

Court File No. A-71-23

FEDERAL COURT OF APPEAL COUR D'APPEL FÉDÉRALE	
F I L E D	MAR 10 2022 SORAYA PREMJI
VANCOUVER, BC	

FEDERAL COURT OF APPEAL

BETWEEN:

Leanne **MOLCHAN**

Applicant

and

Attorney General of Canada

Respondent

APPLICATION UNDER s. 28(1)(g.1) of the *Federal Courts Act*, (R.S.C., 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 on the following page.

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 the Federal Court of Appeal, 701 West Georgia Street, Vancouver, BC, V7Y 1B6.

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.

MAR 1 0 2023

Pacific Centre P.O. Box 10065
701 West Georgia Street
Vancouver, British Columbia, V7Y 1B6

ORIGINAL SIGNED BY
SORAYA PREMJI
Issued by: A SIGNÉ L'ORIGINAL

TO:

Attorney General of Canada
British Columbia Regional Office
Department of Justice Canada
900 - 840 Howe Street
Vancouver, British Columbia V6Z 2S9

AND TO:

Social Security Tribunal
235 Queen Street,
Room S143
Ottawa, Ontario K1A 0H5

APPLICATION

This is an application for judicial review in respect of the Social Security Tribunal - Appeal Division (the "SST-AD") decision number AD-22-685 rendered by Member Charlotte McQuade (the "Member") on February 10, 2023 (the "Appeal Division Decision"). The Appeal Division Decision dismissed the applicant's appeal and held that the applicant's Employment Insurance ("EI") claim should be reconsidered, resulting in an overpayment of EI benefits. The Appeal Division Decision was first communicated to the applicant on February 10, 2023.

THE APPLICANT MAKES APPLICATION FOR:

1. An order setting aside the Appeal Division Decision;
2. An order remitting this matter to the SST-AD with directions to allow the applicant's appeal and to rescind the March 11, 2021 decision and May 6, 2021 reconsideration decision made by the Canada Employment Insurance Commission (the "Commission"), or such other directions as this honourable Court deems just;
3. Costs; and
4. Any further order that this honourable Court deems just.

THE GROUNDS FOR THE APPLICATION ARE:

- A. The Member erred in law and jurisdiction by concluding that the Commission can retroactively change a decision regarding availability absent any new and relevant information.**

The Commission cannot retroactively reconsider and change a decision involving a judgement call – such as availability - under s. 52 of the *Employment Insurance Act*, S.C. 1996, c. 23 (the "*EI Act*") absent some new fact or information. This principle is so fundamental that it has even been confirmed in the Commission's own policy manual. To hold otherwise would mean that all claimants who receive EI benefits must live with years of uncertainty that the Commission might one day just change its mind and

demand the money back, even if the claimant has provided all necessary information openly and honestly. This would undermine the goal of the EI system, which is to provide some measure of financial security to the unemployed. It would also undermine the principle of finality in decision making.

B. The Member erred in fact and law by concluding that the applicant had made false statements.

There is no dispute or controversy that the Commission's agents specifically told the applicant to report that she was available for work. There is equally no dispute or controversy that the applicant accurately gave the Commission all relevant information before that direction was given. A claimant who reports exactly what the Commission tells them to report has not provided false information.

C. The Member erred in law by concluding that this court's decision in *Canada (Attorney General) v Buors*, 2002 FCA 372 (*Buors*) controlled the appeal.

The *Buors* decision is not controlling. The *Buors* decision – and the *Granger v. Canada Employment and Immigration Commission*, [1986] 3 FC 70 decision it relies upon - dealt with circumstances where the Commission had no discretion because of constraints imposed by the *EI Act*. The issues in the present case concerning availability and whether to retroactively reconsider a claim are discretionary in nature. The *EI Act* does not mandate a particular outcome. Further, in *Granger*, the Commission was expressly not seeking retroactive repayment of benefits as it is in the present case.

D. The Member erred in fact and law by concluding that delay and financial hardship are irrelevant when considering whether discretion has been exercised judicially.

These factors are relevant. The fact that the EI scheme creates a statutory time-limit to reconsider a claim does not make the Commission's delay irrelevant. Nor does the

Commission's separate and distinct power to write-off debts make the hardship imposed on the claimant irrelevant when considering whether to exercise discretion to reconsider a claim and impose a debt in the first place.

E. The decision to reconsider the applicant's claim is unreasonable in all the circumstances.

Given the SST's own findings of fact, it is unreasonable to conclude that the claim should be reconsidered, resulting in a substantial overpayment. The Member confirmed that:

- a. the applicant was not at fault;
- b. the applicant was fully honest and cooperative; and
- c. hardship will result from the decision to reconsider the claim.

The decision to reconsider the applicant's claim in these circumstances is unreasonable and unjust.

THIS APPLICATION WILL BE SUPPORTED BY: The SST-AD's record of proceedings.

The applicant requests the Social Security Tribunal to send a certified copy of the following material that is not in the possession of the applicant but is in the possession of the Social Security Tribunal to the applicant and to the Registry:

- a. A list of all material in the applicant's SST file; and
- b. Copies of all material in the applicant's SST file that were not distributed to the parties in the course of the appeal.

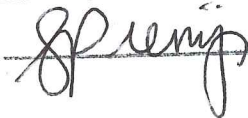
March 10, 2023


 Kevin Love, Counsel for the Applicant
 Community Legal Assistance Society
 Suite 300-1140 West Pender Street
 Vancouver, B.C. V6E 4G1
 P: 604-673-3104
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I HEREBY CERTIFY that the above document is a true copy of the original (as used) out of / filed in the Court on the _____

day of MAR 10 2023 A.D. 20____

Dated this _____ day of MAR 10 2023 20____



**SORAYA PREMJI
 REGISTRY OFFICER
 AGENTE DU GREFFE**