Court File No. T-800-23

FEDERAL COURT

BETWEEN:

REBECCA ABDO

Applicant

-and-

ATTORNEY GENERAL OF CANADA

Respondent

APPLICANT'S MEMORANDUM OF FACT AND LAW

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PART I: STATEMENT OF FACT

OVERVIEW

1. The Applicant, Rebecca Abdo, seeks judicial review of a decision of the General Division of the Social Security Tribunal ("SST" or "Tribunal"). On November 23, 2022, General Division member Bret Edwards (the "Member") issued his decision (the "Decision") denying Mrs. Abdo's appeal of the decision of the Canada Employment Insurance Commission (the "Commission") to deny her Employment Insurance ("EI") benefits on the basis of misconduct. Leave to appeal to the Appeal Division of the SST was denied.

2. Mrs. Abdo submits the Decision is unreasonable and therefore requests this Court quash the Decision, declare that she did not lose her job due to her own misconduct, and order that she receive EI benefits.

BACKGROUND

3. Mrs. Abdo was employed by Canadian Blood Services ("CBS") between May 13, 2011 and November 16, 2021.

4. On September 3, 2021, CBS implemented a workforce COVID-19 Vaccination Policy (the "Policy"), which stated that all employees were required to receive the COVID-19 vaccines unless unable due to "human rights grounds (e.g. religious reasons)".[1] The Policy further stated, "*[I]n **all** cases **requiring** workplace accommodation, Canadian Blood Services **will** accommodate, in accordance with the relevant human rights legislation and the Human Rights in the Workplace - Discrimination Policy, to the point of undue hardship*".[2]

5. On September 28, 2021, Mrs. Abdo submitted a request for accommodation, explaining she was unable to be vaccinated on the basis of her sincerely-held religious beliefs. Mrs. Abdo also included a supporting letter from a pastor, as requested.[3]

[1] Affidavit of Rebecca Abdo ("Abdo"), Ex A, Applicant's Record ("AR") at 46.
[2] Abdo, Ex A, AR at 47. [Bold emphasis added.]
[3] Abdo, Ex B, AR at 52.

6. On October 8 and 15, 2021, Mrs. Abdo met with Michelle Germaine of CBS's People, Culture and Performance department to discuss Mrs. Abdo's request for accommodation in greater detail.

7. On October 22, 2021, CBS denied Mrs. Abdo's request for accommodation on religious grounds because it "concluded that the reason for [her] refusal to be vaccinated is due to a personal belief and not a belief **imposed** by [her] religion". CBS reasoned that "nothing in the information Mrs. Abdo provided suggested that becoming fully vaccinated is **prohibited** by [her] religion"; and "[t]he spiritual leader of the Christian denomination has not demonstrated a legitimate religious basis for exemption from vaccine mandates in any established stream of Christianity". CBS stated, "**we are not disputing that your individual religious beliefs are strong**". CBS also asserted it would not be able to accommodate Mrs. Abdo in any event.[4]

8. On November 1, 2021, Mrs. Abdo was placed on a 10-day unpaid leave of absence. On November 16, 2021, Mrs. Abdo's employment was terminated. CBS recorded the termination as "dismissal with cause".[5]

9. On December 20, 2021, Mrs. Abdo applied for EI benefits, which the Commission denied on or about April 11, 2022, citing as its reason that Mrs. Abdo had lost her employment as a result of her own "misconduct".

10. On May 11, 2022, Mrs. Abdo applied to the Commission for reconsideration of the decision to deny her EI benefits. On July 10, 2022, the Commission maintained its decision to deny Mrs. Abdo EI benefits on the basis of misconduct.[6]

11. On August 12, 2022, Mrs. Abdo appealed the decision of the Commission to the General Division of the SST.[7] On November 23, 2022, the General Division of the SST dismissed Mrs. Abdo's appeal.[8]

12. On December 23, 2022, Mrs. Abdo applied for leave to appeal to the Appeal Division of the SST, which was refused on March 18, 2023.[9]

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[4] Abdo, Ex C, AR at 55. [Emphasis added.]
[5] Abdo, Exs D, E, AR at 58, 61.
[6] Abdo, Ex H, AR at 73.
[7] Abdo, Ex I, AR at 77.
[8] Decision, AR at 21.
[9] AR at 33.

A. Decision to Be Reviewed

13. In the Decision, the Member found the Commission had "proven the Claimant lost her job because of misconduct (in other words, because she did something that caused her to lose her job)"[10] "because she refused to comply with her employer's mandatory COVID-19 vaccination policy".[11]

14. The Member relied entirely on the statement of the employer in Mrs. Abdo's termination letter[12] in reaching his conclusion, stating the termination letter disclosed no evidence Mrs. Abdo had been fired by reason of the denial of her religious accommodation request, and that Mrs. Abdo had not "provided any other evidence to counter what the letter says".[13] The Member went on to state: "I accept that the Claimant believes her employer let her go because they refused her religious exemption request, but the evidence clearly shows that she was let go for not complying with her employer's mandatory COVID-19 vaccination policy".[14]

15. The Member explained his understanding of misconduct in the EI context, basing his exposition on case law, namely: *Canada (Attorney General) v McNamara*;[15] *Paradis v Canada (Attorney General)*;[16] and *Mishibinijima v Canada (Attorney General)*.[17]

16. The Member expounded on his understanding of EI law, stating:

> The law doesn't say I have to consider how the employer behaved. Instead, I have to focus on what the Claimant did or failed to do and whether that amounts to misconduct under the Act…Issues about whether the Claimant was wrongfully dismissed or whether the employer should have made reasonable arrangements (accommodations) for the Claimant aren't for me to decide. I can consider only one thing: whether what the Claimant did or failed to do is misconduct under the Act.[18]

17. The Member stated that he had to determine why Mrs. Abdo lost her job, then determine whether the law considers that reason to be misconduct. He stated, "there is misconduct if

[10] Decision at para 2, AR at 21.
[11] Decision at para 8, AR at 22.
[12] Decision at para 11, AR at 22.
[13] Decision at para 12, AR at 22.
[14] Decision at para 13, AR at 22.
[15] 2007 FCA 107 [*McNamara*], Applicant's Book of Authorities ("AB") at TAB 8.
[16] 2016 FC 1282 [*Paradis*], AB at TAB 22.
[17] 2007 FCA 36 [*Mishibinijima*], AB at TAB 19.
[18] Decision at paras 19-20, AR at 23-4.

the Claimant knew or should have known that her conduct could get in the way of carrying out her duties toward her employer and that there was a real possibility of being suspended because of that".[19]

18. The Member pointed to the wilfulness component of the test for misconduct and found Mrs. Abdo's conduct was wilful.[20] The Member also pointed to the predictability the wilful conduct would lead to termination of Mrs. Abdo's employment and found Mrs. Abdo knew dismissal was a possibility.[21] He therefore found Mrs. Abdo's dismissal was the result of her misconduct.

PART II: ISSUES

19. Whether Mrs. Abdo's adherence to her conduct-governing sincerely-held religious beliefs is "misconduct" within the meaning of the *Employment Insurance Act*.

PART III: SUBMISSIONS

LAW

A. Standard of Review

20. Pursuant to *Agraira v Canada (Minister of Public Safety and Emergency Preparedness)*,[22] the proper approach to be taken by this court is a review of the administrative decision, as though it were "stepping into the shoes of the administrative body".[23] The standard of review is reasonableness, pursuant to *Canada (Minister of Citizenship and Immigration) v Vavilov*.[24]

B. The *Vavilov* Standard

21. While the *Vavilov* court settled on reasonableness as the standard of review in all but the narrowest of exceptions, it made equally clear how high the standard of reasonableness actually is.

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[19] Decision at para 17, AR at 23.
[20] Decision at para 41, AR at 27.
[21] Decision at para 46, AR at 28.
[22] 2013 SCC 36 [*Agraira*], AB at TAB 1.
[23] *Agraira* at paras 45-6.
[24] 2019 SCC 65 [*Vavilov*], AB at TAB 12.

