APPLICATION

FEDERAL COURT

BETWEEN:

WIESLAW KUK

- and -

SOCIAL SECURITY TRIBUNAL OF CANADA

APPLICATION UNDER section 18.1 of the *Federal Courts Act,* RSC 1985, c F-7

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 at (*place where Federal Court of Appeal (or Federal Court) ordinarily sits*).

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:_____

(*Registry Officer*)

Address of local office:

180 Queen Street West
Suite 200
Toronto, Ontario
M5V 3L6

TO: SOCIAL SECURITY TRIBUNAL OF CANADA

PO Box 9812, Station T
Ottawa, ON K1G 6S3

This is an application for judicial review in respect of

SOCIAL SECURITY TRIBUNAL OF CANADA

[1] On December 23, 2022 the Social Security Tribunal ("SST") has refused Claimant's application for leave to appeal (File # AD-22-887) on a matter concerning the disqualification of EI benefits due to the alleged misconduct. The Claimant submits this decision was made on a biased opinion and based on an error of law and facts. The SST Appeal division decision was communicated to the Claimant on December 28, 2022, citing "The Claimant's appeal has no reasonable chance of success".

Overview

[2] The applicant was employed as an IT Technical Specialist for a Public hospital and worked away from the hospital setting with office located at 20 Dundas St West in Toronto and on a 100% remote schedule since March 2020 and 50% remotely since the start of his employment in 2006. On September 13th, 2021, the employer instituted a mandatory Covid-19 vaccination policy and terminated applicant's employment on November 2, 2021 for an alleged breach of contract.

[3] On November 8, 2022, The Social Security Tribunal General Division found the applicant lost his job because of 'misconduct' due to non-compliance with the Employer's vaccination policy (File # GE-22-2750) and sided with the Employment Insurance Commission decision to disqualify the applicant from receiving EI benefits.

[4] On November 29, 2022, the applicant submitted an appeal to Social Security Tribunal Appeal Division to reconsider the decision on the basis of error of law and facts. The applicant's request for appeal was refused. The applicant claims the SST did not conduct a thorough examination of the essential elements of the circumstances before rendering its decision and only rehashed test words that do not support the finding of 'misconduct'. To dismiss applicant's

request for an appeal without giving proof that meets the requirements of ‘misconduct’ in case law is seen as a form of deliberate and pre-established protocol.

Relief Sought

The applicant is seeking an allowance of Employment Insurance (EI) regular benefits that were denied by the “Social Security Tribunal of Canada” and “The Canada Employment Insurance Commission” based on committed errors of fact and law. The applicant claims that the Commission and the SST of Canada hasn’t proven that the applicant lost his job because of misconduct and that he has done something wrong that caused him to lose his job.

The Grounds for Judicial Review

[5] The applicant submits that his dismissal was not misconduct under the law. While the employer alleges a breach of employment contract as indicated in employer’s communication email from August 25, 2021. (GD3-72) “What will happen to me if I decline to get vaccinated? If you decide not to be vaccinated by October 22, 2021, you will be deemed to be in breach of your employment contract which will result in your termination for cause.” The “Commission” and SST failed to evaluate applicant’s employment agreement (GD6-3) as it pertains to employee’s duties and responsibilities owed to an employer in order to determine if an expressed or implied breach of duty has occurred.[1] In other words, in the eyes of law, for misconduct to occur, there must be clear evidence of breach of existing employment obligations such as it impairs the performance of the duties owed to an employer. The SST and Commission has failed to prove this point and has not established the relationship on how applicant’s conduct could get in a way of carrying out his duties owed to an Employer especially when his job as an IT Technical Specialist allowed him to work exclusively from home since March 2020. It is the duty of the independent judiciary to consider the obligations imposed on the employer as well as the employee contained in the provisions of the “Employment Agreement” in determining if a breach of obligations has occurred that could potentially give rise to a ‘misconduct’.

[6] Since the employment agreement usually details the obligations and conditions of employment both parties owe to each other, neither party can impose unilaterally new conditions to the agreement without consultation and acceptance of the other. The only exception to this is where legislation demands a specific action by an employer and a compliance by an employee. The SST has elected to ignore applicant's employment agreement and submitted that a mere existence of a policy, which the applicant failed to comply with is enough to be a breach of a duty owed to his employer. The employer explicitly articulated in (GD3-74) that Covid-19 vaccination is a new qualification and condition of employment and requires all new hires to be vaccinated against Covid-19. Because this condition for new hires was put into effect on September 13, 2021 along with mandatory Covid-19 policy, it could not have been in effect under applicant's employment contract written in 2006. There is also no evidence that there exists either a Provincial or Federal legislation that requires anyone to be vaccinated. Directive #6 for Public Hospitals issued by the Chief Medical Officer of Health does not establish an absolute requirement for vaccination and offers a negative test for health care workers as a minimum requirement (GD3-68). As a result, the absence of such legislation or directives supported in the legislation that obligate individuals to be vaccinated, makes vaccination voluntary.

