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December 23, 2022

Our File No: 21507-6-12-1-22015 / 7804123

BY EMAIL

Richard Lefebvre
Manager, AD & GD-EI Operations
PO Box 9812, Station T CSC
Ottawa, ON K1G 6S3

Dear Mr. Lefebvre,

RE: HICKEY, Joseph v. Canada Employment Insurance Commission (GE-22-2365)

These submissions respond to the Appellant's Notice of Constitutional Question coded as GD-2 (Notice) and his subsequent submissions coded as GD-14. For the following reasons, the Respondent Canada Employment Insurance Commission submits that the Appellant's Notice still does not meet the requirements of subsection 1(1) of the *Social Security Tribunal Regulations* (*Regulations*),[1] as he has failed to outline how sections 30 and 31 of the *Employment Insurance Act* (*EI Act*)[2] violate his rights under the *Canadian Charter of Rights and Freedoms* (*Charter*).[3] Without an outline of submissions as to how the provisions of the *EI Act* violate his *Charter* rights, the Appellant's Notice is not sufficient and his appeal must proceed regularly.

Summary Factual Background

The Bank of Canada notified their employees of the upcoming implementation of a COVID-19 Vaccination Policy (Policy) whereby employees were required to be fully vaccinated or request an exemption.[4] Employees had until November 1, 2021, to comply. The Appellant requested an exemption under the Policy for medical, religious and human rights reasons.[5] This request was denied by the Bank of Canada.[6] The Appellant subsequently refused to comply with the Policy.

The Bank of Canada placed the Appellant on an administrative leave without pay effective November 22, 2021. The Appellant confirmed that he has appealed the employer's decision.

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[1] *Regulations*, SOR/2022-255, ss. 1(1) ["*Regulations*"].
[2] SC 1996, c 23, s. 30 and 31 ["*EI Act*"].
[3] Canadian Charter of Rights and Freedoms, Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.
[4] COVID-19 Vaccination Policy, GD3-324 to 327.
[5] Request for accommodation dated November 12, 2021, GD3-328 to 331.
[6] Correspondence from Bank of Canada to Appellant dated November 19, 2021, GD3-332 to 333.

On April 4, 2022, the Respondent denied the Appellant employment insurance regular benefits because he had voluntarily taken leave from his employment without just cause.[7]On May 3, 2022, the Appellant requested a reconsideration of this decision. He believed the Commission's decision to be erroneous. The Appellant also filed a Notice of Constitutional Question as part of his request for reconsideration.[8] The Respondent maintained its refusal on reconsideration however the reason for the refusal was modified to being suspended from his employment due to his own misconduct.[9]

The Appellant filed a Notice of Constitutional Challenge under ss. 2 and 7 of the *Charter* dated July 15, 2022.[10] A pre-hearing conference was held whereby the Tribunal informed the parties of its mandate. The Appellant informed the Tribunal that he disagreed and asked for an opportunity to file submissions. As such the Tribunal requested submissions from the Appelant on the Tribunal's jurisdiction to decide on the potential infringement of his *Charter* protected rights for the following three elements:

a) The Federal Government's vaccination mandate directive to Crown corporations;
b) The Bank of Canada's COVID-19 Vaccination Policy; and
c) The Bank's decision to deny the Appellant's request for an accommodation.[11]

In response to this request, the Appellant provided the submissions coded as GD-14.

A. The applicable requirements under section 1 of the *Regulations*

As of December 5, 2022, constitutional appeals at the Social Security Tribunal are governed by section 1 of the *Regulations*. Section 1 provides the criteria that must be met in order for a notice to be sufficient. The Appellant must identify the provision(s) that will be challenged, the material facts relied on to support the constitutional challenge, and a summary of the legal argument to be made in support of the constitutional challenge.[12] The individuals claiming a violation of their *Charter* rights must identify the provision they wish to put at issue and provide any submissions in support of the alleged constitutional issue.[13] The submissions must be sufficiently precise to display and outline a *Charter* argument and how they support the *Charter* issue raised. The Appellant need not prove their case now, but they must at a minimum provide some bare facts an explanation that shows how the legislative provision(s) at issue may infringe their *Charter* rights.[14] Section 1 of the *Regulations* imposes a higher threshold than the old paragraph 20(1)a) of the previous *Regulations*.

