NOTICE OF APPEAL

Court File No.

FEDERAL COURT OF APPEAL

BETWEEN:

WIESLAW KUK

(Appellant)

and

ATTORNEY GENERAL OF CANADA

(Respondent)

APPEAL UNDER section 27(1) of the *Federal Courts Act,* RSC 1985, c F-7

NOTICE OF APPEAL

TO THE RESPONDENT:

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

THIS APPEAL will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court directs otherwise, the place of hearing will be as requested by the appellant. The appellant requests that this appeal be heard at the Toronto location.

IF YOU WISH TO OPPOSE THIS APPEAL, to receive notice of any step in the appeal or to be served with any documents in the appeal, you or a solicitor acting for you must prepare a notice of appearance in Form 341A prescribed by the *Federal Courts Rules* and serve it on the appellant's solicitor or, if the appellant is self-represented, on the appellant, WITHIN 10 DAYS after being served with this notice of appeal.

IF YOU INTEND TO SEEK A DIFFERENT DISPOSITION of the order appealed from, you must serve and file a notice of cross-appeal in Form 341B prescribed by the *Federal Courts Rules* instead of serving and filing a notice of appearance.

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

Date: _____ Issued by: _____

Address of local office:

180 Queen Street West
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TO: ATTORNEY GENERAL OF CANADA

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APPEAL

THE APPELLANT APPEALS to the Federal Court of Appeal from the order of The Honourable Madam Justice McVeigh dated August 23, 2023 (T-186-23)**.** The Federal Court dismissed appellant's application for judicial review made in response to Social Security Tribunal Appeal Division (the "SST") decision to deny EI benefits to appellant. The SST asserts the appellant has committed a wrongful act worthy of a punishment by declining to accept employer's compulsory new term of employment that imposes an experimental Covid-19 medical treatment in the absence of available safety and efficacy trial data.

THE APPELLANT seeks,

orders quashing the decision and directing the Employment Insurance Commission to release to the Appellant the amount of employment insurance to which he is entitled.

THE GROUNDS OF APPEAL are as follows:

1. The Honourable Madam Justice McVeigh failed to observe the breach of procedural fairness by the SST with respect to determining the nature of abrupt suspension of earnings while the appellant was in a period of compliance with the newly imposed employment conditions. According to Employment Insurance Act (S.C. 1996, c.23), sec. 54(u) the commission has a duty to investigate not only the employee but also the employer because the employer committed first violation on October 19, 2021, approximately two weeks before appellant's employment was officially terminated.

   Section 54(u) of the Act states,

"(54) The Commission may, with the approval of the Governor in Council, make regulations.

(u) defining and determining the circumstances in which and the time at which an interruption of earnings occurs;"

2. Employer's failure to communicate abrupt interruption of earnings to employee constitutes a breach of Section 60(1) of the ESA SO 2000 Act. The appellant would have had the opportunity to exercise his rights under the Employment Insurance Act Sec 29 (c)(xi) to "*just cause voluntary leave*" had he been aware of his unexpected earnings suspension. This would allow him to qualify for EI benefits on the grounds *"(xi) practices of an employer that are contrary to law"*. It appears that Honourable Madam Justice McVeigh misapprehended the circumstances and significance of this fact and turned it into the following general response. *"if he wished to pursue constructive dismissal this would be done in a different forum but is not applicable to this EI refusal"*. Arguments above were presented to Federal Court in [48,49,50,67] of appellant's memo of argument and was before the SST.