22. A decision maker's decision will not be reasonable if the decision maker has failed to "meaningfully grapple with key issues or central arguments" raised by a party.[25] "Justification and transparency require that an administrative decision maker's reasons meaningfully account for the central issues and concerns raised"[26] in order to prove he has "actually listened to the part[y]".[27] If the decision "cannot be said to exhibit the requisite degree of justification, intelligibility and transparency", it will be unreasonable:[28]

> [A] reasonable decision is one that is justified in light of the facts…The decision maker must take the evidentiary record and the general factual matrix that bears on its decision into account, and its decision must be reasonable in light of them…The reasonableness of a decision may be jeopardized where the decision maker has fundamentally misapprehended or failed to account for the evidence before it.[29]

23. A decision will not be reasonable if the decision maker strayed from the purpose and intent of the statute: "It [is] impossible for an administrative decision maker to justify a decision that strays beyond the limits set by the statutory language it is interpreting".[30]

24. A decision will not be reasonable if it is not "justified in relation to the **constellation of law and facts** that are relevant to the decision…Elements of the legal and factual contexts of a decision operate as constraints on the decision maker".[31]

25. A decision will not be reasonable if it involves an "irrational chain of analysis":[32] "The internal rationality of a decision may be called into question if the reasons exhibit clear logical fallacies, such as circular reasoning, false dilemmas, unfounded generalizations or an absurd premise".[33]

26. A decision will not be reasonable if the decision maker reasoned backward from a conclusion: The decision maker "cannot adopt an interpretation it knows to be inferior – albeit plausible – merely because the interpretation in question appears to be available

[25] *Vavilov* at para 128.
[26] *Vavilov* at para 127.
[27] *Vavilov* at para 127.
[28] *Vavilov* at para 100.
[29] *Vavilov* at para 126.
[30] *Vavilov* at para 110.
[31] *Vavilov* at para 105. [Emphasis added.]
[32] *Vavilov* at para 103.
[33] *Vavilov* at para 104.

and is expedient. The decision maker's responsibility is to discern meaning and **legislative intent**, not to 'reverse-engineer' a desired outcome".[34]

27. The principle of responsive justification means that if a decision has particularly harsh consequences for the affected individual, the decision maker must explain why its decision best reflects the **legislature's intention**. This includes decisions with consequences that threaten an individual's life, liberty, **dignity** or **livelihood**".[35]

C. Recent SST Decisions

28. The General Division has declared "This Tribunal is allowed to consider whether a provision of the *Employment Insurance Act* or its regulations (or related legislation) infringes rights that are guaranteed to a claimant by the Charter".[36]

29. The General Division has found that religion is a protected ground and sincerely religious claimants who have availed themselves of an employer's policy to apply for religious exemption to vaccination have not committed misconduct, even if the employer effectively sends them packing.[37]

30. The General Division has recognized that where an employer's vaccination policy includes religious exemption and an employee has claimed said religious exemption, the employee has followed the policy, rendering the termination of employment **not** a result of having failed to follow the policy, rather the employer's refusal to accommodate. Further, an employee's assumption an employer will follow its own policy is sufficient to defeat the predictable dismissal element of the misconduct test. Finally, evidence of an employer's lack of intention to follow its policy in accommodating religious employees militates against the idea a religious employee who has made a meritorious claim for religious accommodation could reasonably expect to be dismissed.[38]

31. The General Division has the authority to interrogate the lawfulness—***as distinct from reasonableness***—of an employer's policy, pursuant to the logical inference emanating from the Federal Court of Appeal's decision in *Bedell*:[39] "It is inconceivable that the

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[34] *Vavilov* at para 121. [Emphasis added.]
[35] *Vavilov* at para 133. [Emphasis added.]
[36] *SS v Canada Employment Insurance Commission*, 2022 SST 1659 [*SS*] at para 59, AB at TAB 24.
[37] *ZZ v Canada Employment Insurance Commission*, 2022 SST 597 [*ZZ*] at paras 24, 32, AB at TAB 27.
[38] *DL v Canada Employment Insurance Commission*, 2022 SST 281 [*DL*] at paras 25, 27, 29, 32, 44-5, AB at TAB 17.
[39] *Canada v Bedell* 1984 CarswellNat 154, 60 N.R. 115 [*Bedell*], AB at TAB 3.

General Division would determine that it had no authority to decide whether [an obviously unlawful] policy was lawful…then accept that an employee's non-compliance with such a policy would constitute misconduct".[40]

D. The Governing Statute: *Employment Insurance Act*

32. According to section 30(1) of the *EI Act*, "A claimant is disqualified from receiving any benefits if the claimant lost any employment because of their misconduct or voluntarily left any employment without just cause". The *EI Act* does not define the term "misconduct" and, therefore, the meaning of it has been worked out over decades of tribunal and Federal Court decisions.

33. Section 49(2) of the *EI Act* states: "The Commission shall give the benefit of the doubt to the claimant on the issue of whether any circumstances or conditions exist that have the effect of disqualifying the claimant under section 30…if the evidence on each side of the issue is equally balanced".

E. Other Misconduct Law and Guidance

a) Digest of Benefit Entitlement Principles

34. The Digest of Benefit Entitlement Principles (the "Digest") by which decision makers are meant to govern themselves concerning an employee's entitlement to EI benefits elucidates the law of misconduct in the employment context at Chapter 7. The Digest cites 71 Federal Court of Appeal cases in the Misconduct chapter alone.

35. The Digest states: "In finding that a claimant has lost their employment by reason of misconduct, the Commission must show beyond the balance of probabilities, that the action…caused the claimant to **no longer meet** a required condition of employment"—the implication being that some **pre-existing condition of employment in place at the time the employee entered into the employment relationship** has been breached.[41]

36. The Digest further states: "To establish misconduct, it **must** be shown that the conduct in question constituted a breach of the employer-employee relationship"[42] which the Digest goes on to make clear is connected to the **employment contract**, whatever form it takes: "Any employment relationship can be called a contract between employee and employer.

[40] *NE v Canada Employment Insurance Commission*, 2022 SST 732 at paras 32-38, AB at TAB 21.
[41] Digest, Chapter 7 at 7.2.0. [Emphasis added.]
[42] Digest at 7.2.4. [Emphasis added.]

Whether written, verbal, or unstated, this contract is an agreement about the duties and responsibilities each party owes the other".[43] Only **after** "the Commission establishes the existence of conduct that has caused a breach in the employment relationship for which the claimant is personally responsible" will the decision maker move into the inquiry concerning whether such breach was wilful:[44] "[T]o be considered misconduct under the *EI Act*, the actions must be…a breach of an obligation arising explicitly or implicitly from the contract of employment; **otherwise there is no misconduct**".[45]

37. The Digest discloses that "[t]he officer's decision is not arbitrary, nor is it based on assumptions or vague allegations. To determine entitlement, the officer follows a specific process" which includes "evaluat[ing] the evidence without prejudice", "mak[ing] a decision based on the weight of evidence",[46] and giving "the benefit of the doubt" to the claimant where "the evidence presented by the claimant and by the employer are equally balanced".[47]

38. The Digest promises the decision maker "will adapt their fact-finding to the **specific circumstances** of the case".[48]

39. The Digest cites[49] the case of *Attorney General v MacDonald, J, Laurie*,[50] in which the Federal Court of Appeal upheld a decision made by an Umpire who found the Commission is not at liberty to condone certain kinds of employer misconduct by depriving a claimant of benefits.[51]

40. The Federal Court had found that "misconduct must be a **reprehensible** act or omission", citing *Canada v Tucker*[52] and *AG of Canada v Secours*.[53] The Federal Court had also

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[43] Digest at 7.2.4.3. [Emphasis added.]
[44] Digest at 7.2.4.4. [Emphasis added.]
[45] Digest at 7.2.5. [Emphasis added.]
[46] Digest at 7.2.0.
[47] Digest at 7.2.3.1.
[48] Digest at 7.2.1. [Emphasis added.]
[49] Digest at note 10.
[50] A-152-96, 1997 CarswellNat 647, [1997] A.C.F. No. 499, [1997] F.C.J. No. 499, 71 A.C.W.S. (3d) 196 [*MacDonald*], AB at TAB 7; CUB 31946 [*MacDonald 2*], AB at TAB 26.
[51] *MacDonald 2*.
[52] 1986 CanLII 6794 (FCA), [1986] 2 FC 329 [*Tucker*], AB at TAB 10. [Emphasis added.]
[53] 1995 CarswellNat 122, [1995] F.C.J. No. 210, 179 N.R. 132, 53 A.C.W.S. (3d) 453, A-352-94 [*Secours*], AB at TAB 9.

cited *Joseph*[54] for the proposition that "[t]o prove misconduct by an employee it must be shown that he behaved in some way other than he **should** have",[55] and stated further:

