident that the Justices in *"Lemire"* referred to the provisions of the dismissed employee's **collective agreement** to address issues surrounding the sanction applied. Clearly, the Justices benefitted from access to that collective agreement in considering the case.

[50] In the present case, there was no Vaccination Policy in existence that the Claimant previously agreed to be bound by, nor did she accept the Vaccination Policy and work under it only to be in non-compliance at a later time. She expressed her unwillingness to accept the Vaccination Policy immediately upon its implementation and never agreed to be bound by it.

[57] I have already found that the Commission has not met its burden to prove that there was a breach of an expressed or implied duty arising out of the Claimant's employment contract.

[58] Regardless of whether the Claimant's action can be characterized as willfully or that she knew her decision would likely lead to her dismissal, the Commission has not proven that she owed her Employer a duty to accept vaccination to remain employed. In fact, the Claimant had every right not to consent to the Employer's unilateral demand.

18. The December 14, 2022 decision of AL v. Canada Employment Insurance Commission further states that common law confirms that employees have a right to not accept medical treatment, and that the rejection of medical treatment is not misconduct:

> (76) The common law confirms that the Claimant has a legal basis or "right" to not accept any medical treatment, which includes vaccination. If vaccination is therefore voluntary, it follows that she has a choice to accept or reject it. If she exercises a right not to be vaccinated, then if challenges the conclusion that her actions can be characterized as having done something "wrong " or "something she should not have done," whether willfully or not, that would support misconduct and disqualification within the meaning of the EI Act?
>
> (77) Even the Claimant's employment contract (CA) acknowledges that she has the right to refuse any recommended or required vaccination.

> (78) The issue of the Covid-19 vaccinations and dismissals resulting from noncompliance is an emerging issue. No specific case law currently exists on the matter that guides decision matters.
>
> (79) Indeed, I could not find a single case where a claimant did something for which a specific right, supported in law, exists, and subsequently that action was still found to be misconduct simply because it was deemed willful.
>
> (80) In the absence of a FCA decision that provides such guidance, I am persuaded that the Claimant has a right to choose whether to accept any medical treatment.

19. The December 5, 2022 decision of LN v Canada Employment Insurance Commission further states that common law confirms that employees have a right to not accept medical treatment, and that the rejection of medical treatment is not misconduct:

> [51] Lastly, there is no evidence of either Federal or Provincial legislation that demands employees to be vaccinated against Covid-19 that then placed an obligation on both the Employer to apply the legislation requirements, and the Claimant to comply.
>
> [63] As I noted above, there is no Federal or Provincial legislation that demands Covid-19 vaccination. Therefore, since there is no legal obligation founded in legislation, vaccination is voluntary.
>
> [64] It is both well founded and long recognized in Canadian common law that an individual has the right to control what happens to their bodies. The individual has the final say in whether they accept any medical treatment.
>
> [65] The common law confirms that the Claimant has a legal basis or “right” to not accept any medical treatment which would include vaccination. If vaccination is therefore voluntary, it follows that she has a choice to accept or reject it. If she exercises a right not to be vaccinated, then it challenges the conclusion that her actions can be characterized as having done something “wrong” or “something she should not have done,” whether willfully or not, that would support misconduct and disqualification within the meaning of the EI Act?

> [66] The issue of the Covid-19 vaccinations and dismissals resulting from non-compliance is an emerging issue. No specific case law currently exists on the matter that guides decision makers.
>
> [67] Indeed, I could not find a single case where a claimant did something for which a specific right, supported in law, exists, and that action was still found to be misconduct simply because it was deemed willful.
>
> [68] In the absence of a FCA decision that provides such guidance, I am persuaded that the Claimant has a right to choose whether to accept any medical treatment. Despite that fact that her choice contradicts her Employer's Vaccination Policy, and led to her dismissal, I find that exercising that "right" cannot be characterized as a wrongful act or undesirable conduct sufficient to conclude misconduct worthy of the punishment of disqualification under the Act.