3. The Honourable Madam Justice McVeigh has disregarded appellant's audio recording evidence on employer's admission to misleading practice of Covid-19 exemption requests that proves breach of good faith beyond reasonable doubt. This argument was presented at all stages of appeal. Justice McVeigh response was broad and not attentive to this evidence. She notes *"arguments directed at sanctioning employer conduct are a matter for another forum."* Contrary to her comment, the Employment Insurance Act sec. 39(1) specifically deals with issues of this nature and the SST and the Federal Court committed a reviewable error in this regard. Section 39 of the Act states,

"(39)(1) The Commission may impose on an employer or any other person acting for an employer or pretending to be or act for an employer, a penalty for each of

the following acts if the Commission becomes aware of facts that in its opinion establish that the employer or other person has

(a) made, in relation to any matter arising under this Act, a representation that the employer or other person knew was false or misleading;"

Employer's actions that result in violation of individual rights whether protected by Provincial, Federal legislations or Canadian Charter of Rights and Freedoms are within the jurisdiction of the Federal Court and not suitable for another forum for determination of EI benefits.

4. The Honourable Madam Justice McVeigh refused to exercise jurisdiction to interpret Provincial and Federal health and hospital regulations raised by the appellant and dismissed it unreasonably.

"I will not address the Applicant's arguments regarding a number of both Federal and Provincial health and hospital acts which relate to his arguments against the mandatory vaccine policy.. Those arguments are not relevant to this determination."

5. The appellant submits that Justice McVeigh erred in fact and law because the Tribunal's decision of alleged 'misconduct' is found on arbitrary set of circumstances and did not take to consideration number of violations of Federal and Provincial Acts outlined below, which affected the outcome of the decision and led to unfair denial of EI benefits. *"Misconduct occurs when an employee's behavior is in violation of the obligations set out in his contract of employment."* [4] per Employment Insurance Agency definition.

6. In July 10, 2020 the Supreme Court of Canada (The "SCC") upheld the constitutionality of Canada's Genetic Non-Discrimination Act ("the GNDA") [1]. It now has been settled that the GNDA and its protections of Canadians' genetic test information are valid across Canada. Because the provisions of the employer's Covid-19 protocol force unvoluntary disclosure of Covid-19 PCR genetic testing, which qualifies as DNA/RNA test to predict disease or transmission risk, it is prohibited, and employers may not demand that information

as a condition of employment or promotion. It is the covid-19 policy that makes the vaccination a new condition of employment [2] thus contravene this Act. The argument on Genetic Non-Discrimination Act was documented in [4c] of Tribunal General Division appeal letter dated November 29, 2022 and presented at the SST GD hearing on November 4, 2022.

7. The rights of individual to bodily autonomy are of fundamental personal importance and may not be forced upon individual involuntarily and without informed consent. Covid-19 injections are considered gene therapies as defined by the American Society of Gene and Cell Therapy ("the ASGCT") "*Because the vaccine introduces new genetic material into cells for a short period of time to induce antibodies, it is a gene therapy as defined by ASGCT*".[3] Due to genetically modified DNA presence, novel Covid-19 therapies are not synonymous with traditional vaccines.

8. Protected rights under the Health Care Consent Act 1996, SO 1996, c 2, Sch A ('the HCCA') section 11(1)(2) state that <u>consent to medical treatment must be voluntary and informed</u>. Because the provisions of employer's mandatory Covid-19 protocol are non-voluntary and yield unavoidable outcome, they are in in direct conflict with the Act and may not give rise to misconduct under the law. This argument was documented in [35,36,37] of appellant's memo of argument of Federal Court dated April 10, 2023.

9. The Honourable Justice McVeigh committed a reviewable error stating "*the employer has an obligation to include mandatory vaccination policies imposed by the province*." and these policies "*impose obligations on all of its employees*". This arbitrary perception is fundamentally flawed. (a) Justice McVeigh misapprehended the objective of the Covid-19 policy, which is not akin to routine and standard health and safety protocols because it imposes <u>medical treatments involuntarily</u> without consideration of the EA and the absence of strong scientific facts. (b) the Covid-19 treatment was not an absolute requirement imposed by

the province (aka public order “Directive#6”) and could not have been as it would conflict with the Charter and provisions of other Canadian laws.