> Whether the acts of an employee fall into the definition of misconduct is a question of fact which depends on **all the circumstances of the case.** In any case the onus to prove misconduct clearly rests with the Commission and ***where there is reasonable doubt, the issue must be resolved in favour of the claimant***.[56]

41. Additionally, the Federal Court had found that a five-year work history "without incident and with a positive appraisal record" was evidence which militated against a sudden finding of misconduct.[57] The Federal Court had cited the cases of *Canada v Bedell*, *Tucker*, and *Canada v Brissette*,[58] as "[c]ollectively…stand[ing] for the proposition that if the necessary mental element is absent the conduct complained of will not be characterized as misconduct within the contemplation of…the *Act*".[59]

42. *MacDonald* clarifies that while the Member is not to render judgment on whether the ***employer*** committed misconduct, nothing in the *Act*, nor the case law, ***prevents*** the Member from "taking into account all the circumstances of the case"—including the actions of the employer—in the commission of determining whether the ***employee*** committed misconduct.

b) Other Federal Court of Appeal Decisions

43. The Federal Court of Appeal has defined misconduct as a) conduct that is **reprehensible**, b) conduct that is **wilful**, and 3) conduct that an employee knows or ought to know may **lead to** his or her **dismissal**.[60]

44. The Federal Court of Appeal has decided 10 additional cases featuring conduct it characterizes as reprehensible—three of which use or cite the term "reprehensible"

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[54] *Joseph v Canada (Employment & Immigration Commission)*, 1986 CarswellNat 1346, 1986 CarswellNat 1347, 1 A.C.W.S. (3d) 350, A-636-85 [*Joseph*], AB at TAB 18.
[55] *MacDonald 2*. [Emphasis added.]
[56] *MacDonald 2*. [Emphasis added.]
[57] *MacDonald 2*.
[58] 1993 CanLII 3020 (FCA), [1994] 1 FC 684 [*Brissette*], AB at TAB 5.
[59] *MacDonald 2*.
[60] *MacDonald*, *Mishibinijima*, *Secours*, *Canada (Attorney General) v Bellavance*, 2005 FCA 87 [*Bellavance*], AB at TAB 4, *Brissette*, *Tucker*, *Canada (Procureure générale) c Marion*, 2002 FCA 185, AB at TAB 13, *Canada (Procureure générale) c Turgeon*, [1999] FCJ No. 1861, 1999 CarswellNat 2521 [*Turgeon*], AB at TAB 14, *McNamara*, *Canada (Attorney General) v Gagnon*, 2002 FCA 460 [*Gagnon*], AB at TAB 6 *and Canada (Attorney General) v Wasylka*, 2004 FCA 219 [*Wasylka*], AB at TAB 11. [Emphasis added.]

(*Mishibinijima*, *Secours*, *Bellavance*); two of which use the term "undesirable", which is itself defined as conduct deserving "punishment" (*Brissette*, *Tucker*); and the balance of which point to conduct the Court views as reprehensible or deserving of punishment (*Marion*, *Turgeon*, *McNamara*, *Gagnon* and *Wasylka*).

45. Those reprehensible behaviours include not showing up for work due to alcohol abuse (*Mishibinijima*); "employment-related shortcomings"[61] tied to substance abuse (*Turgeon*); not showing up for work due to smoking crack (*Wasylka*); showing up at work high (*Tucker*); drunk driving (*Brissette*); failing an employment drug test (*McNamara*); conflict of interest (*Bellavance*); manually altering a time card against company policy (*Secours*); smoking pot at work (*Marion*); and failing to report fraud contrary to company policy (*Gagnon*).

i) The Substance Abuse "Disability" Cases

The Law According to the Federal Court of Appeal in Mishibinijima, Turgeon and Wasylka

46. The Federal Court of Appeal states in *Mishibinijima*, quoting *Secours*:

> It is sufficient that the **reprehensible** act or omission complained of be made "wilfully", i.e. consciously, deliberately or intentionally. In the present instance, the respondent knew that she could not manually alter her time card as she had been warned previously. Yet she consciously and deliberately did it.[62]

47. The Court states further: "I am **not** suggesting that the applicant's alcohol problem was an irrelevant consideration" and "[T]he measures which an employer takes or could have taken with respect to an employee's alcohol problem **may be relevant to the determination of whether there is misconduct**".[63]

48. However, the *Mishibinijima* court found that the claimant had not adduced evidence sufficient to support alcohol dependence:

> [35] The evidence before the Board with respect to the applicant's problem with alcohol is very weak and, in my view, insufficient to justify the conclusion sought by the applicant…The specific questions and answers read as follows:

[61] CUB 41931.
[62] *Mishibinijima* at para 13. [Emphasis added.]
[63] *Mishibinijima* at para 23. [Emphasis added.]

> Q. … Do you feel that you have an alcohol problem?
> A. Yes.
> Q. And is it your feeling that you are unable to control this problem?
> A. Yes.
>
> [36] That is the extent of the evidence adduced by the applicant regarding his alcohol problem. I cannot see how that evidence could possibly support an argument that his conduct was not wilful. Whether or not, in a given case, a different conclusion could be reached, assuming that sufficient evidence was adduced regarding a claimant's inability to make a conscious or deliberate decision, which evidence would likely include medical evidence, is an issue which I need not address. Clearly, in the present matter, the evidence adduced is incapable of supporting a conclusion that the applicant's conduct was not wilful.

49. The conduct in *Turgeon* was "employment-related shortcomings" and the Federal Court of Appeal did not buy that the "alcohol problem" was of sufficient magnitude that the claimant could rely on it as justification for the misconduct:

> Even admitting purely for the sake of argument that alcoholism could be relied on to justify misconduct within the meaning of [the disqualification section], there was no evidence before the board of referees in the case at bar allowing it to conclude that the alcohol problem alleged by the claimant was such as to allow him to argue this justification.[64]

50. The *Wasylka* court described the claimant as having "indulged in the consumption of crack-cocaine which resulted in his failure to report to work and to perform the services required from him"[65]. The Court stated that "the mere fact of having an alcohol **problem** is not in itself sufficient to make the exclusion contained in s. 28(1) inapplicable to a claimant" and "[t]his is certainly just as true a finding for the voluntary or reckless consumption of drugs, especially illegal drugs"[66] before going on to explain *how* the behaviour was wilful:

> The consumption of drugs by the respondent, even though **attractive or irresistible**, was voluntary in the sense that his acts were conscious and that he was aware of the effects of that consumption and the consequences which could or would result. **He did declare that he could "not focus on anything that matters" when he was taking the drug**.[67]

[64] *Turgeon* at para 2.
[65] *Wasylka* at para 1.
[66] *Wasylka* at para 2. [Emphasis added.]
[67] *Wasylka* at para 4. [Emphasis added.]

51. The *Wasylka* court also found there were other benefit provisions internal to the *Act* better suited to address the claimant's needs around his illness, and of which the claimant had already availed himself: "Section 21 of the *Employment Insurance Act* and 40 of the *Employment Insurance Regulations* already provide for sickness benefits and the respondent has been a recipient of such benefits".[68]

Misconduct Case Law Relied on by the Member

52. Each of the Member's exemplar cases in which the Federal Court or Federal Court of Appeal upheld a finding of employee misconduct reveals that the employee was found not only to have acted wilfully, but also to have breached a ***pre-existing*** term of the employment contract, all involving substance abuse: *McNamara*; *Paradis*; *Mishibinijima*.

53. The case of *Paradis* is another wherein the claimant claimed a "drug dependency".[69] The Federal Court stated in that case, "the employer's policy states that all employees must remain free from the effects of and dependency on illegal drugs and/or alcohol while on the worksite"[70]—a specified pre-condition of employment in play at all times. The *Paradis* claimant also operated a crane and had blacked out on the job.[71] The Court found "the SST-GD reasonably found that it was the applicant failing a drug test that led to his dismissal" which breached his contract of employment; and "he could not point to a reviewable error in the SST-GD decision or in that of the SST-AD…He was unable to identify a failure to observe a principal of natural justice, error in law or erroneous finding of fact".[72]

ii) The Non-"Disability" Cases

54. Misconduct in the Federal Court of Appeal cases wherein a claimant did not attempt to claim a protected ground includes failure to report fraud contrary to an established pre-employment company policy (*Gagnon*), and conflict of interest (*Bellavance*).

55. The *Bellavance* court described the reprehensible behaviour constituting misconduct thus:

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[68] *Wasylka* at para 5.
[69] *Paradis* at para 17.
[70] *Paradis* at para 2.
[71] *Paradis* at para 2; see also CUB 70257 at para 16: "An incident which triggers a positive drug test is cause for dismissal for substance abuse".
[72] *Paradis* at para 33.