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[7] Decision letter from Service Canada to Appellant dated April 4, 2022, GD3-26.
[8] Request for reconsideration and Notice of Constitutional Question, GD3-28 to 39.
[9] Reconsideration decision dated June 17, 2022, GD3-42 to 43.
[10] Notice of Constitutional Question, GD2-7 to 11.
[11] Letter from the Tribunal dated October 19, 2022.
[12] *Regulations*, supra note 1.
[13] *Minister of Employment and Social Development v SR and DR*, 2018 SST 786, at para 24 [*SR and DR*]; *ZB v Canada Employment Insurance Commission*, GE-20-309, at para 7 – 8 [*ZB*] Tab 1.
[14] *ZB*, *supra* note 13, para 28.

B. The Appellant's Notice does not outline how his *Charter* rights have been infringedby sections 30 and 31 of the *EI Act*

i. The Tribunal cannot hear constitutional questions beyond its subject matter expertise

The Appellant's contentions rest with his former employer's vaccine policy, its application and their denial of his request for accommodation, and the Federal Government of Canada's COVID-19 vaccine mandates. The Tribunal can only consider *Charter* issues that arise in the course of a matter within the jurisdiction of the Tribunal.[15] The Tribunal cannot determine the constitutional validity of the federal mandate, his former employer's policy, or the Bank of Canada's denial of the Appellant's accommodation request. These matters are more appropriately dealt with by the Appellant's union, the appropriate labour board, or human rights commission.

There is no question that the legislature granted the Tribunal the jurisdiction to hear constitutional questions and determine whether a provision in the *Department of Employment and Social Development Act* (*DESDA*),[16] the *EI Act*, *Canada Pension Plan*,[17] and the *Old Age Security Act*[18] violates an individual's *Charter* rights. This is consistent with the findings in the *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)*[19] trilogy and *R. v. Conway*[20] that found that when thelegislature grants a Tribunal the authority to hear questions of law, this encompasses questionsrelating to the *Charter*. The Tribunal is not a superior court and does not have the same ability ofa court to hear *all* questions relating to the *Charter*. The Tribunal can hear constitutional questions
that are *properly* before it.[21] Meaning, the constitutional questions the Tribunal can hear must pertain to the benefits schemes before it. Moreover the Tribunal must already have jurisdiction over the whole of the matter before it namely, the parties, subject matter and the remedy sought.[22] The Tribunal does not have jurisdiction over the Bank of Canada and its policy. The Tribunal cannot declare the Bank of Canada's policy unconstitutional.

The Appellant's assertion that the *DESDA* permits the Tribunal to hear *all* questions of law ignores limits imposed by the *DESDA* and the *Regulations*. However, "the power to decide questions of law will not always imply the power to apply legal principles beyond the tribunal's enabling statute… statutory creatures are necessarily limited by the boundaries placed upon them by legislature."[23] The authority to hear all questions is not an unfettered authority and the Tribunal is

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[15] *Canada (Human Rights Commission) v Warman*, 2012 FC 1162; *Nova Scotia (Workers' Compensation Board) v Martin*; *Nova Scotia (*Worker's *Compensation Board) v Laseur*, 2003 SCC 54, para 45 ["*Martin*"]; *Tranchemontagne v Ontario (Director, Disability Support Program)*, 2006 SCC 14, [2006] 1 SCR 513, para 24 ["*Tranchemontagne*"].
[16] SC 2005, c 34 ["*DESDA*"].
[17] RSC, 1985, c C-8.
[18] RSC, 1985, c O-9.
[19] [1991] 2 SCR 5 ["*Cuddy Chicks*].
[20] *R v Conway*, 2010 SCC 22 at para 6.
[21] *Cuddy chicks*, *supra* note 19.
[22] *Cuddy Chicks*, *supra* note 19.
[23] *Tranchemontagne*, *supra* note 15, para 27.

limited in some of the questions it can decide.

