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A-237-23

Court File No.: ~~T-2385-22~~

FEDERAL COURT OF APPEAL

BETWEEN:

ANDRÉ GILLES GIVOGUE

FEDERAL COURT OF APPEAL COUR D'APPEL FÉDÉRALE	
F I L E D	SEP 15 2023
D	É P O S É
OTTAWA, ON	I

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

Notice of Appeal

(Section 27.2 of the *Federal Courts Act*; Form 337, Rule 337 of the *Federal Courts Rules*)

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 place where Federal Court of Appeal ordinarily sits in Ottawa.

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.

June 22, 2023

15 sept, 2023

Elizabeth Silva

Issued by: (Registry Officer)

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Appeal

THE APPELLANT APPEALS to the Federal Court of Appeal from the order of Madam Justice Avvy Yao-Yao Go dated June 19, 2023 in file T-2385-22, October 21, 2022, by which she dismissed the application for judicial review against the decision of the Canadian Human Rights Commission rendered on October 21, 2022 .

The Applicant was made aware of this decision by email on June 19, 2023.

THE APPELLANT ASKS that the appeal be granted in that the decision of the Commission be quashed and that the matter be sent back to the commission for a new assessment;

Or give the judgment and award the process or other proceedings that the Federal Court should have given or awarded;

Or make a declaration as to the conclusions that the Federal Court should have reached on the issues decided by it and refer the matter back for a continuance of the trial on the issues that remain to be determined in light of that declaration.

THE GROUNDS OF APPEAL are as follows:

1. **Improper Legal Basis for Decision:** The foundation of the argument of the union, CHRC Complaints Services division, Human Rights Officer, the Canadian

Human Rights Commission, and the Federal Court judge were reached on an improper basis, by mistakenly using the "narrow health-based definition of genetic tests" contrary to the broader genetic test definition under genetic characteristics protected under the CHRA in their analysis, reports, decision, etc. This erroneous interpretation led to flawed analyses, reports, and decisions that do not align with the legislative intent and the CHRA's broader provisions. This realization further underscores the necessity of a comprehensive investigation into the misinterpretation that formed the basis of the Commission's conclusion.

2. **Erroneous Interpretation of "Genetic Characteristics":** The union, CHRC Complaints Services division, Human Rights Officer, the Canadian Human Rights Commission, and the Federal Court judge made significant errors in their interpretation of the law, particularly regarding the definitions of "genetic tests" and "genetic characteristics." They erred on the interpretation of the "Genetic Characteristics" within the meaning of the Canadian Human Right Act section 3 (3): *"Where the ground of discrimination is refusal of a request to undergo a genetic test or to disclose, or authorize the disclosure of, the results of a genetic test, the discrimination shall be deemed to be on the ground of genetic characteristics."*
3. **Failure to Understand the Appellant's Argument:** The judge did not fully understand the foundation of my argument, raising questions about the thoroughness of the judge's review of the case.

4. **Vindication from Misconduct at the Social Security Tribunal:** A favorable decision or vindication at the Social Security Tribunal General Division (File Number GE-22-3918) on related matters should be considered as evidence that supports my case and call into question the reasonableness of the adverse decision that I am appealing. Furthermore, I have been vindicated from any misconduct, which strengthens the need for a thorough investigation into my case. It's essential to highlight that the adjudicator Marisa's findings in the Social Security Tribunal (SST) decision affirmed that I had not engaged in misconduct by refusing to disclose my vaccination status. Marisa's analysis aligns with my position and underscores the legitimacy of my actions. This not only reinforces the fact that my refusal to disclose my vaccination status was compliant with the Policy but also establishes that it did not constitute misconduct nor non-compliance according to the findings of the SST adjudicator Marisa.

5. **Correctness Standard of Review:** While the standard of review for the Decision is generally "reasonableness," as established by Vavilov and confirmed in Bergeron, this case presents a significant error that warrants reconsideration. Specifically, the human rights officer, decision maker, and judge misinterpreted the "genetic test" definition, using a "narrow health-based definition of genetic tests," overlooking the broader genetic characteristics protected under the CHRA, constituting a fundamental mistake of law. This suggests that a higher standard of review, namely "correctness," should be applied to ensure the decision's validity. According to Vavilov, a reasonable decision must be internally coherent and aligned with both the facts and the law, while also considering the

administrative context, available evidence, and impact on affected parties. The Decision in this case fails to meet these criteria; despite appearing reasonable at first glance, its foundational legal and factual inaccuracies compromise its validity and legality. Given these shortcomings, the "correctness" standard could be considered the appropriate measure for review in this specific case. An otherwise reasonable outcome also cannot stand if it was reached on an improper basis.