> [The respondent] had used his position as an insurance officer to give preferential treatment to some of his former employees and certain members of his family…[H]e had also intervened personally in the processing of cases of unemployment insurance claims made by some of his employees…[T]he respondent was in fact in a conflict of interest when he used, for his own benefit, information obtained in the performance of his duties, which was not accessible to the public…[T]he respondent had not disclosed the nature of his activities to his employer, as he was required to do under the Code of Conduct…[T]he actions taken were serious and had irreparably compromised the relationship of trust with the employer. The lack of co-operation shown by the respondent, who was asked for explanations by the employer, merely exacerbated the situation and made it impossible for him to be reinstated in his position. We mention these findings of the grievance arbitrator merely to highlight the evidence of the respondent's misconduct and the seriousness of this misconduct. There is no doubt that the serious faults committed by the respondent constituted misconduct within the meaning of the Act…[V]iolation of the HRDC Code of Conduct, as in this case, indicates **reprehensible** conduct that is incompatible with the due or faithful discharge of the duties that the respondent was required to perform…If, as it should have done, the board of referees had considered the evidence concerning the conflict of interests and the serious breaches of the Code of Conduct, it could not have done otherwise than to find misconduct within the meaning of the Act. If it had not ignored the irreparable breach of the relationship of trust with the employer as a result of the respondent's actions, it would have seen that the loss of his employment was the result of misconduct.[73]

56. Prior to the advent of COVID, cases in which the SST, the court, or both routinely found misconduct involved not only wilfulness, and not only the breach of an existing term of employment, but also objectively sanctionable behaviour, i.e. "reprehensible" conduct.

F. The Law in the Context of Religion

57. The Supreme Court of Canada has both defined religion[74] and declared religion an immutable characteristic.[75]

58. The SCC states in *Amselem* all that is necessary to establish religious belief is a person

> has a **practice or belief**, having a **nexus with religion**, which **calls for a particular line of conduct**, either by being objectively or subjectively obligatory or customary, or by, in general, subjectively engendering a

[73] *Bellavance* at paras 2-6, 11. [Emphasis added.]
[74] *Syndicat Northcrest v Amselem*, 2004 SCC 47 [*Amselem*], AB at TAB 25.
[75] *Corbiere v Canada (Minister of Indian and Northern Affairs)*, 1999 CanLII 687 (SCC), [1999] 2 SCR 203 [*Corbiere*], AB at TAB 16.

> personal connection with the divine or with the subject or object of an individual's spiritual faith, irrespective of whether a particular practice or belief is required by official religious dogma or is in conformity with the position of religious officials;
>
> and
>
> is **sincere** in his or her belief.[76]

59. Religious belief **governs conduct**, *supra*, and religious infringement is established when a policy interferes with conduct-governing beliefs in a way that is beyond trivial or insubstantial. Such infringement triggers the duty to accommodate to the point of undue hardship.[77]

60. *Amselem* is clear that **no confirmation of the belief or practice by a religious leader** is necessary;[78] **no proof of the established practices of a religion** is necessary;[79] **no mandatory doctrine of faith** supporting the belief is necessary;[80] neither a government body nor a tribunal is in a position to interpret the content of an individual's **subjective understanding** of his or her religious obligations;[81] even the role of a tribunal is to assess mere sincerity of belief, not validity of belief;[82] and sincerity of belief simply implies an honesty of belief.[83] *Amselem* also declines to endorse an objective standard and speaks to the appropriate nature of the inquiry: "[C]laimants seeking to invoke freedom of religion should not need to prove the objective validity of their beliefs in that their beliefs are objectively recognized as valid by other members of the same religion, nor is such an inquiry appropriate".[84]

61. Further, *Amselem* rejects the idea that personal beliefs ought or even can be severed from the religious beliefs of the religious person, characterizing religion as inherently involving "personal convictions or beliefs", "personal choice and individual autonomy", "personal or subjective conception", "personal autonomy", "personal sincerity", "personal choice of religious beliefs", "personal notions of religious belief", "voluntary expressions of faith", "profoundly personal beliefs", "intensely personal" beliefs and

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[76] *Amselem* at para. 56. [Emphasis added.]
[77] *Amselem* at para. 59.
[78] *Amselem* at para. 56. [Emphasis added.]
[79] *Amselem* at para. 54. [Emphasis added.]
[80] *Amselem* at para. 49. [Emphasis added.]
[81] *Amselem* at para. 50. [Emphasis added.]
[82] *Amselem* at para. 52.
[83] *Amselem* at para. 51.
[84] *Amselem* at para. 43.

"personal religious 'obligations'".[85] ***Amselem* confirms that religious belief *is personal* belief**.

62. The SCC states in *Corbiere* that religion is "constructively immutable" because it is "changeable only at unacceptable cost to personal identity"[86] and again affirms this principle in *Quebec v A*.[87]

63. Neither the SST nor the Federal Courts define or characterize religion, but, of course, are bound by the Supreme Court's findings regarding religion.

ARGUMENT

A. Acting in Accordance with One's Religious Beliefs Is Not Misconduct

64. Mrs. Abdo is a person of deep religious faith, as she has made known. She held forth concerning her religious abstention from COVID vaccination to the employer, the Commission, the Tribunal Member—complete with reference to the holy text of her religion.[88] Mrs. Abdo's counsel held forth concerning Mrs. Abdo's religious beliefs and religious abstention from COVID vaccination—complete with reference to the holy text of her religion.[89] There can have been no doubt in the Member's mind what Mrs. Abdo believed about her religious obligation to abstain from COVID vaccination.

65. Mrs. Abdo and her counsel explained to the Member that for her, it is sinful to receive the COVID vaccines. Sin separates the Christian from God. Separation from God is, for the Christian, an intolerable state of affairs which brings unbearable distress.[90]

66. Mrs. Abdo easily meets the *Amselem* standard of a person holding sincere beliefs with a nexus to religion. The Policy, absent accommodation, easily meets the standard of an infringement on those beliefs beyond the trivial or insubstantial.

67. Never in the history of this country has the law countenanced punishing the religious person for declining to sin, the result of which is separation from God, nor defined

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[85] *Amselem* at paras 39-43, 47, 49, 54.
[86] *Corbiere* at para 13.
[87] *Quebec (Attorney General) v A*, 2013 SCC 5 [*Quebec v A*] at paras 336-7, AB at TAB 23.
[88] AR at 84-86, 88-91, 116-7, 155-7, 161-2, 164-8; Transcript of November 1, 2022 Hearing ("Transcript"), p 5, lines 9-17, p 6, lines 7-24, p 10, lines 15-26, p 11, lines 1-26, p 12, lines 1-5, p 27, lines 2-26, p 28, lines 1-26, p 29, lines 1-21, AR at 292-3, 297-8.
[89] Transcript, p 35, lines 18-26; p 36, lines 1-26; p 37, lines 1-26; p 38, lines 1-26; p 39, lines 1-14; p 42, lines 23-6; p 43, lines 1-5, AR at 299-301.
[90] *Ibid*; *Supra* at note 88, Transcript.

adherence to sincerely-held religious beliefs as misconduct, nor demanded the religious person forsake his or her beliefs on pain of dismissal, disqualification from a benefits regime into which (s)he has paid over the course of his or her entire working life, or for any other reason. Never in the history of this country has the law characterized religious belief as optional to the religious believer, such that dispensing with religious belief at the behest of the State or any other entity is considered so much nothing—akin to ditching a bad habit, or reconsidering a mere opinion, or changing one's socks. It is patently unreasonable to declare that **religious** abstention from vaccination constitutes any sort of meaningful choice, let alone misconduct. Such a finding is an attack on the dignity of religious objectors, and an affront to religious freedom, itself a cornerstone of a free and democratic society in which minorities are equal members.

B. Religion Is Immutable

a) Mrs. Abdo Possesses an Immutable Characteristic

68. Canadian law, which conceptualizes religion as "constructively immutable" because it is "changeable only at unacceptable cost to personal identity"[91] does not countenance altering immutable characteristics.

69. Mrs. Abdo explained her religious beliefs in great detail with reference to the Holy Bible, the authoritative holy text of her religion, being Christianity. She rendered the testimony of her conversion to the Member during the hearing.[92] She explained her encounter with God and His truth, how it saved her from a life of depression and despair.[93] She explained that when asked at work why she cared so much about her tasks, her answer was that she was not working for CBS only; she was working for God, and that Scripture instructs her to do everything she does as to the Lord.[94] Mrs. Abdo is not a woman reticent to share her beliefs when questioned. She was an open book.