To this point, the Appellant relies on the language in subsection 64(1) of the *DESDA* that grants the Tribunal the authority to hear any questions of law necessary for the disposition of an application before it. However, subsections 64(2) and (3) limit the Tribunal's authority to hear questions relating to certain aspects of the *Canada Pension Plan* and the *EI Act*. This assertion also ignores that subsections 64(2) and (3) provide limits on what questions the Tribunal can decide in the context of the CPP and section 90 of the *EI Act*. Moreover, the Supreme Court in *Martin* indicates that the power to subject a provision to *Charter* scrutiny will only be found where the Tribunal has jurisdiction to decide questions of law *relating to that specific provision*. The *Regulations* impose limits on the constitutional questions that can be decided by the Tribunal. Subsection 1(1), the Notice provision, permits claimants to challenge the operability, validity, or applicability of any provision of the *CPP*, *EI Act*, of *OAS Act*, or the *DESDA*. The *Regulations* circumscribe the Tribunal's jurisdiction to hear constitutional issues relating only to its enabling statute and the programs that are properly before it.[24]

The Appellant relies on *Syndicate des métallos, section locale 2008 c Procureur général du Canada*,[25] to stand for the proposition that the Tribunal can decide on the validity of his former employer's vaccine policy. This argument ignores the fact that the Tribunal is limited to hearing matters regarding the operability, applicability, or validity of provisions from the *EI Act*, *CPP*, and *OAS*, it is not a superior court and has limits on its authority to hear all constitutional questions.[26]

The Appellant's employer's vaccine policy and finding he could not be accommodated do not fall within the purview of the Tribunal's jurisdiction. The appropriate avenue to challenge his former employer's vaccine policy and denial of his accommodation request is either through his union's grievance process, or through the appropriate labour board or human rights commission. The Appellant has indicated that he has already initiated the process to challenge this employer's policy and denial of his accommodation request.[27] By asking the Tribunal to similarly decide these issues, the Appellant is asking the Tribunal to duplicate proceedings which undermines the principles of finality and fairness in litigation, which may be perceived as a collateral attack on the other proceeding, and may ultimately amount to an abuse of process.[28]

The Appellant's arguments hinge on the determination of whether his employer's policy is unconstitutional, as his Notice does not outline a valid *Charter* argument pertaining to the operability, validity, or applicability of an *EI Act* provision, his Notice should be dismissed.

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[24] *Cuddy Chicks*, *supra* note 19.
[25] *Syndicat des métallos, section locale 2008* c *Procureur général du Canada*, 2022 QCCS 2455, of note the Superior Court of Quebec has ruled that provisions that imposed the vaccination, although they infringed the liberty and security of the person, did not violate section 7 of the Canadian Charter of Rights. Even if section 7 of the Charter were to be found to have been violated, this violation would be justified as being a reasonable limit under section 1 of the Charter.
[26] *Cuddy Chicks*, *supra* note 19.
[27] *Cuddy Chicks*, *supra* note 19.
[28] *Douglas/kwantlen Faculty Assn. v Douglas College*, [1990] 3 SCR 570.

ii. The Notice does not outline a violation of subsection 2(a) *Charter* rights

The Appellant has not indicated how sections 30 and 31 of the *EI Act* infringe his subsection 2(a) *Charter* rights. Simply asserting a *Charter* right does not amount to a violation. To show a violation of his subsection 2(a) rights, the Appellant must demonstrate:

1. He has a sincerely held belief or practice with a nexus to religion (or secular morality); and
2. That the impugned provision interferes with his ability to act in accordance with those beliefs in a manner that is more than trivial or insubstantial.[29]

The Notice does not indicate what religious beliefs the Appellant holds and how sections 30 and 31 interfere with his ability to act in accordance with his religious beliefs or beliefs that are grounded in moral secularity. An outline of a valid *Charter* argument cannot be ascertained without the particulars, or the facts that create a nexus between the impugned provisions and his *Charter* right. The Appellant's Notice fails to provide the facts upon which he claims his subsection 2(a) right has been violated.

