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AND TO: Social Security Tribunal of Canada  
Appeal Division  
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## **APPEAL**

THE APPELLANT APPEALS to the Federal Court of Appeal from a decision of the Federal Court of Canada, dated and communicated to Rebecca Abdo December 28, 2023, by which Justice McVeigh dismissed Mrs. Abdo's application for judicial review.

THE APPELLANT ASKS that the decision of the court below be set aside and the application for judicial review be allowed with costs.

THE GROUNDS OF APPEAL follow.

### **OVERVIEW**

1. This is an appeal from the decision of the Federal Court dismissing the judicial review application of Rebecca Abdo (the "Appellant").
2. The Appellant's employment as a medical laboratory technologist at Canadian Blood Services ("CBS") was terminated due to her religious abstention from covid vaccination.
3. The Canada Employment Insurance Commission (the "Commission") denied the Appellant's application for employment insurance ("EI") benefits on the basis of "misconduct", a decision upheld by the General Division ("GD") of the Social Security Tribunal ("SST"). The Appeal Division ("AD") of the SST refused the Appellant leave to appeal the GD's decision.
4. The Federal Court dismissed the Appellant's application for judicial review of the SST AD's decision refusing leave.

### **BACKGROUND**

5. The Appellant was employed by CBS as a medical laboratory technologist from May of 2011 to November of 2021.
6. On September 3, 2021, CBS implemented a workforce policy stating that all employees were required to receive covid vaccines unless unable due to "human rights grounds (e.g. religious reasons)" (the "Policy"). The Policy further stated, "[I]n all cases requiring workplace accommodation, Canadian Blood Services will accommodate, in accordance

with the relevant human rights legislation and the Human Rights in the Workplace - Discrimination Policy, to the point of undue hardship”.

7. On September 28, 2021, the Appellant submitted a request for accommodation, explaining why, in detail, she was unable to be vaccinated on the basis of her sincerely held religious beliefs. The Appellant also included a supporting letter from a pastor, as requested.
8. On October 8 and 15, 2021, the Appellant met with Michelle Germaine of CBS’s People, Culture and Performance department to discuss the Appellant’s request for accommodation in greater detail.
9. On October 22, 2021, CBS denied the Appellant’s request for accommodation on religious grounds, stating that it was “not disputing [her] individual religious beliefs” but would only consider a “prohibit[ion]” “imposed” by an “established stream of Christianity”.
10. On November 1, 2021, the Appellant was placed on a 10-day unpaid leave of absence. On November 16, 2021, the Appellant’s employment was terminated. CBS recorded the termination as “dismissal with cause”.
11. On December 20, 2021, the Appellant applied for EI benefits, which the Commission denied on or about April 11, 2022, citing as its reason that the Appellant had lost her employment as a result of “misconduct”.
12. On May 11, 2022, the Appellant applied to the Commission for reconsideration of the decision to deny her EI benefits. On July 10, 2022, the Commission maintained its decision to deny the Appellant EI benefits on the basis of “misconduct”.
13. On August 12, 2022, the Appellant appealed the decision of the Commission to the SST GD. On November 23, 2022, the SST GD dismissed the Appellant’s appeal.
14. On December 23, 2022, the Appellant applied for leave to appeal to the SST AD, which was denied on March 18, 2023.

15. On December 28, 2023, the Federal Court dismissed the Appellant’s application for judicial review of the SST AD decision denying leave to appeal.

## STANDARD OF REVIEW

16. The Federal Court of Appeal will, in practice, review the administrative decision on the standard of reasonableness, as though “‘step[ping] into the shoes’ of the lower court”, pursuant to *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 [*Agraira*] at paragraphs 45-6: [T]he appellate standards of correctness and palpable and overriding error and...the administrative law standards of correctness and reasonableness...should not be confused with one another in an appeal to a court of appeal from a judgment of a superior court on an application for judicial review of an administrative decision”.
17. The *Agraira* court continues, quoting *Telfer v Canada Revenue Agency*, 2009 FCA 23 at paragraph 18: “[T]he question for the appellate court to decide is simply whether the court below identified the appropriate standard of review and applied it correctly. The appellate court is not restricted to asking whether the first-level court committed a palpable and overriding error in its application of the appropriate standard”.
18. The *Agraira* court sums up with reference to *Merck Frosst Canada Ltd. v Canada (Health)*, 2012 SCC 3 at paragraph 247, explaining that the proper approach places the “appellate court’s focus...in effect, on the administrative decision”.
19. All administrative decisions are subject to the reasonableness standard imposed in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65. Among other criteria, a reasonable decision must “‘meaningfully grapple” with the “key issues” and “central arguments” raised by the appellant; demonstrate the decision maker was “actually alert and sensitive to the matter before it”; demonstrate the decision maker “actually listened” to the appellant; discharge the “decision maker’s responsibility” to “discern meaning and legislative intent, not to ‘reverse-engineer’ a desired outcome”; and “explain why [the] decision best reflects the legislature’s intention” where the appellant’s dignity hangs in the balance.

