Court File No.: A-83-23

FEDERAL COURT OF APPEAL

B E T W E E N:

ROBIN FRANCIS

Applicant

and

CANADA (ATTORNEY GENERAL)

Respondent

APPLICANT'S FACTUM

July 4, 2023

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OVERVIEW

1. The Applicant, Robin Francis (the "**Applicant**"), applies to this Court for judicial review of a decision rendered by Member Charlotte McQuade ("**Member McQuade**") on February 17, 2023 in the Appeal Division of the Social Security Tribunal of Canada (the "**Tribunal**"). In her decision (the "**Decision**"), Member McQuade denied the Applicant's appeal of a decision rendered by Member Solange Losier of the Tribunal's General Division, itself an appeal of an earlier decision made by the Canada Employment Insurance Commission (the "**Commission**"). The Commission's earlier decision denied the Applicant's claim for employment insurance benefits ("**EI Benefits**"), which he had submitted after having been terminated from his employment as a Decision Support Consultant with the London Health Sciences Centre ("**LHSC**") on October 22, 2021 as a result of being unable to comply with LHSC's COVID-19 vaccination policy (the "**Policy**") due to his religious and conscientious beliefs.

2. Member McQuade's Decision agreed with Member Losier and the Commission that the Applicant had lost his employment due to "misconduct", and consequently, pursuant to s. 30(1) of the *Employment Insurance Act*, SC 1996, c. 23 (the "**EI Act**"), he was not entitled to EI Benefits.

3. The Applicant submits that the Decision contains several reviewable errors. **First**, on a correctness standard of review, the Decision incorrectly holds that the "misconduct" analysis under s. 30(1) does not involve the exercise of the Tribunal's discretion and thus a proportionate balancing under the well-known *Doré/Loyola* analysis of the Applicant's *Charter*[1] rights engaged by the Decision was not required. This is manifestly not the case. The Applicant's *Charter*[2] rights, including particularly his freedom of conscience and religion, were infringed by the Decision, and

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

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

the Decision was required to proportionately balance that infringement against the applicable objectives of the EI Act. The failure of the Decision to even attempt this analysis requires that the Decision be set aside. The Appellant submits that owing to the circumstances of this case, this Court ought to perform the analysis now, rather than send this matter back to the Tribunal.

4. **Second**, alternatively, if the Tribunal's "misconduct" analysis does not involve the exercise of the Tribunal's discretion, then this Court should allow the common law test for "misconduct" to evolve to guide the Tribunal to engage in the constitutionally-necessary consideration of *Charter* protections where they arise in the course of a "misconduct" analysis.

5. **Third**, on a correctness standard, the Decision failed to recognize that (a) the Policy was ambiguous; and (b) the Policy was void *ab initio*, since LHSC failed, as a matter of employment law, to provide fresh consideration to the Applicant in exchange for the Policy's imposition on the Applicant. For both reasons, a finding of "misconduct" could not be sustained as a result.

6. **Fourth**, on a reasonableness standard of review, as discussed below, for several reasons, the discrete requirements of the common law test for "misconduct" were not met.

7. Thus, the Applicant did not engage in "misconduct" within the meaning of s. 30(1) of the EI Act. Therefore, the Applicant asks this Court to grant his application for judicial review, set aside Decision below and approve the Applicant's claim for EI Benefits in its entirety.

PART I - FACTS

A. <u>Underlying Facts Leading to the Applicant's Termination and EI Benefits Claim</u>

1. The Applicant's Employment with LHSC

8. The Applicant's first day working with LHSC was June 3, 2015. He was employed as a Decision Support Consultant.[3] The Applicant's evidence was that since mid- 2020 he had been

[3] Applicant's Compendium **("Compendium"), Tab 1.** See also Affidavit of Selena Bird, sworn April 20, 2023 (the "**Bird Affidavit**"), paragraph 3 and Exhibit "A", GD3-21, **Application Record ("AR"), page 89**.

working from home – all team meetings and work were being done online.[4] The evidence demonstrates that the Applicant was a diligent worker who was praised for his attendance record.[5]