[7] The employment agreement (GD6-3) reveals that there was no requirement to be vaccinated against Covid-19 or that this is considered an essential condition of employment. New employees were only to demonstrate to be free from specific communicable and infectious diseases as stipulated by the Ontario Hospital Association protocols "OHA" and did not enforce vaccinations and neither does "OHA" [2]. Additionally, OHA does not have a dedicated Covid-19 protocol and only provides general recommendations for airborne influenza. Confirmation of immunity can be accomplished through many ways such as anti-body test (serology), TB skin test and therefore one cannot assume that forced vaccination is the only way to demonstrate immunity against a specific disease. The agreement also does not contain a provision for dismissal because of not being vaccinated against any specific communicable disease. Moreover, Covid-19 disease was added post applicant's termination to the Employer's corporate immunization policy (GD2-25) in November 2021. This further confirms that Covid-19 vaccination was never part of the corporate immunization policy requirement during applicant's

term of employment. This is evident by the last revision date of (GD2-25). In conclusion, neither the employment contract nor the corporate immunization policy support employee's obligation imposed by the Covid-19 vaccination policy. Furthermore, the implementation of disciplinary dismissal clause in the Covid-19 policy contravenes the Occupational Health and Safety Act, RSO. 1990, c. O.1 section 28(3), which states the employee is not required to participate in any communicable disease surveillance protocol, unless the employee consents to do so. Section 50(12) of the same also prohibits the employer to discipline or threaten to dismiss an employee, impose any penalty upon employee or coerce an employee because an employee has acted in compliance with the act or regulation made thereunder.
The SST and the Commission has presented no evidence from which to draw a conclusion that an expressed or implied duty exists in the employment agreement on forced Covid-19 vaccination requirements or that the applicant agreed to the mandatory Covid-19 policy (GD2-28).

[8] The SST and the Commission capriciously treat an action that is willful, intentional, or deliberate in nature as 'misconduct' without considering the basic criteria of 'misconduct' definition as set out by the very Employment Insurance Agency (AD1-2). It clearly states "Misconduct occurs when an employee's behavior is in violation of the obligations set out in his contract of employment …" No reference to such behavior was ever substantiated in the context of applicant's obligations owed to an Employer and as such the SST has not met the burden of proof to verify the facts and evidence to support a true finding of 'misconduct'. At best the dismissal should have been administrative in nature and not have an element of punishment because of undesirable conduct. Imposing a retaliatory action on employees who are threatened to be disciplined for not agreeing to a medical treatment ("aka Covid-19 injections") with no alternative outcome is excessive and unreasonable, especially for employees who work exclusively from home and there is no reasonable expectation of them returning to the workplace anytime soon. In fact, as of the date of this letter the employer still did not recall employees in applicant's department to the office. Refer to following case decision(s) on the Covid-19 policies' disciplinary measures being unreasonable and excessive by the rule of law. (a) Power Workers' Union v. Elexicon Energy Inc, 2022 CanLII 7228 (O.N.L.A) para 114; (b) Electrical Safety Authority v. Power Worker's Union 2022 CanLII 343 (O.N.L.A) para 101; (c) Toronto

Professional Fire Fighter's Association v. City of Toronto 2022 para 315, 316.

[9] The SST failed to recognize an essential element that the requirement of Covid-19 vaccination was not required for staff who worked exclusively from home. In a communication from August 25 2021, the Employer specifically states "For those members of team UHN who never are required to come onsite to any of our facilities, the vaccination requirement is not mandatory." (GD3-72). Similarly, in another communication from September 13, 2021 the employer further reiterated in an FAQ that "UHN employees who work remotely 100% of their time and as a result can be exempted." (GD3-55). This communication grants the permission to employees who work exclusively from home to be excluded from the Covid-19 vaccination requirement and as such should not be seen as a 'misconduct' simply because the employee exercised to follow Employer's authorized protocol.

[10] The evidence of an audio recording of an exit interview (GD02A) with a Director of UHN IT Dept. further confirms, the Employer never meant to fulfil their obligation with respect to their communications on remote staff not needing vaccination, a decision that is contradictory to employer's earlier announcements. The following is confession statement by the UHN IT Executive Director Carl Virtanen

"..It was my decision that nobody in UHN Digital be exempt from the policy because they are working remotely"

This is a clear example of a breach of good faith and a misleading practice under the law. The employer communicated conflicting and misleading information by making applicant believe that he will be exempt on the basis of working exclusively from home. Instead, the employer chose to deliberately dismiss valid and pre-authorized exemption and prearranged the outcome ahead of time. In an identical case (SST GE-22-510/2022 SST 281) the Tribunal recognized the fundamental wrongdoing of an employer committing an act of bad faith by not following through with their obligation on Covid-19 policy exemptions, which led to a favorable decision for the applicant.