## GROUNDS OF APPEAL

20. The Federal Court identified the appropriate administrative law standard of review, being reasonableness, but erred in its application of that standard to the administrative decision under review by finding reasonable the decision of the SST AD to refuse leave to appeal the SST GD decision.
21. The Federal Court fell into this error by failing to recognize the same central error of law the SST AD and SST GD failed to recognize: an immutable characteristic cannot be misconduct primarily because misconduct must be voluntary and immutable characteristics are involuntary.
22. The Appellant is religious.
23. Religion is a subjective, personal, sincere, religious belief which governs the religious adherent’s conduct: *Syndicat Northcrest v Amselem*, 2004 SCC 47. This means that at law, religious belief is inseparable from the conduct it governs. Religion comprises things a religious person believes, things a religious person must do, and things a religious person must not do. Religious conduct is as much religion as religious belief, according to the Supreme Court of Canada (*Amselem*).
24. Religion is an immutable characteristic: *Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203, 1999 CanLII 687 [*Corbiere*]. This means that at law, a person can no sooner change her religion than, for example, her sexual orientation or gender identity.
25. Immutable characteristics cannot be altered: *Corbiere*. This means that at law, an immutable characteristic cannot be extinguished.
26. Immutable characteristics are immutable across all legislative contexts—“they are not deemed immutable in some legislative contexts and a matter of choice in others”: *Quebec (Attorney General) v A*, 2013 SCC 5 [*Quebec v A*]. This means that immutable characteristics are immutable in the legislative context of employment insurance. For

further certainty, this means that immutable characteristics are immutable under the *Employment Insurance Act* (“*EI Act*”).

27. Immutable characteristics are not a choice: *Quebec v A*. This means that immutable characteristics are not voluntary.
28. Misconduct must be voluntary in the employment insurance context. This means that the Appellant’s immutable characteristic of religion (*Corbiere*), which includes both religious belief and religious conduct (*Amselem*), and which does not cease to be an immutable characteristic in the context of employment insurance (*Quebec v A*) cannot be misconduct pursuant to the *EI Act*.
29. The Federal Court failed to acknowledge the three crucial Supreme Court of Canada decisions the Appellant placed before it—*Corbiere*, *Quebec v A* and *Amselem*—let alone grapple with the central argument these cases buttress, an argument the Appellant could not possibly have advanced more clearly, an argument the Court acknowledged was “predominant” before omitting to analyze it.
30. The Federal Court failed to grapple with the SST AD’s failure to grapple with the SST GD’s legal error of deciding the Appellant made a “choice” not to change that which is unchangeable at law.
31. The Federal Court wrote seven times that the Appellant made a “decision” or “choice” not to change her unchangeable characteristic, contrary to *Corbiere* and *Quebec v A*.
32. The Federal Court wrote seven times that not changing the Appellant’s unchangeable characteristic was “voluntary”, contrary to *Corbiere* and *Quebec v A*.
33. The Federal Court wrote four times that the Appellant’s failure to change her unchangeable characteristic was “deliberate” or “intentional”, contrary to *Corbiere* and *Quebec v A*.
34. The Federal Court framed as a “refusal” the Appellant’s inability to change what the law states is unchangeable. The Federal Court wrote that it was “reasonable” for the SST AD to sign off on the SST GD’s decision that the Appellant made a “choice” not to change

that which is unchangeable according to the Supreme Court of Canada (*Corbiere and Quebec v A*).

35. The Federal Court's overarching error in approving the SST AD's overarching error of approving the SST GD's overarching error engages a further error: failure to consider whether an employee could possibly owe an employer a duty to extinguish her **immutable characteristic**, which the Supreme Court of Canada has ruled is not possible (*Corbiere and Quebec v A*).
36. The foregoing are pure errors of law.
37. The Federal Court further erred in asserting the applicant in *Francis v Canada (Attorney General)*, 2023 FCA 217 [*Francis*] made similar arguments to those of the Appellant. The *Francis* applicant made **no argument** concerning immutable characteristics pursuant to *Corbiere and Quebec v A*—the central argument and precedents proffered by the Appellant; nor did the Federal Court of Appeal in *Francis* base its decision on immutable characteristics pursuant to *Corbiere and Quebec v A*, which fails to be surprising, given the arguments and law were not placed before it.
38. These Supreme Court of Canada precedents and the Appellant's accompanying arguments are, however, squarely before this Court, as they were before the Federal Court. Accordingly, the Appellant expects this Court will answer the question she has placed before it, **with reference to the Supreme Court of Canada precedents supporting her argument**: whether, against all high court precedent on point, the Federal Court was reasonable in approving the SST AD's conclusion that it need not intervene in the SST GD's decision because the Appellant had a choice to **change** that which is **unchangeable** and in not **changing** that which is **unchangeable**, somehow committed misconduct.

THE APPELLANT INTENDS TO RELY ON the *Employment Insurance Act*, SC 1996, c 23; *Federal Courts Act*, RSC 1985, c F-7; *Federal Courts Rules*, SOR/8-106; Federal Court application record; Federal Court hearing transcript; and Federal Court decision.

THE APPELLANT PROPOSES THE APPEAL BE HEARD VIRTUALLY.

January 24, 2024

  
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