2. The Policy

9. LHSC's revised Policy was introduced on September 3, 2021.[6] The Policy provided, in relevant part, as follows:

> LHSC staff and affiliates will:
>
> - Complete a COVID-19 Vaccination e-learning program
> - Provide documentation of all required COVID vaccination doses to Occupational Health and Safety Services (OHSS) or
> - Provide valid documentation of a medical exemption to Occupational Health and Safety Services or
> - Provide documentation for an exemption under Human Rights to People Services
> - Conduct a self-administered COVID-19 rapid antigen test and document results prior to attending work, if an approved exemption is documented. This testing is not a replacement for being fully vaccinated but may play a role in the accommodation process. Beginning October 22, 2021, only those with a valid medical exemption or those with exemption under the Human Rights code will be provided this accommodation.
>
> […]
>
> 1. Staff and Affiliates who are deemed to be not vaccinated may be accommodated per this policy due to: A confirmed medical contraindication (from an attending Physician/Nurse Practitioner reviewed by OHSS), or
> 2. A reason that is verified as applicable under the Ontario Human Rights Code
>
> […]

10. The Policy went on to provide two different disciplinary outcomes in response to two different situations. **First**, if a person chose to remain unvaccinated without a medical or human

[4] **Compendium, Tab 2**. Bird Affidavit, paragraph 3 and Exhibit "A", GD3-10. **AR, page 398**.
[5] **Compendium, Tab 3**. Bird Affidavit, paragraph 3 and Exhibit "A", GD2-13. **AR, page 45**.
[6] **Compendium, Tab 4**. Bird Affidavit, paragraph 3 and Exhibit "A", GD2A-1 to GD2A-4. **AR, page 61**.

rights exemption, the Policy provided that such a person ***would not be terminated*** but would be placed on ***unpaid leave***:

> All other staff and affiliates who are deemed not vaccinated per this policy will NOT be accommodated and will not be allowed to report to work. They will be placed on an unapproved, unpaid leave of absence until they are 14 days past being fully vaccinated. [Emphasis added.]

11. **Second**, with respect to persons using COVID-19 rapid test kits for self-testing purposes, the Policy admonished those persons not to give or sell such kits to other persons or falsify test results. The Policy advised that failure to heed this admonishment ***might result in discipline, up to and including termination***:

> Rapid test kits distributed to those staff members by LHSC are to be used by the staff affiliates who receive them. The rapid tests may not be given or sold to any other person. Failure to comply with the terms of this policy, including falsifying test results, the prohibition on distributing the rapid tests, may result in discipline up to and including termination of employment or revocation of privileges. [Emphasis added.]

3. The Applicant Attempts to Apply for a Human Rights Exemption, but is Summarily Denied

12. On September 22, 2021, the Applicant swore an affidavit, in which he requested a human rights exemption, which the Policy had indicated was available, based on "*creed and conscience*". "Creed" is a protected ground of discrimination under the Ontario *Human Rights Code*.[7] [8]

13. However, the Applicant was never subsequently interviewed or approached by LHSC with a view to investigating the Applicant's request for a human rights exemption. LHSC took no steps whatsoever to determine whether the Applicant's request was valid. Instead, approximately two weeks later, on October 5, 2021, LHSC sent the Applicant a brief e-mail denying the Applicant's request for an exemption.[9] It merely provided:

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[7] *Human Rights Code*, R.S.O. 1990, c. H.19.
[8] **Compendium, Tab 5**. Bird Affidavit, paragraph 3 and Exhibit "A", GD2-23 to GD2-24. **AR, page 55**.
[9] **Compendium, Tab 6**. Bird Affidavit, paragraph 3 and Exhibit "A", GD2-25. **AR, page 57**.

> At this time LHSC is not considering any exemptions other than medical exemptions or Human Rights exemptions as per the *COVID-19 Vaccination Policy*.