20. The adjudicator's analysis and decision described in parts (10) - (19) above, taken from the December 14, 2022 decision of AL v. Canada Employment Insurance Commission and the December 5, 2022 decision of LN v Canada Employment Insurance Commission conflict with the January 15, 2023 decision the applicant received from the Social Security Tribunal.

The adjudicator in AL v. Canada Employment Insurance Commission state:

> So, did the Claimant lose her job because of misconduct?
>
> [81] Based on my findings above, I find that the Claimant did not lose her job because of misconduct.
>
> [82] This case is not about whether the Employer's Vaccination Policy is legal or reasonable nor whether its decision to dismiss the Claimant is justified. The issue is whether the Claimant's decision not to be vaccinated, despite the Employer's Vaccination Policy, supports a conclusion of misconduct. The courts have detailed the test to make that determination and it is upon the Commission to prove the elements.
>
> [83] The Commission has not met the burden of proof to establish that the Claimant breached an expressed or implied duty arising out of her employment agreement.
>
> [84] Further, the Claimant had a right both expressed in Canadian case law and detailed in Article 19.02 of her collective agreement to refuse vaccination.

[85] **Given those expressed rights, I find that the Claimant decision not to get vaccinated, despite her Employer's Vaccination Policy, is not misconduct under the Act.**

(emphasis added)

The adjudicator in LN v. Canada Employment Insurance Commission state:

So, did the Claimant lose her job because of misconduct?

[69] Based on my findings above, The Claimant did not lose her job because of misconduct under the Act.

[70] The Commission has not met the burden of proof to establish a finding of misconduct. It has not shown that there was a breach of an expressed or implied duty arising out of her employment contract.

[71] **Further, given the common law right to choose whether to accept any medical treatment including vaccination, the Claimant's decision not to be vaccinated is a reasonable and acceptable explanation supported in law for not complying with the Employer's vaccine Vaccination Policy regardless of the outcome that she was dismissed and is not misconduct under the Act.**

(emphasis added)

21. The case of D.L. v. Canada Employment Insurance Commission appeared before the General Division of the SST. The claimant D.L.'s employment had been terminated after her employer created a mandatory Covid-19 Vaccination Policy. The Canada Employment Insurance Commission denied employment insurance benefits to the claimant D.L. due to a finding of misconduct. The claimant D.L. stated that she did not commit misconduct. The General Division of the SST on March 14, 2022, agreed with the claimant D.L that there was no misconduct and that the claimant was not disqualified from receiving employment insurance benefits. The decision in D.L v. Canada Employment Insurance Commission states that:

[19] The Commission submits they previously determine the Claimant had committed misconduct, despite knowing about her religious exemption letter, due to the Claimant submitting the letter beyond the Employer's deadline for exemption requests. However, the Employer accepted the letter, despite it being submitted late, and dismissed the Claimant, in part, due their

inability to accommodate the Claimant's religious beliefs. Therefore, there is no link between the timing of the delivery of the letter with the Claimant's dismissal

[27] Second, I find the Claimant did choose one of the two accepted reasons for not getting vaccinated, as she says she cannot be vaccinated for a religious reason, so she complied with that part of the Vaccination Policy.

[29] I find the Claimant followed the Employer's COVID-19 Vaccination Policy, and thus failing to follow that Vaccination Policy is not why she was fired.

[30] So, why was the Claimant fired if it was not for failing to follow the Employer's COVID-19 Vaccination Policy?

[31] I find she was fired because she was not vaccinated and asked for a religious exemption.

[32] The employer declined to accommodate the Claimant's religious exemption. I find it is clear the employer was planning to deny the Claimant's religious exemption request, and then dismiss her, before the Claimant even submitted her religious leader's letter.

[35] In the employer's internal communication document it says that in the first week of November 2021, they reached out to all employees without any vaccinations and no approved medical reason to notify them of termination.

