Court File No:

FEDERAL COURT

BETWEEN:

Lawrence Gould

Applicant

and

Social Security Tribunal of Canada

Respondent

Notice of Application

TO THE RESPONDENT(S):

A PROCEEDING HAS BEEN COMMENCED 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 in Sydney, Nova Scotia (or, failing that, Halifax, Nova Scotia).

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 prepare a notice of appearance in Form 305 prescribed by the *Federal Courts Rules* and serve it on the applicant's solicitor, or where 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: October 24, 2023

Issued by: _____

(Registry Officer)

1720 - 1801 rue Hollis Street

Halifax, NS B3J 3N4

_____

- **TO:**

  Social Security Tribunal of Canada
  PO Box 9812
  Station T
  Ottawa, ON K1G 6S3

Application

This is an application for judicial review in respect of the decision by *Melanie Petrunia, tribunal member of the Appeal Division of the Social Security Tribunal dated October 4, 2023, file number AD-23-691, refusing the applicant leave to appeal the decision of the General Division of the tribunal with respect to the applicant's eligibility for Employment Insurance benefits. The decision was first communicated to the applicant on October 4, 2023.*

The applicant makes application for:

1. *If the undisputed facts establish beyond reasonable doubt that the finding of misconduct resulting in disqualification from EI benefits alleged to have been perpetrated by the applicant was based upon factual error, then the initial decision to deny benefits ought rightly to be overturned.*
2. *In the alternative, an order setting aside the refusal for leave to appeal so that the appeal may go forward, with the assigned tribunal member to be instructed that previous appeals have been denied based upon factual error and that the pertinent facts directly relating to the alleged misconduct must be considered.*
3. *Any other such corrective action deemed appropriate by this honourable court with the result that the pertinent facts and evidence are taken into consideration within the final decision with respect to the applicant's eligibility for EI benefits, that is, the pertinent facts and evidence will cease to be omitted from consideration.*

The grounds for the application are:

1. *The tribunal member exhibits presumable bias against the applicant based upon the nature of the alleged misconduct, that being that the applicant violated the employer's drug and alcohol policy to which he had previously signed an agreement to observe by refusing the employer's request for a drug and alcohol test following a minor traffic accident while operating a company vehicle. This bias is most conspicuous within the member's mischaracterization/selective reading of the employer's drug and alcohol policy, wherein the most relevant section is expressly removed from consideration and a reference to that section concerning consequences for refusal to test is presented as though it were an indisputable truth when in fact it is taken out of context and is in effect a lie, with the missing context actually rendering the section on refusal to test entirely inapplicable and irrelevant in this matter. This mischaracterization of the section on refusal to test was the focus of the applicant's appeal in which it was explained that the General Division member had committed this crucial error of fact as had Service Canada before him, and in response the Appeal Division member proceeded to perpetuate the very same error of fact within the opening statements of her decision.*
2. *In upholding the allegation that the applicant violated the drug and alcohol policy, the tribunal member willfully disregards that section of the policy entitled Post-Incident Testing which specifically addresses the particular circumstances of the applicant and should logically serve as the focus of any unbiased consideration of this matter.*
3. *The section entitled Post-Incident Testing details various prerequisites that must be fulfilled prior to any request for drug and alcohol testing, including establishment of reasonable cause/observation of the employee for signs of inebriation, immediate submission of the rationale behind the request, and the concurrence of a second supervisor in addition to the attending supervisor that such a request is warranted; that is, no single individual is empowered to make such a request on their own authority. Without this context, the oft-repeated bit concerning consequences for refusal to test, in the absence of any qualification, creates a natural presumption within the mind of the reader that the employer seemingly reserves the right to make such a request at its discretion, when in fact the policy states that this is not so.*
4. *In statements made to Service Canada, the employer's safety officer reveals that he booked an appointment for a drug and alcohol test in the applicant's name prior to leaving his office to attend the scene, knowing only that there had been a minor accident and thus without having observed the condition of the applicant nor having had the opportunity to formulate the slightest notion of reasonable cause/rationale and without the approval of a second supervisor. The subsequent request was then indisputably made in direct violation of the drug and alcohol policy and that section of the policy regarding consequences for refusal of a request made in accordance with the policy is irrelevant.*
5. *Because the request was not made in accordance with the policy, the applicant did not violate the policy by refusing the request, the employer wrongfully dismissed the applicant on those grounds, and the alleged misconduct that disqualified the applicant from receiving EI benefits was predicated upon factual error.*

6. *The tribunal member grudgingly addresses this subject later in her decision presumably only because it was the express focus of the applicant's appeal and in so doing frames the applicant's explanation of the Post-Incident Testing section as a "claim" put forward with regard to seemingly insignificant technicalities within the policy, obfuscating the fact that this is the missing context for the section on refusal to test and the most germane part of the document.*
7. *The safety officer's failure to act in accordance with the policy, thereby disproving the allegation of misconduct against the applicant, is provided fleeting acknowledged and is then summarily dismissed with reference to a precedent which holds that, in a determination of misconduct, the employer's behaviour is not at issue and will not be considered. This precedent should have no bearing upon any decision in this matter because it introduces a logical contradiction into the subject matter. Whether the tribunal member is being dishonest or is genuinely oblivious in this regard, the fact is that the employer's behaviour has already been made an issue and has been taken into consideration within the allegation that the applicant violated the drug and alcohol policy. The presumption that the employer acted in accordance with the policy is inherent within the allegation; otherwise how can it be said that the applicant violated the policy by opting not to cooperate with the employer? In recognition of this fact, the tribunal member would not actually need to "consider" the employer's behaviour, but to "Reconsider" it. The tribunal member cannot be permitted to silence the applicant and preclude all possible means of defending oneself by disregarding any facts or evidence which challenges their presumptions with regard to the employer and thus by extension removing from consideration that part of the drug and alcohol policy which is specifically relevant to the situation. There is only one way in which the allegation of misconduct can be proven or disproven and that is by a full reading of the policy in its entirety and subsequent comparison with the undisputed events of the day in question, including any behaviour on the part of the employer which has a direct bearing upon the determination of misconduct. Anything else is a suppression of the truth.*
8. *In the initial decision by Service Canada to disqualify the applicant from receipt of EI benefits, it is stated that the drug and alcohol policy allows for the employer to request a Post-Incident drug and alcohol test if the employee exhibits signs of impairment. It will be noted that even here the policy is misunderstood and truncated, that they fail to identify additional prerequisites such as the approval of a second supervisor, but more importantly, even by the standard of this incomplete understanding of the policy, the safety officer still fails to act in accordance with the policy, having booked the test before even looking upon the applicant. Clearly, Service Canada had been unaware at this point that the safety officer had booked the test when he did; indeed, his statements in that regard were made during the reconsideration process later. This is the decision that the applicant has contested for the past year and which has been upheld through numerous appeals. It is a decision that was unequivocally based upon factual error. How then can it be permitted to stand?*

This application will be supported by the following material:

1. *A copy of the employer's drug and alcohol policy.*
2. *A transcript of the safety officer's conversation with a Service Canada representative.*
3. *A copy of the rationale for the initial refusal of EI benefits by Service Canada (which was obtained only by way of an ATIP request, as Service Canada curiously withheld it from the SST case file).*

Dated at Sydney, Nova Scotia this 24th day of October , 2023. .

Lawrence Gould

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