It is unclear how sections 30 and 31 of the EI Act could be capable of interfering with the Appellant's ability to act in accordance with his profoundly held personal beliefs. This section neither constrains the Appellant's right to hold or express any particular beliefs, nor does it interfere with any religious practices or ask him to do anything contrary to his beliefs.

iii. Section 7: Life, Liberty, and Security of the Person

The Appellant has not outlined how his right to life, liberty, or security of the person has been violated because of the alleged vagueness of sections 30 and 31 of the *EI Act*. Finding a violation under section 7 is a two-part test wherein the Appellant must show:

1. His right to life, liberty, or security of the person has been violated; and
2. The denial of this right is inconsistent with the principles of fundamental justice.[30]

The Appellant has not outlined which of his rights to life, liberty, or security of the person has been violated by sections 30 or 31 of the *EI* Act. Instead, he has only asserted his employer's vaccination policy has violated his section 7 rights. Otherwise, the Appellant asserts that sections 30 and 31 of the *EI Act* offend the principles of fundamental justice because they are unconstitutionally vague. The Appellant does not have an independent right to the fundamental freedoms outlined in the second step of the section 7 test. Without identifying whether it is his right to life, liberty, or security of the person that is engaged by sections 30 and 31, and how, the

[29] *Penner v. Niagara (Regional Police Services Board)*, 2013 SCC 19, paras 89, 91.
[30] *R v Malmo-Levine*, [2003] 3 SCR 571 at paragraph 83; *R v White*, [1999] 2 SCR 417, para 38; *R v S(RJ)*, [1995] 1 SCR 451 at page 479.

Notice fails to provide the necessary information to ascertain what arguments the Appellant intends to make.

Further, vagueness can also be raised at the section 1 stage of the *Charter* analysis.[31] However, the Appellant has only asserted a right not to be subjected to vague laws without identifying which right under section 7 has been engaged and provided submissions as to how, or if he intends to raise his arguments about vagueness under section 1. The latter assumes that a violation has been found at the section 7 stage which then the Tribunal should turn its attention to the section 1 analysis. This cannot be the case as the Appellant has not provided an outline of which section 7 guarantee(s) have been violated by sections 30 and 31, and how.

Any perceived deprivation of liberty or security that the Appellant feels is a result of his own choices and lacks the sufficient causal connection to government action required to engage section 7 of the *Charter*. It is unclear how sections 30 and 31 of the *EI Act* violate the Appellant's life, liberty or security of the person. Sections 30 and 31 of the *EI Act* do not in any way constrain the Appellant's right to refuse receiving a COVID-19 vaccine. Neither does the legislation require the COVID-19 vaccination. The Appellant's argument is misplaced.

Conclusion

The Appellant's contentions rest with his employer's vaccine policy and its application of that policy. The validity of this policy cannot be addressed by the Tribunal. The Appellant has not provided a sufficient notice pursuant to subsection 1(1) of the *Regulations* because he has failed to outline a constitutional challenge relating to the *EI Act* that can be heard by the Tribunal. The constitutional appeal should be dismissed and the matter should proceed regularly.

The Appellant is not copied on this letter because we understand the Tribunal forwards all documents. Should you have any questions or concerns, please do not hesitate to contact me.

Dani Grandmaître
Counsel for the Commission

[31] *Canada (Attorney General) v JTI-Macdonald Corp.*, 2007 SCC 30, *supra*, at paragraphs 77-79; *Irwin Toy Ltd. v Quebec (Attorney General)*, [1989] 1 SCR 927.

TAB 1

Tribunal File Number: GE-20-309

BETWEEN:

Z[redacted] B[redacted]

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Charlotte McQuade

HEARD ON: N/A

DATE OF DECISION: July 4, 2020

INTERLOCUTORY DECISION

[1] Z[redacted] B[redacted] (the "Claimant") raised a Charter issue in her Notice of Appeal. To pursue a constitutional challenge, the Claimant must first file a notice with the Social Security Tribunal ("Tribunal") which meets the requirements of paragraph 20(1)(a) of the *Social Security Tribunal Regulations* (SST Regulations). The Claimant's spouse, a licensed paralegal and the Claimant's representative, filed a notice[1] but it does not meet the requirements to raise a constitutional issue. The notice does not specifically identify any provisions of the *Employment Insurance Act* (EI Act) or *Employment Insurance Regulations* (EI Regulations) relevant to the issue under appeal. The submissions do not relate to properly identified provisions in issue and do not contain sufficient facts or explanation to raise the outline of a Charter argument. The Claimant will be permitted until July 24, 2020 to provide an amended notice which meets the requirements of paragraph 20(1)(a) of the SST Regulations, failing which her constitutional claim will be dismissed and the appeal will proceed on its merits. The Claimant only need file this amended notice with the Tribunal.