70. Mrs. Abdo's religion is an immutable characteristic pursuant to *Corbiere*. The law recognizes that Mrs. Abdo can no sooner change her religious beliefs than her Ethiopian ethnicity. That the employer unjustly and unlawfully denied her religious accommodation is not a matter under the SST's purview, in terms of imposing any sanction on the

[91] *Corbiere* at para 13; *Quebec v A* at paras 336-7.
[92] *Supra* at note 88, Transcript.
[93] *Ibid*.
[94] Transcript, p 75, lines 1-26, AR at 309.

employer; neither did Mrs. Abdo request any such remedy. However, recognizing that Mrs. Abdo's characteristic is immutable and in no way constitutes misconduct is squarely in the SST's jurisdiction, and is in fact its obligation.

b) The Federal Court Cases Did Not Involve Immutable Characteristics

71. None of the Federal Court cases (*supra*), even the cases wherein a "disability" was claimed, involved an immutable characteristic. Even had the Court suffered no doubt as to whether the claimants' "problems" with alcohol or drugs constituted a disability—which was by no means the case—alcoholism and drug addiction are not immutable characteristics. Billions of dollars and countless hours are spent in this country in an effort to *mute* those very characteristics. The same cannot be said for immutable characteristics.

72. Also noteworthy is that the Federal Court of Appeal cases grapple with an element of misconduct the Member failed even to mention: **reprehensibility** of conduct. The case law makes plain that while conduct must be wilful, and while conduct must lead to dismissal with some predictability from the perspective of the fired employee, it must also be "reprehensible"—sometimes stated as deserving of "punishment": *MacDonald*, *Joseph*, *Mishibinijima*, *Secours*, *Bellavance*, *Brissette*, *Tucker*, *Marion*, *Turgeon*, *McNamara*, *Gagnon* and *Wasylka*.

73. An obvious pattern emerges from the Federal Courts' "misconduct" precedents: no reasonable person would question how objectively "reprehensible" it is to combine work and substance abuse, or to engage in fraud. Such unethical behaviour is clearly and categorically very different from declining to undergo a particular medical intervention, especially when doing so would violate a sincerely-held religious belief.

74. Even in purported "disability" cases, the Federal Courts have found insufficient evidence to support the "disability". In other words, to the extent a disability would ground a finding the claimant had not behaved "wilfully", the Court has rejected the claim, in part, on the basis the supposed disability was not proven. The Court has also left open the possibility that where a disability were proven, the misconduct analysis might change. This is important because in comparing cases of **unproven** disability with a case wherein a protected ground can easily be proven, the Member has committed the fallacy of false

equivocation. Logical fallacies are fatal on the *Vavilov* standard, because a decision based upon logical fallacy lacks the requisite transparency, justification, and intelligibility.[95]

75. Mrs. Abdo's immutable and protected characteristic of religion is not "reprehensible", nor is her declination to act in violation of her religious beliefs.

C. The Member Was Required to Inquire into Legislative Intent

76. The implication of the Member's interpretation of section 30 of the *EI Act,* being the "misconduct" disqualification section, is that the legislators intended to draft a statute which discriminates against a religious minority on the basis of an immutable characteristic. The Member failed to meaningfully grapple in his reasons with whether this was, in fact, the legislators' intention. The only other possibility is that the legislators did not intend to discriminate against every religious person in the country who might need to abstain from some practice or other by reason of his or her religious beliefs, in which case the Member incorrectly interpreted the legislators' intent. Either way, the Member's decision cannot be reasonable on the *Vavilov* standard.

77. As Member Shaw stated in *SS,* "This Tribunal is allowed to consider whether a provision of the *Employment Insurance Act* or its regulations (or related legislation) infringes rights that are guaranteed to a claimant by the Charter" [96]—**which section 30 of the *Act* doubtless does if it is taken to mean that every religious person in this country must abandon his or her faith on pain of disqualification.**

78. It was incumbent on the Member either to a) reject an interpretation of the *EI Act* which would smear as perpetrators of misconduct every religious person in the country whose religious belief dictates (s)he cannot be vaccinated, or b) interrogate whether such a provision could possibly be *Charter*-compliant. He did neither. Not only are people in Canada shielded from laws which discriminate on the basis of immutable characteristics; *Vavilov* makes plain that decisions with consequences to a person's dignity and livelihood require a decision maker to ensure it has grappled with legislative intent.[97]

79. It was not open to the Member to sidestep this crucial question by invoking the lowest resolution interpretations of a handful of Federal Court of Appeal cases he could muster. On this basis alone, the decision does not meet the *Vavilov* standard of reasonableness:

[95] *Vavilov* at paras 99-105.
[96] *SS* at para 59.
[97] *Vavilov* at para 133.

"Where the meaning of a statutory provision is disputed in administrative proceedings, the decision maker **must** demonstrate in its reasons that it was **alive to** these essential elements".[98]

80. Further, the Member ran afoul of section 49(2) of the *EI Act*, in which the legislators plainly conveyed their intention that the employee be given the benefit of the doubt where equal evidence exists in the employer's and employee's accounts of the separation.

81. Indeed, the Commission **must** give the employee the benefit of the doubt in such circumstances. No such benefit was here given, despite the evidence of Mrs. Abdo's sincerely-held religious beliefs, the evidence Mrs. Abdo had followed her employer's religious accommodation procedure in good faith, and the evidence of the employer's complete misapprehension of the case law concerning religious accommodation—all of which weighed in Mrs. Abdo's favour. The Decision is contrary to both the *Act* and the principles of *Vavilov*, the latter of which requires not only that the Decision accord with governing legislation, but also meaningfully account for the facts.

82. Mrs. Abdo testified that she had followed the policy by submitting a meritorious religious exemption claim pursuant to the employer's policy; that her information was accepted as true until the person receiving her information consulted with "lawyers"; and that a sudden change took place which in her view could only mean the employer preferred not to follow its policy by accommodating her. The Member did not even bother to consider the maxim flowing from *MacDonald* that an employer cannot go back on its word and use that to charge a claimant with misconduct—which the employer in the present case did: it promised that legitimate human rights exemptions would be granted, and then went back on its word by failing to grant one on a meritorious application submitted by Mrs. Abdo. In fact, Mrs. Abdo testified before the Member that the employer had been constantly assuring employees since at latest July of 2021—well before the Policy was introduced—that religious employees need not worry about losing their employment because they would be accommodated.[99] It is disingenuous to pretend Mrs. Abdo's testimony was unclear: **this** is why she was not worried—because she knew she held sincere religious beliefs and had been assured that holders of sincere religious beliefs

[98] *Vavilov* at para 120. [Emphasis added.]
[99] Transcript, p 4, lines 8-26; p 5, lines 3-14, 17-25; p 21, lines 21-6; p 22, lines 1-5, 20-4; p 23, lines 23-6; p 24, lines 1-4 at AR 291-2, 296.

would not be punished—**not** because she believed "they would automatically approve all exemption requests",[100] as the Member "paraphrased".

83. For this reason, Mrs. Abdo testified that owing to a sudden unexpected and unfavourable turn of events, having been assured since Spring/Summer 2021 there would be no problem;[101] having submitted a meritorious claim; having answered every question posed to her; having provided proof of the sincerity of her beliefs so as to permit the employer to authenticate her religious claim; having been assured the sincerity of her beliefs was not in question, until legal counsel intervened;[102] and further, having demonstrated willingness to rigorously follow safety protocols[103] and having explained she works alone and that accommodation was not even canvassed,[104] Mrs. Abdo quite reasonably assumed the employer must simply be wanting rid of her[105]—another bit of testimony the Member found "isn't relevant" ***for the reason*** "I can only look at the Claimant's actions".[106]

84. This is, of course, patently false, as all the case law acknowledges: the "misconduct" must be an operative cause for the termination. If misconduct was not the reason for the termination, that fact is highly relevant, contrary to what the Member asserts.

85. There is easily "balancing" evidence on Mrs. Abdo's side of the claim, which the Member had a duty to recognize, as opposed to privileging the employer's version.

86. It is not beyond the jurisdiction of the members of the SST to reason, to think critically, to ask themselves whether the legislative body, which has not defined misconduct, truly intended the legislation to punish every religious person in the country for nothing other than declining to violate his or her conduct-governing sincerely-held religious beliefs.