(c) Sec 8.1(5) of Public Hospitals Act, R.S.O. 1990, c. P.4 precisely emphasizes previous point. In the event of a conflict, the ‘HCCA’ and ‘Occupational Health and Safety Act’ provisions including the Charter prevail over Public Health Minister’s orders (i.e., Directive#6)

Directives by Minister
“*8.1 (1) The Minister may issue operational or policy directives to the board of a hospital where the Minister considers it to be in the public interest to do so.”*

Law prevails
“8.1 (5) For greater certainty, in the event of a conflict between a directive issued under this section and a provision of any applicable Act or rule of any applicable law, the Act or rule prevails.”

10. The SST Tribunal and the Federal Court argues that the Covid-19 is akin to a health and safety protocols, even though it is officially described as immunization program. This notion faces two significant legal issues. First, it crosses the legal boundary because it gives the employer the power to substitute medical decisions that otherwise would only be authorized and exercised by medical professionals on an informed and voluntary basis. To appellant’s knowledge there is no such legislation in Canada that would grant such unilateral powers to employers. Second, this would then be subject to offence under the Occupational Health and Safety Act, R.S.O. 1990, c. O.1 section 28 (3), which states the employee is not required to participate in any communicable disease surveillance protocol (i.e., Covid-19 policy elements constitute an infection surveillance, prevention, and control program), unless the employee consents to do so. Furthermore, section 50 (1) of the Occupational Health and Safety Act, which prohibits disciplinary action for involuntary and/or enforced participation in a communicable disease program such as Covid-19; impose any penalty upon employee or coerce an

employee because an employee has acted in compliance with the Act or a regulation made thereunder. This argument was presented in [29, 6, 37, 38, 39] of appellant's memo of argument of Federal Court and at all stages of appeal.

11. The Covid-19 protocol deprived appellant of employment opportunities due to infringement on Canadian Human Right Act R.S.C, 1985, c. H-6. Specifically, on protected grounds of genetic characteristics and medical disability through forced disclosure of genetic Covid tests and vaccination status. The human rights submission was presented at all stages of appeal and was unjustly dismissed as a matter for another forum.

12. The Honourable Justice McVeigh and the Social Security Tribunal ("the SST") relied on provincial [emphasis added] public order Directive#6 to influence their decision, therefore it shall be upon the Federal Court's duty to address questions of fact and law particularly in circumstances when their decision does not align with the Canadian Charter of Rights and Freedoms, provincial or federal legislations discussed in previous sections and conflicts with other tribunal decisions on this matter discussed below.

13. The Honourable Justice McVeigh failed to observe that employer's Covid-19 policy was not in accordance with the principles of fundamental justice because it was *arbitrary*, *disproportionate*, and *overly broad* thus in violation of the Sec. 7 of the Canadian Charter Rights and Freedoms. The employer failed all (3) tests.

    a. *Arbitrary*. The employer failed to explain why the alternatives could not be made available to those who did not want to be vaccinated. The implementation of ***unable*** *vs* ***unwilling*** to accommodate is also arbitrary and without reason. The Covid-19 policy was extremely harsh, unjustified, and harmful according to Team UHN experience survey. It was established on general perception of safety measures lacking supporting evidence because vaccinated people are still very capable of spreading the virus.

b. *Policy directive was unproportionate*. Policies directing the termination of unvaccinated employees were “unreasonable” considering the constantly changing and evolving situation with COVID-19 pandemic.” The employer did not have “just cause” in terminating appellant simply because of his refusal to undergo forced experimental injection, (a) the appellant was teleworking 100% of time and did not pose any health hazard. (b), he was willing to demonstrate his natural immunity to the Corona virus through T-cell testing as documented in his exemption application. Both options would have been a more proportionate and reasonable**.** Furthermore**,** according to Covid-19 natural immunity scientific brief [5] published by WHO on May 10, 2021, states

   i. *“90-99% of individuals infected with the SARS-CoV-2 virus develop neutralizing antibodies”*

   ii. *“Available scientific data suggests that* ***that in most people immune responses remain robust and protective against reinfection for at least 6-8 months after infection (the longest follow up with strong scientific evidence is currently approximately 8 months).”***

c. *Broad* (a) because it failed to consider the circumstances of appellant already working remotely and in low-risk IT environment, while access to many other public facilities and shopping centers did not require proof of vaccination and allowed for testing at the minimum. (b) conflicts with corporate policy on immunization.