OVERVIEW

[2] The Claimant's six-year old daughter has an autism diagnosis. She fractured her arm and required surgery. The Claimant's daughter's constant movements had to be monitored post-surgery so the healing of the fracture was not disrupted. The Claimant took a leave from work to care for her daughter while she recovered. The Claimant applied for six weeks of family caregiver benefits for a critically ill child on October 19, 2019. To be eligible for caregiver benefits for a critically ill child, a medical doctor or nurse practitioner must issue a certificate saying the child is a "critically ill child" and requires care or support of one or more of their family members. [2] A "critically ill child" is defined as a person under 18 whose baseline state of health has significantly changed and whose life is at risk as a result of an illness or injury. [3] The Claimant provided a medical certificate that said her daughter's baseline health had significantly

[1] GD17.
[2] Section 23.3(1) of the *Employment Insurance Act.*
[3] Subsection 1(6) of the *Employment Insurance Regulations*.

changed and she required care of a family member. However, the certificate said the Claimant's daughter's her life was not at risk as a result of the illness or injury.[4]

[3] The Canada Employment Insurance Commission (the "Commission") denied the Claimant's request for caregiver benefits for a critically ill child because the medical certificate submitted did not indicate that her child was critically ill or injured. [5] The Claimant requested that the Commission reconsider its decision and provided further medical information to the Commission. However, that new information still did not confirm that the Claimant's daughter's life was at risk as a result of her illness or injury. [6] The Commission affirmed its initial decision upon reconsideration. [7] The Claimant appealed the reconsideration decision to the Tribunal. In her Notice of Appeal, the Claimant raised a Charter issue. [8]

[4] To put the constitutional validity, applicability or operability of the EI legislation in issue, a notice must be filed by the Claimant that complies with paragraph 20(1)(a) of the SST Regulations. The Claimant's representative was alerted at a pre-hearing conference held on February 28, 2020 and by letter dated February 28, 2020, to this requirement. The Claimant's representative filed a notice with the Tribunal on April 22, 2020. [9] The Commission filed submissions with the Tribunal on May 28, 2020, arguing that the notice does not satisfy the criteria to raise a constitutional issue.[10] The Commission seeks that the constitutional portion of this appeal be dismissed, or alternatively that the Tribunal either direct the Claimant to file a sufficient notice within a permitted time or that the Tribunal summarily dismiss this appeal. The Claimant's representative then filed further submissions on June 30, 2020,[11] responding to the Commission's submissions.

[5] I have decided, for the reasons set out below that the Claimant's notice is not sufficient to raise a constitutional issue. However, I will permit the Claimant until July 24, 2020 to provide an amended notice.

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[4] GD3-19.
[5] GD3-24.
[6] GD3-40.
[7] GD3-58.
[8] GD2.
[9] GD17.
[10] GD21.
[11] GD22.

ISSUE

[6] The only issue I must decide at this stage is whether the Claimant's notice raises a constitutional issue that meets the requirements of paragraph 20(1)(a) of the SST Regulations.

ANALYSIS

[7] The Tribunal cannot decide Charter issues without a proper understanding of the factual context, which led to the alleged breach, or infringement of a claimant's rights and a focus on the specific part of the legislation which caused it. [12] For this reason, claimants who intend to raise Charter issues in their appeals have to file a notice with the Tribunal stating the section of the legislation at issue and brief submissions in support of the issue raised. [13] If the Tribunal is satisfied that a claimant has laid this foundation, they then must file a more detailed document (record), which includes evidence, submissions, and authorities they intend to rely on.

[8] Paragraph 20(1)(a) of the SST Regulations does not impose an unduly high burden on claimants who seek to challenge the constitutionality of some aspect of benefits-conferring legislation.[14] However, I have to reject a claimant's notice if they do not identify the law they intend to put at issue or if they do not outline a consistent constitutional argument. [15] It is not sufficient for the Claimant to make indirect generalized references to the Charter without further clarification. [16]A claimant's submissions must be sufficiently specific to permit a decision-maker to at least see the outline of a constitutional argument. [17]

Does the Claimant's Notice raise a constitutional issue?

[9] No. The Claimant has not identified relevant provisions of the EI Act or EI Regulations and the Claimant's submissions do not contain sufficient facts or explanation to provide the outline of a constitutional argument.