14. The e-mail quoted a statement promulgated by the Ontario Human Rights Commission:

> [A] person who chooses not to be vaccinated based on personal preference does not have the right to accommodation under the Code. Even if a person could show they were denied a service or employment because of a creed-based belief against vaccinations, the duty to accommodate does not necessarily require they be exempted from vaccine mandates, certification or COVID testing requirements. The duty to accommodate can be limited if it would significantly compromise health and safety amounting to undue hardship – such as during a pandemic.[10]

15. No other justification for the denial of the Applicant's request was provided.

4. The Applicant is Terminated

16. On October 13, 2021, LHSC management and the Applicant had a meeting, where LHSC informed the Applicant that his employment was terminated effective October 22, 2021.[11]

17. LHSC then followed through with the termination. On October 22, 2021, LHSC both met virtually with the Applicant and sent him a letter advising that he was being terminated on that date (the "**Termination Letter**").[12]

B. <u>Subsequent Facts Leading to This Appeal</u>

18. Subsequently, the Applicant applied for EI Benefits.[13] On January 11, 2022, the Commission sent the Applicant a letter, advising:

> You are not entitled to Employment Insurance benefits from October 24, 2021 because you lost your employment with LONDON HEALTH SCIENCES CENTRE on October 21, 2021 as a result of your misconduct.[14]

19. On January 19, 2022, the Applicant filed a Request for Reconsideration of the Commission's decision.[15] The Commission's reconsideration decision was sent to the Applicant

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[10] **Compendium, Tab 6**. Bird Affidavit, paragraph 3 and Exhibit "A", GD2-25. **AR, page 57**.
[11] **Compendium, Tab 7**. Bird Affidavit, paragraph 3 and Exhibit "A", GD3-13. **AR, page 81**.
[12] **Compendium, Tab 8**. Bird Affidavit, paragraph 3 and Exhibit "A", GD2-20 to GD2-22. **AR, pages 52-54**.
[13] **Compendium, Tab 9**. Bird Affidavit, paragraph 3 and Exhibit "A", GD3-3 to GD3-20. **AR, pages 71-88**.
[14] **Compendium, Tab 10**. Bird Affidavit, paragraph 3 and Exhibit "A", GD3-26 to GD3-27. **AR, pages 94-95**.
[15] **Compendium, Tab 11**. Bird Affidavit, paragraph 3 and Exhibit "A", GD3-28 to GD3-31. **AR, pages 96-99**.

in a letter dated on March 3, 2022. In the letter, the Commission advised the Applicant that its decision to deny the Applicant's claim for EI benefits had not changed.[16]

20. The Applicant then submitted a Notice of Appeal to the General Division, with supporting documentation, on or about March 14, 2022.[17] The Applicant's hearing before the General Division proceeded on July 7, 2022 by videoconference.[18]

1. The General Division's Decision

21. On July 26, 2022, Tribunal Member Solange Losier ("**Member Losier**") dismissed the Applicant's appeal.[19] Essentially, Member Losier found that the Commission had proven that the Applicant had engaged in misconduct for the following reasons: (1), because the Policy had been communicated to the Applicant;[20] (2) because the Applicant wilfully chose not to comply with the Policy;[21] (3), because the Applicant "*knew or ought to have known the consequences of not complying would lead to a dismissal*";[22] (4) because the Applicant had not proven he was exempt from the Policy;[23] and (5) because Member Losier "*generally accepted*" that the LHSC could choose to impose policies at the workplace. She held that the LHSC imposed a vaccination policy which "*became a condition of his employment when they introduced the policy*"[24]

22. Member Losier acknowledged at paragraph 52 of her decision that the Applicant had raised several other arguments and had filed evidence to support his position on those arguments. However, Member Losier declined to address those arguments, holding that she did not have

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[16] **Compendium, Tab 12**. Bird Affidavit, paragraph 3 and Exhibit "A", GD02B-2. **AR, page 67**.
[17] **Compendium, Tab 13**. Bird Affidavit, paragraph 3 and Exhibit "A", GD2-1 to GD2-27. **AR, pages 33-59**.
[18] **Compendium, Tab 14**. Bird Affidavit, paragraph 3 and Exhibit "A", GD1-1 to GD1-5. **AR, pages 27-31**.
[19] **Compendium, Tab 15**. Bird Affidavit, paragraph 6 and Exhibit "B", AD1A-1 to AD1A-11, **AR, Pages 576-586**.
[20] Compendium, Tab 15. Decision, paragraphs 35-36. AR, Page 582.
[21] Compendium, Tab 15. Decision, paragraphs 37-39. AR, Page 582.
[22] Compendium, Tab 15. Decision, paragraphs 40-46. AR, Page 583.
[23] Compendium, Tab 15. Decision, paragraphs 47-48. AR, Page 583-584.
[24] Compendium, Tab 15. Decision, paragraph 49. AR, Page 584.