The Charter arguments were verbally raised by the appellant at the Federal Court hearing and was also before the SST (see section [c] of appeal letter to GD) dated Aug 4, 2022. However, neither the SST nor Federal Court considered these arguments in any of their decisions. Failure to comment or explain the Charter Challenge Process to the appellant at early stages of the appeal process and not

informing him of the requirement to file a notice in accordance with section 1 of the Social Security Tribunal Regulations 2022, constitutes a defect in procedural fairness. The principles outlined in the Charter take precedence over any of the laws enacted by the federal or provincial government.

14. The Honourable Justice McVeigh failed to observe appellant's submissions on other tribunal decisions that are identical in circumstances and found other claimants not guilty of 'misconduct' for refusing to undergo a Covid-19 medical treatment. This puts the appellant at unfair and biased disadvantage because these decisions constitute sufficiently serious inconsistencies among the same governing bodies. Neither the court considered any arguments from civil cases that found the application of Covid-19 policies unreasonable which are extremely relevant because they have direct impact on deciding misconduct cases. The appellant relies on the following tribunal decisions,

    (a) SST GE-22-1889 "*The individual has the final say in whether they accept any medical treatment including any medical treatment. 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 done 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".* This argument is documented in detail in [60] of applicant's memo of argument and was before the SST and IE commission.

    (b) CAF 2022-125; 2022-162; 2022-078; 2022-109 The Committee concluded that the CAF vaccination policy "*infringed on the rights protected under section 7 of the Charter and that the limitations of these rights were not in accordance with the principles of fundamental justice".*

(c) SST GE-22- 510/2022 SST 281 the employer breached its own Covid-19 protocol provisions by not considering valid exemption requests. This is identical situation to appellant's case and is documented in [42,46] of appellant's memo of argument of Federal Court and was before the SST and IE commission.

The appellant also relies on the following civil case decisions all of which were documented in [62] of appellant's memo of argument of Federal Court and the SST.

(d) Power Workers' Union v. Elexicon Energy Inc, 2022 CanLII 7228 (O.N.L.A) at para 114(i)(ii)

(e) Electrical Safety Authority v. Power Worker's Union 2022 CanLII 343 (O.N.L.A) at para 101

(f) Toronto Professional Fire Fighter's Association, I.A.A.F. Local 3888 v. City of Toronto 2022 at para 274, 315

15. The appellant trusts that Federal Court of Appeal will exercise its jurisdiction to interpret and uphold the laws in question as well as recognize other tribunal and civil case decisions that found the claimants not guilty of 'misconduct' for the same constitutional and provincial legislative reasons.

16. For the reasons above, I find that Honourable Justice McVeigh erred in fact and law and therefore her decision does not legitimately support dismissal of appellant's file. All the above constitute sufficiently serious shortcomings that shall render the decision unreasonable and reviewable on the standard of correctness.

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1. *Genetic Non-Discrimination Act, SC 2017, c 3*. Ottawa, ON: Department of Justice; 2017
2. Island Health v United Food & Comm. Workers Loc 1518, 2023 CanLII 2827 (BC LA), par 89
3. https://asgct.org/publications/news/august-2021/pfizer-vaccine-approved-by-fda
4. https://www.canada.ca/en/employment-social-development/programs/ei/ei-list/fired-misconduct.html
5. https://www.who.int/publications/i/item/WHO-2019-nCoV-Sci_Brief-Natural_immunity-2021.1

September 8, 2023

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