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[12] The Supreme Court of Canada explained this general principle in *Mackay v Manitoba*, [1989] 2 SCR 357).
[13] Paragraph 20(1)(a) of the *Social Security Tribunal Regulations*.
[14] *R. S. v. Minister of Employment and Social Development*, 2017 CanLII 84970
[15] *Canada (Attorney General) v Stewart*, 2018 FC 768.
[16] *Langlois v Canada (Attorney General)*, 2018 FC 1108.
[17] *Minister of Employment and Social Development v. S. R. and D. R.*, 2018 SST 786 (CanLII).

The Claimant has not identified specific relevant provisions of the EI legislation that are at issue [18]

[10] The Claimant has not identified any specific relevant provisions of the EI Act or EI Regulations as being in issue:

[11] The Claimant identifies the following provisions as being issue:

> "sections 12, (children referred to in subsection) sections 23(1) or 152.05(1) of the Act and 38 (1) of the Regulations; Canadian Human rights Act. Specifically, it is a prohibited discriminatory practice under section 3(1) have been interpreted in such a way in this decision so they violate the Canadian Human Rights Act? in this case there is a discriminatory practice in the provision of services by preferring one disability over another. Also The Canada Health Act."[19]

[12] The Commission submit that it is impossible for it to make a proper response because the Claimant does not state the specific section of the EI Act that is alleged to be unconstitutional and does not identify any of the legally relevant provision(s) that govern whether the Claimant is eligible for the family caregiver benefits for critically ill children. The Commission points out that all of the provisions identified, except for section 12 of the EI Act, relate to the payment of parental benefits, which the Claimant had not claimed. Subsection 152.05(1) of the EI Act applies to self-employed persons seeking parental benefits but the Claimant was employed. The Commission submits that the Claimant has also identified the *Canada Health Act* and *Canadian Human Rights Act* (CHRA) as being at issue but the Tribunal is without jurisdiction to hear a constitutional challenge concerning that legislation.

[13] I find the Claimant has not complied with the requirement to set out provisions at issue. The issue under appeal is whether the Claimant is entitled to caregiving benefits for critically ill children (Section 23.2 of the EI Act). The Claimant has not identified any provisions *relevant* to the issue of caregiving benefits for critically ill children. While I can infer the Claimant appears to be trying to put in issue, certain provision(s) relating to caregiver benefits for critically ill

[18] Subparagraph 20)1)(a)(i) of the SST Regulations.
[19] GD17-5.

children, since no references have been made to those provisions, it is not clear whether the Claimant is challenging specific subsections of section 23.2 of the EI Act or intends to challenge the definition of "critically ill child" set out in subsection 1(6) of the EI Regulations. It is not for the Tribunal to speculate which provisions are to be put in issue. The Claimant has referenced parental benefits provisions in her submissions but those provisions relate to benefits to care for a newborn child (or children) or a child (or children) placed for the purposes of adoption. While they relate to a parent providing care, those benefits are not the same benefit as the caregiving benefits for critically ill children and are not relevant in this appeal.

[14] The Claimant has also identified legislation (the *Canada Health Act* and the *CHRA*) as being at issue. The Tribunal has no jurisdiction to make any ruling regarding the constitutional validity, applicability or operability of any legislation other than the EI Act and EI Regulations.[20] The Tribunal can only consider constitutional arguments concerning the legislation that is relevant to this appeal, being the EI legislation.

[15] The onus is on the Claimant to clearly identify the specific provision(s) of the EI Act and/or EI Regulations in issue and those provision(s) must be relevant to the issue under appeal. The Claimant is directed to file an amended notice that clearly identifies the relevant provisions of the EI Act and/or EI Regulations that are in issue.

The Claimant's submissions do not raise the outline of a constitutional issue [21]

[16] The submissions do not relate to properly identified provisions in issue and do not contain sufficient facts or explanation to raise the outline of a constitutional argument. The purpose of the notice required under section 20(1)(a) is for the Claimant to identify specific provisions of the EI Act and/or EI Regulations that she alleges contravene the Charter and to provide submissions that provide an outline of a consistent Charter argument.