authority to decide them. Member Losier concluded that the Applicant's "*recourse is to pursue an action in court, or any other Tribunal that may deal with these particular arguments*."[25]

23. The Applicant then filed an application for leave to appeal to the Appeal Division on or about August 24, 2022.[26] On October 14, 2022, Tribunal Member (Appeal Division) Charlotte McQuade ("**Member McQuade**") issued her decision in which she granted leave to the Applicant to proceed with an appeal.[27]

2. The Appeal Hearing and Supplementary Written Submissions

24. The appeal hearing before Member McQuade proceeded by way of videoconference on December 12, 2022. During the hearing, Member McQuade asked counsel to provide her with additional to provide supplementary written submissions on the following three issues:

a) how the principles set out in *Paradis v. Canada (Attorney General)*, *Mishibinijima v. Canada (Attorney General)* and *Canada (Attorney General) v. McNamara* (i.e. when considering a "misconduct" case, the focus is on the employee's conduct, and not that of the employer) ought to impact her analysis in this case (if at all);

b) the Applicant's response, if any, to the Respondent's reliance on *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54; and

c) whether the Tribunal's task in this matter (i.e. determining whether the Applicant engaged in "misconduct" under the EI Act) involves the exercise of statutory discretion, which in turn requires the Tribunal to employ the well-known *Doré/Loyola* analysis.

25. Only two days after the hearing, on December 14, 2022, the General Division of the Tribunal released a decision in the matter of *Annette Lance v. CEIC*, File No. GE-22-1889.[28] In counsel's view, the *Lance* decision addressed the very same issues facing the Tribunal in the Applicant's appeal and was instructive.

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[25] Compendium, Tab 15. Decision, paragraph 54. AR, Page 585.
[26] **Compendium, Tab 16**. Bird Affidavit, paragraph 6 and Exhibit "B", AD1-4 to AD1-14. **AR, pages 273-283**.
[27] **Compendium, Tab 17**. Bird Affidavit, paragraph 6 and Exhibit "B", AD8, **AR, pages 931-939**.
[28] *AL v. Canada Employment Insurance Commission,* 2022 SST 1428 (SST) [*Lance*].

26. Accordingly, the Applicant's counsel included the *Lance* case and corresponding submissions, along with a request for the Tribunal to consider the new decision, in his supplementary written submissions to Member McQuade. These were all forwarded to her attention by e-mail on December 19, 2022 per the agreed-upon schedule.[29]

27. On January 5, 2023, the Applicant's counsel received the Commission's responding supplementary submissions, as requested by Member McQuade.[30]

3. The Applicant's Further Written Submissions

28. On January 9, 2023, the Applicant's counsel wrote to the Tribunal, attaching a new decision by Member Elizabeth Usprich of the General Division of the Tribunal.[31] This decision was only released on January 3, 2023, and so could not have been included either in the Applicant's original representations or in its supplementary written representations dated December 19, 2022.

29. The issues raised in this new decision were virtually identical to the issues raised in the Applicant's case. In fact, the employee in this new case also worked for LHSC and was subject to the same Policy as the Applicant was in this case. Accordingly, the Applicant's counsel asked the Tribunal to consider this additional decision and the underlying documents filed with it.[32]

30. The Applicant's counsel's urgent correspondence in this regard was indeed received by the Tribunal, as indicated by an internal document provided by the Tribunal in this proceeding. A "screen shot" of an internal Tribunal e-mail dated January 9, 2023 advises "*Good morning, New urgent correspondence available in the U: drive*".[33]

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[29] **Compendium, Tab 18**. Bird Affidavit, paragraph 6 and Exhibit "B", AD7-1 to AD7-35. **AR, pages 883-917**.
[30] **Compendium, Tab 19**. Bird Affidavit, paragraph 6 and Exhibit "B", AD8-1 to AD8-11. **AR, page 919-929**.
[31] This decision is not available on the Tribunal's searchable decision database. It is included in the **Compendium at Tab 27**; **AR, pages 991-1002**.
[32] **Compendium, Tab 20**. Bird Affidavit, paragraphs 7-12 and Exhibits "C" and "D". **AR, pages 941; 944-1002**.
[33] Compendium, Tab 28. AR, pages 1054-1063. The "screen shot" e-mail is found at AR, page 1063.