[36] I find this is more proof that the employer was not going to accept any religious exemption requests as it says that all employees without an approved medical reason will be terminated, not any employees without an approved religious or medical reason, or all employees without an approved reason, it specifically lists any employees without a medical reason as going to be terminated.

[37] This supports that it is only medical reasons for not being vaccinated that they were going to, or did accept.

[38] The employer having already decided to reject religious letters before the Claimant even submitted her letter shows that what the employer was going to do with someone who asked for a religions exemption was pre-planned and was not related to the content of the Claimant's religious letter, the date she submitted it, or any sort of refusal of the Claimant to comply with the Employer's COVID-19 Vaccination Policy.

The adjudicator in L.D. v. Canada Employment Insurance Commission state: Was the Claimant's conduct misconduct?

[41] The final part of the test to determine if the Claimant lost her job due to misconduct is whether the Claimant knew, or ought to have known, that she would be fired for not being vaccinated and asking for a religious exemption.

[42] I find the Claimant could not possibly have known this, nor should she ought to have known this.

[43] I find the Claimant could not possibly have known her employer had predetermined that they were going to reject all religious exemption letters.

[44] The Employer's COVID-19 Vaccination Policy says that a religious reason is a valid reason to not be vaccinated and that employees will not be disciplined for this decision.

[45] I find this Vaccination Policy would lead the Claimant to expect there would be no discipline at all, never mind termination, for her decision to not be vaccinated and ask for a religious exemption.
[48] So, as the Claimant did not know, nor should she ought to have known, that she would be fired for not being vaccinated and asking for a religious exemption, as she could not have known her employer had predetermined to reject all religious exemptions, her conduct does not rise to the level of misconduct and therefore she should not be disqualified from benefits.

[49] The appeal is allowed.\

22. The Appeal Division adjudicator gave a conclusory decision on May 26, 2023 on file AD-23-250.

23. The Appeal Division did not conduct its own objective analysis on whether or not misconduct occurred.

24. The Appeal Division adjudicator did not properly analyze or adjudicate on the grounds the applicant presented to reach a determination.

25. In the applicant's submission to the Appeal Division. The applicant listed grave errors of law and errors of fact made by the General Division of the Social

Security Tribunal. However, in their decision, the Appeal Division stated that “I don’t see a case for these arguments."

26. The applicant's submission to the Appeal Division stated that the General Division of the SST made an error of law when the General Division did not consider the fact that misconduct must constitute a breach of a duty that is expressly noted or implied in the contract of employment. The applicant’s submission also stated that there was no expressed or implied duty to be vaccinated arising out of the applicant’s collective agreement. This criterion must be present to determine misconduct, according to Paradis v. Canada Attorney General, 2016 FC 1282 and Canada (Attorney General) v. Lemire, 2010 FCA 314. This criterion for misconduct was not present in the applicant’s case.

27. The Appeal Division of the SST did not properly analyze or adjudicate on the error of law described in (26), above.

28. The applicant's submission to the Appeal Division also stated that the General Division made an error of law when the General Division did not consider the fact that for misconduct to be found, the application of the Vaccination Policy to the employee must be reasonable within an employment context. See Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd., 2013 SCC 34, Electrical Safety Authority v Power Workers’ Union, 2022 CanLll 343, Toronto (City) v Toronto Civic Employees' Union, CUPE, Local 416, 2022 CanLll 109503 (ON LA), Toronto Professional Fire Fighters' Association, I.A.A.F. Local 3888 v Toronto (City), 2022 CanLll 78809 (ON LA)

29. The Appeal Division of the SST did not properly analyze or adjudicate on the error of law described in (28), above.

30. The applicant’s submission to the Appeal Division also stated that the General Division made an error of law when the General Division did not consider the fact that misconduct must be a breach of such scope that its author could normally foresee that it would be likely to result in his dismissal. See Canada (Attorney General) v. Cartier, 2001 FCA 274 (CanLII), J. R. v. Canada Employment Insurance Commission, 2015 S STG DE1 16 and Electrical Safety Authorify v Power Workers’ Union, 2022 CanLll 343 (ON LA)

31. The Appeal Division of the SST did not properly analyze or adjudicate on the error of law described in (30), above.

32. The General Division stated that the applicant met the conditions for misconduct because the applicant was unable to carry out her work duties after

she was suspended. In their decision, the General Division stated that “The Applicant breached the Vaccination Policy when she chose not to comply with it. I find that this interfered with her ability to carry out her duty to the employer.”