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[20] Section 64(1) of the *Department of Employment and Social Development* Act restricts the Tribunal's jurisdiction to deciding "any question of law or fact that is necessary for the disposition of any application made under this Act." Subsection 20(1) of the *Social Security Tribunal Regulations* sets out the criteria for the notice to be filed to raise a constitutional issue only for that legislation under its jurisdiction, being the Canada Pension Plan, the Old Age Security Act, the Employment Insurance Act, Part 5 of the Department of Employment and Social Development Act or the regulations under any of those Acts.

[21] Subparagraph 20)1)(a)(ii) of the *Social Security Tribunal Regulations*.

[17] The Claimant raises many arguments in her submissions. However, the only argument relevant to the section 20(1)(a) notice is the argument that the Claimant's equality rights under section 15(1) of the Charter have been breached. In that regard, the Claimant's arguments are:

(a) The case has already been won because the amendments to the EI legislation as a result of Covid-19 do not require a medical certificate to be provided so the restriction about being "critically ill" no longer applies;

(b) The Claimant had just cause for voluntarily leaving her employment to care for her daughter as there was no one else to care for her;

(c) The Commission has violated the *Canada Health Act* because a large amount of money was saved by the Provincial Health care system than would have been paid out in EI benefits. The Claimant asserts because she stayed home, her daughter did not require further expensive health care.

(d) El payments for family caregivers are a "service customarily available to the general public" within the meaning of section 5 of the CHRA. The Commission engaged in a discriminatory practice in the provision of that "service" when interpreting the legislation in a manner to deny her benefits.

(e) The Claimant's equality rights under subsection 15(1) of the Charter[22] have been breached.

[18] The Claimant was asked to file a notice relating to the Charter issue, not all issues.

[19] The Claimant's first two arguments concerning amendments to the EI legislation and voluntarily leaving of employment have nothing to do with the constitutional validity, applicability or operability of the EI Act or EI Regulations. I will not rule on the relevance or applicability of those arguments at this preliminary stage as they go to the merits of the case. However, I find they do not raise a constitutional issue.

[22] *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, c 11).

[20] The Claimant's argument concerning the *Canada Health Act* also does not raise a constitutional issue. I have no jurisdiction to make any type of ruling, constitutional or otherwise concerning the *Canada Health Act*. [23] As above, I am limited to considering the constitutional validity, applicability or operability of the EI Act or EI Regulations in the context of the issue that is under appeal.

Section 5 of the CHRA

[21] The Claimant submits that the Commission engaged in a discriminatory practice in the provision of services (EI benefits) contrary to section 5 of the *Canadian Human Rights Act* ("C.H.R.A.") when the Commission interpreted the legislation in such a way that the Claimant was denied caregiver benefits for critically ill children. The Claimant appears throughout her submissions to be confusing the C.H.R.A. and the Charter and treating them as if they are the same legislation, which they are not.

[22] I do acknowledge the Claimant's C.H.R.A. argument and will seek submissions from the parties at a later date concerning whether the Tribunal has jurisdiction to make a ruling as to whether section 5 of the CHRA has been contravened and if so, whether a contravention has occurred. However, the Claimant's argument that the Commission engaged in a discriminatory practice in the provision of services contrary to section 5 of the C.H.R.A. is not a constitutional argument and does not raise a constitutional issue.

Subsection 15(1) of the Charter

[23] The Claimant asserts that the caregiver benefit provisions in the EI legislation discriminate against persons on the basis of disability or perceived disability contrary to subsection 15(1) of *Charter.*

[23] Section 64(1) of the *Department of Employment and Social Development Act*. Subsection 20(1) of the Social Security Tribunal Regulations.

[24] A person claiming a violation of subsection 15(1) of the *Charter* must establish differential treatment under the law that constitutes discrimination on the basis of an enumerated or analogous ground. [24]

[25] Discrimination under section 15 must be analyzed according to a two-part test:[25]

> (1) Does the law create a distinction based on an enumerated (listed) or analogous (implied) ground?
>
> (2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?