D. The Member Gave Meaningful Decisions Short Shrift: *ZZ*, *DL*, *NE*

87. At the same time the Member accepts that less analogous cases wherein the Federal Court of Appeal found objectively reprehensible conduct are sufficiently similar so as to

[100] Decision at para 46, AR at 28.
[101] *Supra* at note 99.
[102] Transcript, p 6, lines 24-6; p 7, lines 1-26; p 8, lines 1-20; p 24, lines 1-26; p 25, lines 1-20; p 74, lines 19-26, AR at 292, 296-7, 309.
[103] Transcript, p 74, lines 8-18, AR at 309.
[104] Transcript, p 2, lines 18-26; p 3, lines 2-22; p 13, lines 7-26; p 14, lines 2-16; p 15, lines 14-26; p 16, lines 1-26; p 17, lines 1-19; p 18, lines 19-26; p 19, lines 1-7; p 26, lines 9-10, AR at 291, 294-5, 297.
[105] Transcript, p 8, lines 22-6; p 9, lines 1-7; p 19, lines 7-26; p 20, lines 1-26; p 21, lines 1-17; p 22, lines 13-17; p 24, lines 16-26; p 25, lines 1-20, AR at 292-3, 295-7.
[106] Decision at para 47, AR at 28.

remove any question of the applicability of their principles to a case of religious abstention from vaccination, he claims that more analogous SST cases are too different from the present case for him to apply their principles. This brand of selective attention to the matters at issue does not pass the *Vavilov* standard of a reasonable decision and raises the spectre of a reverse-engineered decision for the purpose of expediency.

88. One such case is that of *ZZ*, in which Member Losier, at a minimum, meaningfully grappled with religion as a **protected characteristic**, asking this important question: "Is there a reason the Claimant ***could*** **not** comply with the Policy?". [Emphasis added.]

89. As in the present case, the *ZZ* claimant applied for religious exemption; the *ZZ* claimant's employer acknowledged the sincerity of her beliefs; and the *ZZ* employer expressed that it was unable to accommodate her. Member Losier states: "I do not find the Claimant's conduct was wilful, conscious or deliberate. She did not wilfully breach the employer's policy because she **followed all of the steps outlined in the policy** to **ask for an exemption** based on a **protected** ground, in this case **religion**".[107]

90. Mrs. Abdo applied for religious exemption, which was **everything** she **could** do to follow the policy. Mrs. Abdo testified her employer accepted,[108] and her employer acknowledged in writing,[109] that her religious beliefs were sincere. Mrs. Abdo's employer stated it could not accommodate her regardless of whether an exemption were granted.

91. The one distinction between the two is that the employer in *ZZ* "officially" granted the exemption—**but only in the most technical and least practical sense**: The employer relegated the *ZZ* claimant to an unpaid leave. It is a distinction without a difference, which the Member in the present case as much as admitted: "[T]he employer approved the claimant's religious exemption request **but let them go anyway**".[110]

92. The salient point is that Member Losier recognized there is a difference between **reprehensible conduct** and **conduct governed by religious beliefs**, the latter of which Member Losier characterized as "**protected**".

93. Comparing the case of *DL*, that the employer in that case proved more overt in breaking the law by not even addressing religious exemptions is no more or less a mitigating

[107] *ZZ* at para 32. [Emphasis added.]
[108] *Supra* at note 102.
[109] Abdo, Ex C, AR at 55.
[110] Decision at para 52, AR at 29.

circumstance than Mrs. Abdo's employer having more adeptly evaded the law of religious discrimination undetected—or even having acted in good faith. The law makes no distinction between discrimination in intent and discrimination in effect. On the other hand, if the focus is **solely** on employee behaviour and not employer behaviour, the stealth with which the law was broken should make no difference as between the respective employers in any event. It was open to the Member to reject the *DL* decision, but he did not reject it. In choosing to distinguish it, he effectively admitted he agrees with *MacDonald* that employer behaviour is in fact a consideration while staunchly refusing to consider it in this case. This inconsistency does not pass the *Vavilov* standard.

94. In the case of *NE*, Member Lew tackled the "distinction between reasonableness and lawfulness of a policy", determining that while a reasonable policy was immune from interrogation at the SST level, it was far less clear that an unlawful policy enjoys the same privileged place in the misconduct analysis. Member Lew states: "If an employee must comply with a lawful policy, conversely, if an employer's policy is unlawful, arguably an employee should not have to comply with it. And, if the employee does not comply with a policy that is unlawful, arguably, they are not committing misconduct".[111]

95. A policy can only be lawful if it contemplates exemptions in accordance with the law **and follows through**. Absent the "follow through", the policy becomes unlawful. Paying lip service to the idea of following the law does not automatically render the policy lawful. On the evidence, CBS resiled from its obligation to follow its own policy, by denying Mrs. Abdo's meritorious exemption request. Even undue hardship does not shield CBS from its obligation to Mrs. Abdo unless and until it has meaningfully canvassed all possible accommodation options and any risk to safety arising from the accommodation has been "unequivocally established",[112] neither of which occurred.[113] Simply invoking a *bona fide* occupational requirement does not pass muster; procedural and substantive steps are required.[114]

96. Member Lew continues:

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[111] *NE* at paras 32-33, 35.
[112] *Canadian National Railway Company v Teamsters Canada Rail Conference*, 2018 ABQB 405 at para 36, AB at TAB 15; *Multani v Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6 at para 67, AB at TAB 20; *British Columbia (Public Service Employee Relations Commission) v BCGSEU*, 1999 CanLII 652 (SCC), [1999] 3 SCR 3 at para 54, AB at TAB 2.
[113] *Supra* at note 104.
[114] *Supra* at note 112.

> The General Division determined that it did not have any authority to decide whether the employer's vaccination policy was lawful. But, surely the General Division would not hesitate to consider whether an employee had committed misconduct if the employer's policy was **obviously** unlawful…**It is inconceivable that the General Division would determine that it had no authority to decide whether such a policy was lawful, when it clearly would not be, and then accept that an employee's non-compliance with such a policy would constitute misconduct**.[115]

97. Member Lew here raises an important point, which the Member in the present case chose to ignore, despite promising to consider it,[116] omitting to grapple with Member Lew's **argument** flowing from *Bedell* vis-à-vis reasonable versus **lawful**, and stating only that he doesn't "give the…Tribunal's Appeal Division decisions much weight"[117] and "the Claimant's argument about her employer's policy being unlawful isn't relevant".[118]

98. While an SST Appeal Division decision may not be precisely "binding" on the Member, *Vavilov* makes clear that a decision maker should justify a decision to depart from it.[119] Further, novel facts in an uncharted area of the law invite attention to deeper arguments like Member Lew's, as opposed to reliance on the most surface considerations drawn from abjectly dissimilar cases for expediency, which signals reverse-engineering.[120]

99. Finally, as a matter of logic, what Member Lew articulates is plain and obvious. The SST would not deny benefits to grievously wronged claimants in numerous other situations.

100. Even if adhering to one's religion could be called "wilful" conduct an employee ought to know may lead to dismissal, of which it is arguably neither, *infra*, the fact is not all wilful conduct predictably leading to dismissal would attract disqualification.

101. For example, an employee who has resisted her employer's sexual advances would be doing so deliberately, and could predict that her "wilful" resistance might lead to dismissal. However, the SST would not endorse a misconduct finding and deny her EI benefits on the basis of her "wilful" conduct predictably leading to dismissal.

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[115] *NE* at paras 36-9. [Emphasis added.]
[116] Transcript, p 72, lines 24-6, AR at 308.
[117] Decision at para 49, AR at 29.
[118] Decision at para 49, AR at 29.
[119] *Vavilov* at paras 129-32.
[120] *Vavilov* at paras 120-1.

102. Neither would the SST endorse as misconduct the wilful conduct of an employee who refused to lie to a client to the detriment of the employer. Such a refusal may get in the way of the employee's ability to discharge the duties of the employer. Business has many grey areas and it is not always easy to separate the business needs of the employer from an ask that crosses a line. Yet there can be little doubt the employee who had followed her ethical compass would escape a misconduct finding.

103. The SST presumably would not deny EI benefits to a transgender person for transitioning to another gender, even if the employer had a policy against it, even if the transitioner knew there was a real chance they would be dismissed, even if the transition got in the way of discharging their duties, for example if clientele would be lost, or if the transition would otherwise interfere with the business interests of the employer.