[11] Employer unlawfully terminated my pay on Oct 19, 2021 (GD3-19) three (3) days prior to Oct 22, 2021 Covid-19 vaccination policy deadline. This contravenes Section 60(1) of the

ESA SO 2000 as the applicant was still in a period of compliance with the Covid-19 policy and all respective communications at that time. Specifically, the communication from Sept 13, 2021 (GD3-53) clearly states "...there will be no leave of absence available because we have extended the deadline for double vaccination to October 22, 2021 to eliminate any confusion or uncertainty."

The act requirements during notice period state,
60(1). "During the notice period under section 57 or 58, the employer (a) shall not reduce the employee's wage rate or alter any other term or condition of employment. (b) shall in each week pay the employee the wages the employee is entitled to receive, which in no case shall be less than his or her regular wages for a regular work week"

It is apparent the employer engaged in an unethical practice by willfully contravening their own terms of policy deadline and terminated my pay three days prior to Oct 22, 2021, as indicated on applicant's Record of Employment (GD3-19); it's a violation of employer notice period for a mass termination event and their obligation with respect to applicant's pay entitlement.

[12] As per SST decision (GE-22-1889) on an identical case, the Tribunal ruled in favor of applicant stating very important rights and rules of Canadian law as follows "Whether the applicant's decision not to get vaccinated was willful or whether she/he knew or ought to have known that by not being injected it might lead to his/her dismissal is irrelevant. The SST and Commission has not proven that the claimant had a duty to accept any vaccinations. Consequently, it cannot be found that his/her decision to not be vaccinated, regardless of whether it violated the Employer's policy meets the established criteria by case law to arrive at a finding of misconduct. Since the Claimant has the rights to his bodily integrity, it is well founded and long recognized in Canadian common law that individual has a right to control what happens to their bodies. [3] The individual has the final say in whether they accept any medical treatment including vaccination. [4] If vaccination is therefore voluntary, it follows that he has a choice to accept or reject it. If he exercises a right not to be vaccinated, then it challenges the conclusion that his/her actions can be characterized as having something "wrong" or "something he/she should not have done", whether willfully or not, that would support misconduct and

disqualification within the meaning of the EI Act [5] Despite the fact that applicants choice contradicts his/her Employer's policy and led to his/her dismissal, exercising these rights cannot be characterized as wrongful act or undesirable conduct sufficient to conclude misconduct worthy of the punishment of disqualification under the EI Act. The courts have detailed the test to make that determination and it is upon the SST and the Commission to prove the elements."

Conclusion

[13] In summary,

(a) The SST and Commission has not met the burden of proof to establish that the applicant breached an expressed or implied duty arising out of his employment agreement ("EA"). It has been proven in the past by SST Tribunal case (GE-22-1889), that the employee's action to not undergo Covid-19 injection cannot be found to be 'misconduct' simply because it was deemed willful, especially when the employee exercises his/her legal basis to bodily integrity, a "Right" that is well supported in Canadian law and protected by regulations discussed in section [7].

(b) The Employer explicitly expressed the requirement for vaccination is not mandatory for remote staff in two (2) separate email communications. This emphasizes that the applicant has followed the direction of the employer and should not have been a victim of a disciplinary dismissal.

(c) The Employer admits in an audio recording (GD02A) to a misleading act for having to pre-determine outcome to deny exemption, a practice that is unlawful and contrary to employer's previous announcements authorizing remote staff not needing vaccination. It also failed to provide a meaningful explanation why it elected to not follow through with a valid and approved exemption for remote staff. Ignored applicant's follow-up email from October 4, 2021 (GD6-4) requesting clarification on the denial of valid exemption request and refused to engage in any meaningful dialog on this subject.

(d) On the basis of SST decision (GE-22-1889), it states “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 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”. The applicant has a legal right to refuse such medical treatments and not be punished by disqualification of EI benefits.

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1. Canada (Attorney General) v. Lemire, 2010 FCA 314
2. Occupational Health and Safety Act https://www.ontario.ca/laws/statute/90o01#BK96
3. Hopp v. Lepp, [1980] 2 SCR 192 wherein the Supreme Court weighs in on Informed Consent
4. Malette v. Schulman (1990), 72 O.R. (2d) 417
5. Canada Employment Insurance Commission v. Dubinsky, A-636-85

Supported material attached:

1. Supplementary_Documentation.pdf
2. GD02A - ExitInterview_Audio.m4a

January 23, 2023

Signature

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SOR/2021-151, s. 22