[26] In determining whether a distinction is discriminatory, the focus is on whether an impugned law negatively affected a claimant's "human dignity". To help guide this analysis, a contextual analysis is required. Factors to be considered include: (1) any pre-existing disadvantage suffered by the group; (2) the degree of correspondence between the impugned law and the actual needs, circumstances, and capacities of the group; (3) whether the law or program has an ameliorative purpose or effect; and (4) the nature of the interest affected. [26]

[27] Under a section 15(1) claim, the Claimant must first establish that the law treats her differently based on an enumerated ground under section 15(1) of the Charter or an analogous ground. She must then show that the distinction the law makes between herself and others discriminates by perpetuating disadvantage or prejudice to the group she is identifying with, or by stereotyping it. If the Claimant can establish that the provisions in question do violate section 15(1) of the Charter, the burden then turns to the Commission to argue that the violations are justified in a free and democratic society under section 1 of the Charter.

[24] *Law v. Canada (Minister of Employment and Immigration)* [1999] 1. S.C.R. 497.
[25] *Withler v Canada (Attorney General)* 2011 SCC 12.
[26] *Law v. Canada (Minister of Employment and Immigration)* [1999] 1. S.C.R. 497.

[28] The Claimant need not prove her section 15(1) argument at this preliminary stage. However, the Claimant must identify at least some bare facts and explanation concerning the test set out above such that I can see an outline of an argument that her section 15 Charter rights have been violated. I am not satisfied the submissions the Claimant has provided in her notice do that.

[29] The Claimant asserts differential treatment on the basis of disability or perceived disability. The Claimant has not made clear, however, whether she is arguing that the provisions in question discriminate against her or discriminate against her child. This needs to be clarified, given the Claimant is the applicant for benefits. Further, the provisions relating to caregiver benefits for critically ill children do not, on their face distinguish between any specific type of illness or injury. Rather, the distinction is based on whether the child's illness or injury is life threatening or not. If this is the distinction the Claimant is suggesting (life threatening disability versus non-life threatening disability), she has not said that. It is not for the Tribunal to presume what the Claimant is arguing. The Claimant must provide a coherent explanation in her notice of as to how the law treats her differently and on what enumerated or analogous ground.

[30] The Claimant also has not clearly explained how the purported distinction is discriminatory. The Claimant asserts that she was denied equal benefit of the EI Act in comparison with others. However, that alone is insufficient to establish the outline of a discrimination argument: "equality is not about sameness and s.15(1) does not protect a right to identical treatment." [27]

[31] The Claimant does attempt to address the four contextual factors set out in the *Law* case. The Claimant asserts that in the context of unemployment insurance, there has been a past and long history of disadvantages, stereotyping, vulnerability and prejudice caused by the definition of disability for the compassionate care requirement. She has provided no facts to support that allegation. She says that in the present case, the consequences are severe and are overly localized for persons with disabilities. I am unclear what the Claimant means. As above, there is no definition of "disability" in the caregiver benefits for critically ill children provisions. What distinguishes eligibility is not the type of illness or injury but whether the medical evidence certifies that the child's illness or injury puts the child's life at risk. The Claimant has also not

[27] *Withler v Canada (Attorney General)* 2011 SCC 12 at paragraph 31.

clearly explained how the distinction she alleges is discriminatory. In other words how does the purported distinction create a disadvantage to the group she is identifying with, by perpetuating prejudice or stereotyping.

[32] The Claimant's argument is not specific or clear enough to provide a consistent argument that her section 15(1) rights under the Charter have been violated. I acknowledge the Claimant is making submissions about a complex issue and for that reason, I will give her an opportunity to amend her notice.

[33] As above, the Claimant is directed to file an amended notice which explains how the provisions in issue treat her differently and on what enumerated or analogous ground. The submissions must provide sufficient facts and argument to explain how the distinction she alleges is discriminatory.

CONCLUSION

[34] The Claimant's notice is insufficient to raise a constitutional issue. The Claimant is permitted until July 24, 2020 to provide an amended notice, in accordance with the findings in this Interlocutory Order, failing which her Charter claim will be dismissed.

[35] To be clear, the Claimant's amended notice is to only address her Charter claim. The Claimant's Charter notice must identify the specific provision(s) of the EI Act and/or EI Regulations in issue and those provision(s) must be relevant to the issue under appeal. The Claimant is directed to provide submissions that relate to the identified provisions in issue and the Claimant must clearly explain her section 15(1) Charter argument in her submissions. In that regard, she must identify how the provisions in issue treat her differently and on what enumerated or analogous ground. As well, she must explain how the distinction she alleges is discriminatory.

Charlotte McQuade

Member, General Division - Employment Insurance Section