104. Accordingly, there obviously and logically exists a "carve-out" to the supposed "rule" that behaviour which is wilful, which an employee knows may lead to dismissal and which stymies the employer's objectives automatically attracts a finding of misconduct. The Federal Court of Appeal has labelled that distinction: **reprehensibility**. The Member erred in failing to grapple in any way, meaningfully or otherwise, with this key element.

E. No Misconduct Issues Absent a Breach

105. The Member's lapses did not stop at failing to determine whether Mrs. Abdo's conduct was in fact **reprehensible**; he also failed to demonstrate that Mrs. Abdo's conduct breached an obligation arising from her employment contract. According to the Digest, "[T]o be considered misconduct under the *EI Act*, the actions must be…a breach of an obligation arising explicitly or implicitly from the contract of employment; **otherwise there is no misconduct**".[121] Additionally, the case law the Member cited in support of his decision consistently acknowledges breaches of employment contracts and/or objectively sanctionable behaviour as necessary ingredients for a finding of misconduct.

106. *McNamara* and *Paradis* involved claimants who were, as ***pre***-employment conditions, obligated to abide by drug and alcohol policies, and who had subsequently failed drug tests.[122] *Mishibinijima* involved a claimant who had on numerous occasions run afoul of

[121] Digest at 7.2.5. [Emphasis added.]
[122] See Westlaw Canada CED EMPLOYINS s 128 Impairment—Alcoholic Beverages: "**Every** contract of employment includes an implicit rule against the consumption of alcoholic beverages, or other impairments, during working hours" including the effects of such. [Emphasis added.] For example, in Chute, Re (December 19, 1994), CUB 26704, the Umpire stated: "On his own submissions, it is clear that the Claimant committed misconduct by

his employer's basic requirement that he show up for work. So too have the other Tribunal and court "misconduct" cases involved conduct which breaches the employment contract and/or objectively sanctionable behaviour. **Conspicuously absent the list is declining to violate sincerely-held religious beliefs** or declining to submit to a medical treatment. The Member in the present case failed to acknowledge that Mrs. Abdo's conduct was neither in breach of her employment contract nor objectively sanctionable.

107. Implicit in the Member's statement, "There is misconduct if the Claimant knew or should have known that her conduct could get in the way of carrying out her duties toward her employer" is the idea that to ground a finding of misconduct, **a duty must be owed in the first place**. The Member failed to address whether Mrs. Abdo actually owed a duty to her employer either to abandon her religious beliefs or to be COVID vaccinated in any circumstance. The Member appears to simply assume this duty, but has not demonstrated any such duty actually exists. If there is no duty, the misconduct threshold is not met.

F. An Immutable Characteristic Does Not Signal a "Choice"

108. The Member having pointed to no existing term of the employment contract which Mrs. Abdo breached and more importantly, **no law demanding Mrs. Abdo forsake her religion**, the wilfulness element of his considerations, upon which he heavily relied in finding misconduct, is somewhere between premature and irrelevant. Even were it otherwise, arguably, religious belief is not a "choice" in the sense that "wilfulness" has been contemplated by the courts.

109. For better or worse, the case law has clearly identified picking up a bottle or a bong or a crack pipe, in the context of failing to meet the obligations of an employment contract, as a choice. The same cannot be said for religious belief, ingrained, immutable, and inseparable from a person's very identity, sense of meaning, and reason for being. The law has long rejected arguments that a religious person can avoid discrimination by modifying her behaviours or beliefs and making different choices as justification for discrimination.[123] By extension, arguments that a religious person can avoid a charge of misconduct by violating her religious beliefs must also be rejected. To hold otherwise renders religious protection illusory.

drinking alcohol in a non-alcohol environment". Conversely, **no** employment contract includes an implicit rule against religion.

[123] *Quebec v A* at paras 336-7.

110. Failure of the Member to meaningfully analyze the differences between the conduct explored in his exemplar cases and Mrs. Abdo's sincerely-held religious beliefs violates the *Vavilov* standard. The Policy and Mrs. Abdo's sincerely-held religious beliefs are inextricably linked. The Member's severance of the two in order to adopt the position that Mrs. Abdo's religious inability to be vaccinated was "misconduct" is unreasonable because it wilfully ignores that religion is, at law, conduct-governing and immutable. Submitting to vaccination and violating her faith are, for Mrs. Abdo, *one and the same*.

111. Mrs. Abdo was not expected merely to receive a vaccine; she was expected to renounce her conduct-governing sincerely-held religious beliefs on pain of dismissal from her employment. That the Member failed to consider the spiritual implications to Mrs. Abdo of the Policy, choosing instead to oversimplify her objection as an act of disobedience, reveals that he was not alive to the "key issues", "central arguments" and "concerns raised" as required on the *Vavilov* standard. *Vavilov* is clear that where a decision maker's reasons do not *meaningfully* account for the central issues and concerns raised, a decision will not be reasonable.

112. The Member's statement, "I find the Claimant committed the actions that led to her dismissal, as she knew her employer had a mandatory COVID-19 vaccination policy and what she had to do to follow it" seems a throwback to a bygone era where people were forced to trade their dignity and autonomy for their survival. Apparently, in the Member's mind, all Mrs. Abdo had to do was renounce her faith. The trouble is, sincerely-held religious beliefs do not evaporate because they are inconvenient.

G. Mrs. Abdo's Employment Was Terminated Because of Her Religion

113. Against the backdrop of the foregoing, the reason for Mrs. Abdo's untimely dismissal from her employment comes into sharp relief.

114. The Member erred both in fact and in law, both in his assessment of "why [Mrs. Abdo] lost her job", and in the determination her dismissal was on account of "her" misconduct.

115. The Member determined Mrs. Abdo's employment was terminated because she "refused to comply with her employer's mandatory COVID-19 vaccination policy". The first problem with this finding is the Policy contemplated *either* being vaccinated *or* being exempted from vaccination on religious grounds. Since Mrs. Abdo holds sincere religious beliefs against being vaccinated, which she conveyed in clear terms, the interference with

which would be more than trivial or insubstantial, and since she took the steps required by the employer to seek accommodation, it is an error to find Mrs. Abdo "refused to comply" with the Policy.

116. Further, insofar as the Member relied on his finding that Mrs. Abdo claimed her "employer told employees that they would automatically approve all exemption requests",[124] he also erred. The evidence before the Member was not that Mrs. Abdo believed all exemption requests would be automatically approved without regard to their merit, rather that **her meritorious request** would be approved because **her employer would follow the law**, which required the employer to accommodate Mrs. Abdo's legitimate and meritorious claim, based on her conduct-governing sincerely-held religious beliefs, to the point of undue hardship.

117. Mrs. Abdo met her onus pursuant to *Amselem* to establish her sincerely-held beliefs with a nexus to religion the interference with which would be more than trivial or insubstantial. Mrs. Abdo's employer applied the incorrect legal standard to her request on a reasonable reading of *Amselem*, denied her claim, and subsequently dismissed her. This evidence was before the Member, but he failed to consider it. Instead, the Member relied on the employer's assertion in its dismissal letter to Mrs. Abdo that it was dismissing her because she did not comply with its vaccination policy—as though the absence therein of a confession it discriminated is absolute proof of the veracity of its contents.

118. It is a blunt misstatement of the facts to conclude Mrs. Abdo did not comply with the policy when her request for accommodation was unlawfully denied and she was dismissed. Precisely because Mrs. Abdo's religious beliefs were ***sincere***, she could not receive the COVID vaccines. Whether or not her employer's termination of her employment under such circumstances discloses misconduct on the part of the employer, it certainly discloses no misconduct on the part of Mrs. Abdo.

119. While the role of the Member is not to determine whether Mrs. Abdo was wrongfully dismissed and impose sanction on the employer, any analysis which fails to address the circumstances of her dismissal opens the risk of erring in the determination of whether Mrs. Abdo is *herself* guilty of any misconduct. This is plain to see in the different characterizations of the reason for Mrs. Abdo's dismissal, as between Mrs. Abdo and the Member. The Member is not at liberty, on the *Vavilov* standard, to wilfully ignore

[124] Decision at para 45, AR at 28.

circumstances which hold the key to an accurate determination of whether or not Mrs. Abdo committed misconduct. In this vein, it was necessary for the Member to look at whether the employer *legitimately* denied Mrs. Abdo's religious accommodation request, not for the purpose of deciding if the employer committed misconduct, but **for the purpose of deciding if *Mrs. Abdo* committed misconduct**. Instead, the Member stated that Mrs. Abdo having "provided **proof** of her religious belief…**isn't relevant**".[125]

120. The Member conflated his directive to *focus* on Mrs. Abdo's conduct with an absolute prohibition on noticing the employer's conduct, citing to an empty provision[126] to bolster his misapprehension: "The law doesn't say I have to consider how the employer behaved".[127] Section 30 of the *EI Act* in fact says ***nothing on the topic whatsoever***. The legislation itself is silent on how far the Member might delve into employer actions.

