Court No.: _____

FEDERAL COURT

BETWEEN: Anna BROWN

APPLICANT

And

ATTORNEY GENERAL OF CANADA

RESPONDENT

NOTICE OF APPLICATION
(Sections 18 and 18.1 of the *Federal Courts Act*)

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 either virtually or at the Thomas D'Arcy McGee Building, 90 Sparks Street, Ottawa (Ontario), K1A 0H9.

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.

Date:

Issued by:

Address of local office:

TO:

ATTORNEY GENERAL OF CANADA

(To be served by the Court Registry, pursuant to Rule 133 of the Federal Court Rules)

and

Social Security Tribunal – Appeal Division

by email : info.sst-tss@canada.gc.ca and by registered mail at : C.P. 9812, Succursale T, Ottawa ON, K1G 6S3

Application

This is an application for judicial review in respect of a decision of the Appeal Division of the Social Security Tribunal (herein after the Tribunal), rendered on September 21, 2023 by member Candace R. Salmon, in which the latter refused the Applicant the right to appeal to the Appeal Division. The Tribunal case number is: AD-23-337

The Applicant makes application to this Court for an order to:

- **QUASH OR SET ASIDE** the Tribunal's decision;
- **REFER BACK** the matter to a new member of the Appeal Division of the SST for a new determination;
- **ORDER** any directions that the Court considers to be appropriate;
- **WITH COSTS.**

The grounds for the application are:

The Tribunal was bound to apply subsections 58(1) and (2) of the Department of Employment and Social Development Act (S.C. 2005, c. 34). It acted beyond its jurisdiction and refused to exercise its jurisdiction properly.

It failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe.

It erred in law in making its decision, whether or not the error appears on the face of the record.

It based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without the material before it.

It acted by reason of fraud or perjured evidence, and

It acted in any other way that was contrary to law.

More precisely, but not limited to what is mentioned hereunder:

1. The Tribunal member erred in law by erroneously accepting that the newly created employer's policy was an express duty of the employee. The Tribunal decision ultimately found that an ***unlawful*** employer policy *(which contradicted the employee's Collective Bargaining Agreement (CBA [A6.01])* was in fact an *"express condition of employment."*
   A Board or a Tribunal cannot conclude "management rights" without first considering the contract (the employee's CBA) between the employer and

the employee. The Tribunal clearly failed to consider all relevant facts in order to reach its conclusion of “management rights”.

In addition, if the employer had management rights, the Tribunal failed to apply the appropriate criteria in order to reach that conclusion. In that regard, it failed to apply the KVP test to determine that the employer’s vaccination policy is inconsistent with the CBA. If the Tribunal wanted to follow or rely on the management rights concept, it was its duty to consider those criteria. It failed to do so. If the Tribunal wanted to make a conclusion as to the existence of management rights, it was also their duty to consider arguments on both sides, instead of simply presuming that the management rights exist and adding to the employer’s evidence in doing so. When a Tribunal adds to a party’s evidence in order to support its conclusion, it is clear bias, or a clear erroneous finding of facts.

The Tribunal also failed to assess that the employer’s vaccination policy was contrary to existing legislation and/or the employee’s CBA. The proposed employer’s vaccination policy is both prohibited and nullified by the Terms of the CBA. When there is a conflict between statutory obligations, a signed CBA and a new employer’s policy, the legislation and the signed CBA must prevail. The Tribunal failed to apply the Rule of law.

2013 SCC 34: *(¶24-27)*, 2006 SCC 2: *(¶144-146)*

2. The Tribunal also based its decision on an erroneous finding of fact when it ruled that the employee failed to follow the vaccination policy (GD-30). The employee was following the policy as set out by the employer, and had a reasonable expectation that the employer would also follow their implemented policy. The employee was not in misconduct as they had followed the written policy, as set out by the employer, and were waiting for a decision on their accommodation request, as also outlined in the employer’s accommodation policy and various legal statutes regarding the duty to accommodate. The Tribunal failed to consider the employer’s vaccination policy as written, the employer’s existing accommodation policy, as well as the legal statutes regarding the duty to accommodate. Instead, the Tribunal determined that the employee was required to complete many arbitrary tasks *before* they could follow the policy as written. It is *ultra vires* for the Tribunal to unilaterally modify terms inside the corporate policy *(or purport to change the employer's business processes)* by adding content from emails sent by *some other employee* without policy-making authority *(or ownership)*.

3. The Tribunal found inapplicable case law and presented it as either; **(a)** Relevant, **(b)** Binding, or **(c)** an *"instruction [to not] look at an employer's conduct or policies."* In every case cited by the Tribunal to support their decision, the Courts found that the employer's actions are irrelevant **because** the employees clearly broke their Employment Contracts – and freely admitted to such. Misconduct was self-evident in these cases.

These case examples and subsequent interpretations by the Tribunal, were not appropriate or applicable to this employee's circumstances.

Canada (Attorney General) v McNamara, 2007 FCA 107, Paradis v Canada (Attorney General), 2016 FC 1282, Mishibinijima v Canada (Attorney General), 2007 FCA 36 .

4. The Tribunal also provided insufficient reasons to allow me, the Applicant, to understand why I was not allowed to appeal the General Division's' decision. The Tribunal did not consider all of my arguments. I do not understand why some of them were ignored and as a consequence, why my appeal was dismissed. Clearly, the Tribunal did not respect the criteria established in *Canada (Minister of Citizenship and Immigration) c. Vavilov*, 2019 CSC 65 (CanLII), [2019] 4 RCS 653.

This application will be supported by the following material:

- An affidavit of Anna Brown and any other affidavit that will be necessary to present my case;
- A copy of the Tribunal Record.
- A copy of any other material that was considered or should have been considered by the Tribunal.

In this regard, the Applicant requests the Tribunal to send to the Applicant and the registry of the Court, a certified copy of the following documents:

- The Tribunal's Record, including the transcript of the hearing that was supposed to be part of the record that the Appeal Division Member had to consider in order to make its decision.

October 19, 2023

Anna Brown
6 Marwin Road, Ajax, Ontario, L1S 6J7
ratajczakbrown@gmail.com
(416) 525-6708