- 6. Exceptional Circumstances for Correctness Standard:** The decision should be reviewed on the standard of correctness as there is "persistent discord" on questions on law due to the significant error in the interpretation of the genetic test definition. Due to the improper use of the "narrow health-based definition of genetic tests" in my CHRA complaint and the severe adverse effects I've experienced, my vindication from misconduct and proven exceptional circumstances at the Social Security Tribunal, there is a compelling argument for the application of the "correctness" standard for a fair and lawful review. This need is further emphasized by the flawed decision-making processes and potential for discrimination in this case. In addition, I would like to bring to the attention of the reviewing authorities a significant legal analysis that aligns with my case. In the Reference re Genetic Non-Discrimination Act, 2020 SCC 17, all nine Supreme Court judges unanimously agreed that only sections 1 to 7 of the Genetic Non-Discrimination Act (GNDA) were under review, excluding sections 8 to 10. This unanimous consensus implies that the discussions and analyses pertaining to sections 8 to 10, while concurring or dissenting on the constitutionality and criminality of sections 1 to 7, can serve as "persuasive

authority" guiding future decisions, including in my current case. This legal precedent broadens the scope of protection against genetic discrimination, which contradicts the narrow definition applied in my case. Given these complexities and the significant impact of the policy on me, including differential treatment and the disruption of my existing telework agreement, a comprehensive review under the "correctness" standard appears both urgent and necessary to uphold principles of fairness and justice.

7. **Selective Quoting and Omission of Context:** The Federal Court erred in its judgment by selectively quoting from my complaint and omitting essential context, which led to a misrepresentation of my claims and arguments. This oversight includes ignoring a detailed 23-page document that I sent to my employer, the information contained in my affidavit sent to CHRC's Legal Counsel, Ms. Brittany Tovee on July 7, 2022, as well as subsequent correspondence that expanded on my complaint (refer to Appendix 93B - 222-08-23 - Report for Decision Response Submission by Andre Givogue, page 758, para 5, among others).

8. **Failure to Consider Full Scope of Discrimination Claims:** The Federal Court failed to consider the full scope of my discrimination claims, which are based on genetic characteristics and partial/perceived disability. These claims are detailed in multiple documents and correspondences, and the court's failure to consider them in their entirety undermines the validity of its decision (refer to Appendix 34 - 2021-12-21 - 1400b - How Do You Feel Discriminated Against, page 421-423, among others).

9. Inadequate Consideration of Mandatory Testing: The Federal Court, along with the Human Rights Officer and the Canadian Human Rights Commission, failed to adequately consider the mandatory nature of COVID-19 testing as outlined in the Policy on COVID-19 Vaccination and the Framework on Mandatory COVID-19 Testing. This oversight is particularly significant as the mandatory testing, when coupled with the obligation to disclose vaccination status, amounts to a form of genetic discrimination under the CHRA.

10. Failure to Acknowledge Equivalence of Testing and Vaccination Status:

The court erred by not recognizing that, according to the Framework on Mandatory COVID-19 Testing, refusing to disclose testing status is equivalent to not disclosing vaccination status. This is especially relevant for "employees unable to be vaccinated," as defined in the Policy on COVID-19 Vaccination.

11. Omission of Policy Details: The court failed to delve into the critical details concerning mandatory testing as outlined in various policy documents and frameworks, constituting a significant oversight. This includes ignoring the Duty to Accommodate provisions and the Manager's Toolkit, which emphasize that refusal to undergo or disclose testing is considered non-compliance.

12. Prima Facie Discrimination, Forced PCR Testing and Privacy Violation: I

suffered prima facie discrimination when I was compelled and mandated to undergo a PCR test, disclose the results in the Government of Canada Vaccine Attestation Tracking System (GC-VATS) app via the "Framework on mandatory COVID-19 testing for implementation of the Policy" and placed on leave without

pay through no fault of my own. I contend that this requirement is a violation of my rights and constitutes genetic discrimination given the broader purview of the CHRA protects a range of genetic information obtained through other means.

This was not considered in the decision-making process.

13. Adverse Effects and Differential Treatment: I experienced differential treatment and severe adverse effects due to the policy and framework that led to my suspension. As a result of this unwarranted psychological injury, this has led me to be on medical leave followed by a team of medical health professionals. These adverse effects, along with the potential for discrimination, necessitate a comprehensive review under the "correctness" standard to uphold principles of fairness and justice.

14. Severe Consequences on Well-being, Mental Health and Career: The court's failure to consider these multiple layers of complexity had severe consequences on my well-being, mental health and career prospects, reinforcing the need for a thorough review of the decision.

15. Unjust Characterization and Dismissal as Frivolous: The Commission's and Federal Court's labeling of the case as frivolous, combined with the recognition of exceptional circumstances and differential treatment in related legal proceedings, is both unreasonable and legally flawed. This characterization fails to consider the substantial evidence presented, including, improper use of genetic test definition, emails and affidavits that establish a direct link to discrimination under the CHRA. Despite receiving my detailed submissions, the Commission

prematurely concluded that the complaint was frivolous without adequately addressing key issues such as the mandatory nature of COVID-19 testing (refer to Appendix 93B). The court's dismissal also lacked a comprehensive evaluation of the evidence, undermining the integrity of the legal process. Given the significant discrepancies in understanding the genetic test definition and the broader scope of genetic characteristics, a thorough review is essential to highlight the importance of a comprehensive and accurate evaluation rather than dismissing the case as frivolous.

16. And more generally the Commission failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe; erred in law in making a decision; based its decision on an erroneous finding of facts that it made in a perverse or capricious manner or without regard for the material before it; or acted in any other way that contrary to law.

September 15, 2023


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