121. Insofar as the jurisprudence speaks to the matter, it does so in a much more nuanced way than the Member appreciates. For example, the Member cites *Mishibinijima* for the proposition that "the focus is on what the employee did or did not do, and the fact that the employer did not accommodate its employee is not a relevant consideration"; however, that is only half of what the *Mishibinijima* court said, the other half being "I am **not** suggesting that the applicant's alcohol problem was an irrelevant consideration" and "the measures which an employer takes or could have taken with respect to an employee's alcohol problem ***may be relevant to the determination of whether there is misconduct***". The Member's pattern of omitting all nuance in any way helpful to Mrs. Abdo raises the spectre of a reverse-engineered decision, counter to the *Vavilov* court's instructions.

122. While no sanction issues to the employer for its discrimination in the EI law context, neither is it open to the Member to transfer the employer's blame to the employee.[128] The Member is not excused from "adapt[ing] [his] fact-finding to the **specific circumstances** of the case"—specific circumstances which disclosed that the employer had adopted the incorrect legal standard in its denial of Mrs. Abdo's religious accommodation request. Neither the Commission nor the Member is at liberty to condone the employer's discrimination by depriving Mrs. Abdo of benefits.[129]

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[125] Decision at para 46, AR at 28. [Emphasis added.]
[126] *EI Act*, section 30.
[127] Decision at para 19, AR at 23.
[128] *MacDonald 2*.
[129] *MacDonald 2*.

123. The fact of whether Mrs. Abdo held a sincere religious belief against receiving COVID vaccines and whether her employer erred in outright denying her exemption request is crucial to the determination of "why [she] lost her job", for if she lost her job on the basis of religious discrimination, she cannot have committed misconduct within the meaning of the *Act*. Religion governs conduct, as *Amselem* makes clear. To find that conduct governed by religious belief is misconduct would be to find that holding and acting according to religious beliefs which are objectively non-reprehensible is itself misconduct—to wit, **that religion is misconduct.**

H. Conclusion

124. The question is not whether Mrs. Abdo's employer engaged in misconduct, as all past jurisprudence makes plain. The question is whether Mrs. Abdo engaged in anything that can be objectively characterized as "reprehensible" conduct or conduct deserving of "punishment" and therefore "misconduct" pursuant to the *Act*. However, in order to determine whether Mrs. Abdo engaged in misconduct, it is necessary to determine, at a minimum: a) whether Mrs. Abdo owed a duty to her employer to abandon her sincerely-held religious beliefs on pain of dismissal from her employment; b) whether Mrs. Abdo owed such a duty particularly in light of the fact the new policy was a novel condition of employment unilaterally imposed upon her and appearing nowhere in the contract of employment to which she had agreed upon commencing the employment; c) whether a policy purporting to be lawful by paying lip service to the law but which discriminates in practice can be said to be a lawful policy, the contravention of which constitutes misconduct; and d) whether refusal to abandon one's sincerely-held religious beliefs is "wilful" conduct, given that matters of religion to those who sincerely hold religious beliefs go to the core of their identity, way of life, and relationship with the divine.

125. The Member's focus on the wilfulness and predictability requirements of the test for misconduct to the exclusion of the most salient component of any test for misconduct—whether the behaviour was "reprehensible"—fails on the *Vavilov* standard.

126. Neither, pursuant to *Vavilov*, is the decision maker at liberty to adopt an impoverished interpretation of the facts, legislation and case law before him. Since the Member tasked with determining whether Mrs. Abdo committed misconduct could plainly see the employer adopted the incorrect standard for religious infringement; the religious infringement and the Policy were inextricably linked; the Policy constituted a novel term

of employment unilaterally imposed upon the employee; the element of reprehensible conduct was missing; and, in general, there was doubt about the employer's dismissal designation sufficient to trigger section 49(2) of the *EI Act*, he had an obligation to turn his attention to those critical pieces. The Member was made aware that for Mrs. Abdo, submitting to COVID vaccination and abandoning her religious beliefs were *one and the same*. Stating that all the evidence showed Mrs. Abdo was fired for refusing to comply with her employer's policy demonstrates the Member "fundamentally misapprehended or failed to account for the evidence before [him]",[130] failed to "meaningfully account for the central issues and concerns raised by" Mrs. Abdo,[131] and failed to "meaningfully grapple with key issues or central arguments raised by" Mrs. Abdo[132]—calling into question whether the Member "actually listened" to Mrs. Abdo[133] and whether he was "actually alert and sensitive to the matter before [him]".[134]

PART IV: ORDER SOUGHT

127. Mrs. Abdo seeks orders:

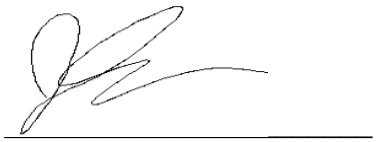
a. Quashing the Decision;

b. Declaring she was not dismissed due to her own misconduct;

c. Directing the Canada Employment Insurance Commission to release to Mrs. Abdo the amount of employment insurance benefits to which she is entitled; and

d. Awarding her costs of this Application.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 20th day of July, 2023.



James S.M. Kitchen
Jody Wells

[130] *Vavilov* at para 126.
[131] *Vavilov* at para 127.
[132] *Vavilov* at para 128.
[133] *Vavilov* at para 127.
[134] *Vavilov* at para 128.

PART V: AUTHORITIES

TAB	JURISPRUDENCE
1	*Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36
2	*British Columbia (Public Service Employee Relations Commission) v BCGSEU*, 1999 CanLII 652 (SCC), [1999] 3 SCR 3
3	*Canada (Attorney General) v Bedell*, 1984 CarswellNat 154, 60 N.R. 115
4	*Canada (Attorney General) v Bellavance*, 2005 FCA 87
5	*Canada (Attorney General) v Brissette*, 1993 CanLII 3020 (FCA), [1994] 1 FC 684
6	*Canada (Attorney General) v Gagnon*, 2002 FCA 460
7	*Canada (Attorney General) v MacDonald*, A-152-96, 1997 CarswellNat 647, [1997] A.C.F. No. 499, [1997] F.C.J. No. 499, 71 A.C.W.S. (3d) 196
8	*Canada (Attorney General) v McNamara*, 2007 FCA 107
9	*Canada (Attorney General) v Secours*, 1995 CarswellNat 122, [1995] F.C.J. No. 210, 179 N.R. 132, 53 A.C.W.S. (3d) 453, A-352-94
10	*Canada (Attorney General) v Tucker*, 1986 CanLII 6794 (FCA), [1986] 2 FC 329
11	*Canada (Attorney General) v Wasylka*, 2004 FCA 219
12	*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65
13	*Canada (Procureure générale) c Marion*, 2002 FCA 185
14	*Canada (Procureure générale) c Turgeon*, [1999] FCJ No. 1861, 1999 CarswellNat 2521
15	*Canadian National Railway Company v Teamsters Canada Rail Conference*, 2018 ABQB 405
16	*Corbiere v Canada (Minister of Indian and Northern Affairs)*, 1999 CanLII 687 (SCC), [1999] 2 SCR 203
17	*DL v Canada Employment Insurance Commission*, 2022 SST 281
18	*Joseph v Canada (Employment & Immigration Commission)*, 1986 CarswellNat 1346, 1986 CarswellNat 1347, 1 A.C.W.S. (3d) 350, A-636-85
19	*Mishibinijima v Canada (Attorney General)*, 2007 FCA 36
20	*Multani v Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6
21	*NE v Canada Employment Insurance Commission*, 2022 SST 732
22	*Paradis v Canada (Attorney General)*, 2016 FC 1282
23	*Quebec (Attorney General) v A*, 2013 SCC 5
24	*SS v Canada Employment Insurance Commission*, 2022 SST 1659
25	*Syndicat Northcrest v Amselem*, 2004 SCC 47
26	*Unemployment Insurance Act and Laurie J. MacDONALD*, CUB 31946
27	*ZZ v Canada Employment Insurance Commission*, 2022 SST 597