33. The General Division concluded that misconduct occurred because the employee was suspended, and was then unable to carry out her work duties. The General Division made an error of fact because misconduct occurs when one is not able to carry out their work duties before being suspended, not when one is not able to carry out their work duties after being suspended. See Mishibinijima v Canada (Attorney General), 2007 FCA 36.

34. The applicant’s submission to the Appeal Division also stated that the General Division made an error of law when the General Division did not consider the fact that if an important Vaccination Policy that is said to be added to the employment contract is unclear from the beginning of implementation and it takes months for full clarification to occur, then the cause and effect in the situation is resulting from the root cause of the Employer’s misleading Vaccination Policy.

35. The Appeal Division of the SST did not properly analyze or adjudicate on the error of law described in (34), above.

36. The applicant’s submission to the Appeal Division also stated that the General Division made an error of fact when the General Division concluded that the applicant met the conditions for misconduct but did not consider or adjudicate the fact that the Vaccination Policy stated that the applicant could apply for an accommodation at any time while the applicant was employed and that the applicant has no control if the Human Resources did not place the Accommodation Request in the applicant ‘s file, as it was Human Resource’s responsibility and duty to uphold the requirements of the Vaccination Policy in regards to timely accommodation requests.

37. Furthermore, there was no definite end date for the application for accommodation within the Employer’s Vaccination Policy. There was never a deadline to submit and obtain an accommodation neither in the Vaccination Policy nor in any communications, written or otherwise, whatsoever from the employer.

38. The Appeal Division of the SST did not properly analyze or adjudicate on the error of fact described in (36) and (37) above.

39. The applicant’s submission to the Appeal Division also stated that the General Division made an error of fact when the General Division did not consider the fact that one of the options in the Vaccination Policy since the beginning was requesting an accommodation according with the Human Rights Code.

40. The SST member refers everywhere in their decision to the applicant asking for an “exemption” which is categorically incorrect. The applicant only ever asked for a religious accommodation in accordance with the Vaccination Policy, not an exemption.

The employer has the duty to accommodate under the Human Rights Code (as stated in the Vaccination Policy). They do not have the duty to exempt an employee.

41. The request to be “exempted” is not stated in the Vaccination Policy or the Human Rights Code.

42. Replacing the word “accommodation” with “exemption” is an assumption and misinterpretation of the SST member creating another error of fact.

43. The Vaccination Policy contained no other viable options that would allow for continued employment. The employer never offered any other alternatives such as testing to anyone as was mentioned in the Vaccination Policy. This further provides evidence that the employer was following the EI memo BE-2021-10 and not the Law and that the employer failed to accommodate according with their own Vaccination Policy. These facts have also been omitted subsequently by the SST member.

44. The Appeal Division of the SST did not properly adjudicate or adjudicate on the error of fact described in (39) to (43), above.

45. The Vaccination Policy was of no force and effect as it was not part of the original employment contract and was not ratified by both parties, as it is my understanding in contract law that revisions and amendments shall and will be agreed to by all parties, even whereby there are clauses within the employment contract to amend from time to time this does not negate the legal requirement of agreement of ALL parties.

46. The Appeal Division of the SST did not consider that the Union 4948 filed a Vaccination Policy grievance on October 22 2020. The grievance relates primarily to the decision to suspend and subsequently terminate workers who have not disclosed their vaccination status. The Union’s position was that the Vaccination Policy was not negotiated with them before implementation, and that the Vaccination Policy was not part of the condition of the applicant’s continued employment with the employer.

47. The SST member did not provide any factual evidence that the Vaccination Policy became a condition of continued employment.

48. The SST member gave no evidence that there exists either Provincial or Federal legislation that requires anyone to disclose their vaccination status. The EI commission memo BE-2021-10 factually states this.

49. **The EI Appeal Division adjudicator made an error of law**.

50. The Appeal Division of the Social Security Tribunal has a legal obligation according to the Department of Employment and Social Development Act (S.C. 2005, c. 34) as follows:

> Leave
>
> 56 (1) An appeal to the Appeal Division may only be brought if leave to appeal is granted.
>
> Grounds of appeal — Employment insurance Section
>
> 58 (1) The only grounds of appeal of a decision made by the Employment Insurance Section are that the Section
>
> (a) failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;
> (b) erred in law in making its decision, whether or not the error appears on the face of the record; or
>
> (c) based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.
>
> Criteria
>
> (2) Leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success.

51. It is required by law that the EI Appeal Division considers the grounds of appeal listed within section 58 of the Department of Employment and Social Development Act. The EI Appeal Division did not properly analyze or adjudicate on the errors of Law and error of fact raised by the applicant which was the grounds for the applicant's appeal.

52. It is required by law, according to the Department of Employment and Social Development Act that the SST Appeal Division only refuses leave to appeal

when the appeal has no reasonable chance of success.

53. The appeal to the Appeal Division had a reasonable chance of success, as it raised grounds evidenced by the decision in AL v Canada Employment Insurance Commission, dated December 14, 2022, the decision in LN v Canada Employment Insurance Commission dated December 5, 2022 and DL v Canada Employment Insurance Commission, date March 14, 2022.

54. The appeal to the Appeal Division had a reasonable chance of success, as it raised grave errors of law and fact made by the General Division of the Social Security Tribunal.

55. The Appeal Division ought not to have refused leave to appeal, as the appeal had a reasonable chance of success based on the errors and omissions and misrepresentations of fact.

56. Such further and other grounds as I may present and the Honourable Court permit.

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 May 24, 2022;

2. Decision, applicant’s Reconsideration application, Canada Employment Insurance Commission, dated June 9, 2022;

3. Applicant's Notice of Appeal to the General Division of the Social Security Tribunal, dated July 7, 2022;

4. Decision for applicant's appeal to the General Division of the Social Security Tribunal, dated January 15, 2023;

5. Notice of applicant’s appeal to the Appeal Division of the Social Security Tribunal, dated March 10. 2023:

6. Decision, applicant's application for Leave to Appeal to the Appeal Division of the Social Security Tribunal, dated May 26, 2023;

7. Decision Letter, applicant's application for Leave to Appeal to the Appeal Division of the Social Security Tribunal, dated May 26, 2023;

8. Letter Correction of the decision applicant's application for Leave to Appeal to the Appeal Division of the Social Security Tribunal, dated June 13, 2023

9. Decision Correction, applicant's application for Leave to Appeal to the Appeal Division of the Social Security Tribunal, dated May 26, 2023;

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

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

Authorities

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

13. DL v Canada Employment Insurance Commission, 2022 SST 281

14. LN v Canada Employment Insurance Commission, 2022 SST 1654

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

16. Canada (Attorney General) v. Lemire, 2010 FCA 31 4.

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

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

19. Toronto (City) v Toronto Civic Employees' Union, CUPE, Local 416, 2022 CanLII 109503 (ON LA),

20. Toronto Professional Fire Fighters' Association, I.A.A.F. Local 3888 v Toronto (City), 2022 CanLll 78809 (ON LA)

21. Canada (Attorney General) v. Cartier, 2001 FCA 2 74 (CanLII);

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

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

24. And such further and other authorities that I may present.

Dated at Toronto Ontario this 23 day of June, 2023.

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