31. Documents filed in this proceeding by the Tribunal also include a document entitled "Telephone Conversation Log", dated January 20, 2023. The document is a record apparently created by Lisa Ladouceur, who indicated that on January 20, 2023, she spoke with the Applicant, who was inquiring about whether Tribunal had accepted the new decision and the underlying documents. Ms. Ladouceur appears to have indicated to the Applicant that the materials "*were received and the member will respond in writing*".[34]

32. Despite the contents of the telephone log, no response was ever received from the Tribunal, whether agreeing or refusing to consider this new decision.

4. Member McQuade's Decision

33. Member McQuade's decision (the "**Decision**") is dated February 17, 2023.[35] Member McQuade dismissed the Applicant's appeal, rejecting every argument advanced by the Applicant. While she did advise that she accepted the Applicant's submissions on the *Lance* decision for consideration, she nonetheless purported to distinguish *Lance* from the Applicant's case.

34. Member McQuade did not refer at all in the Decision to the additional case forwarded to the Tribunal on January 9, 2023.

PART II – ISSUES RAISED ON THIS APPLICATION

35. The Applicant seeks to have this Court set aside the Decision for the reasons set out in the Notice of Application at paragraph **57(a) – (q)**, which will be addressed here as four general issues:

A. the Decision's refusal to justify, or attempt to justify, its infringement of the Applicant's *Charter* rights;

B. the Decision's application of the common law test for misconduct without necessary evolution of that test to conform it to the government's obligations under the *Charter*;

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[34] **Compendium, Tab 21**. Bird Affidavit, paragraphs 15-16 and Exhibit "F". **AR, page 1013**.
[35] **Compendium, Tab 22**. Bird Affidavit, paragraph 17 and Exhibit "G". **AR, pages 1015-1053.**

C. the Decision's errors of employment-related law concerning interpretation and effect of the Policy; and

D. the Decision's unreasonable finding that the Applicant actions concerning the Policy constituted misconduct disqualifying him from receiving EI Benefits.

36. The appropriate relief this Court should grant the Applicant is discussed under each issue.

PART III – LAW & ARGUMENT

Issue #1 - The Decision Failed to Justify its Infringement of the Applicant's *Charter* Rights

37. The Applicant submits that the failure of the Decision to address its infringement of his *Charter* rights attracts a correctness standard of review.[36]

The Decision Engaged *Charter* Protections and Required Justification

38. It is undisputed that Applicant's employer's requirement that he take the Covid vaccine contradicted the Applicant's "sincerely held convictions based on creed and conscience",[37] specifically his Catholic and pro-life beliefs.[38] The sincerity of the Applicant's religious beliefs, attested to by the Applicant's steadfast response to his employer's demand, was not questioned in either of the Tribunal's decisions.

39. Not only did the Applicant lose his job for not contradicting his religious beliefs to take the Covid vaccine, the Commission and the Tribunal's decisions, including the Decision, have deprived him of EI Benefits, on the basis that his failure to contradict his religious beliefs and take the Covid vaccine as required by his employer constituted "misconduct" under s. 30 of the EI Act.

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[36] See *McCarthy v. Whitefish Lake First Nation #128*, 2023 FC 220 at para 53, quoting *Canadian Broadcasting Corporation v. Ferrier*, 2019 ONCA 1025 at para 35; *Robinson v. Canada (Attorney General)*, 2020 FC 942 at para 42; see also *Guelph and Area Right to Life v. City of Guelph*, 2022 ONSC 43 at paragraph 85 (Div. Ct.); CHP v. City of Hamilton, 2018 ONSC 3690 at paragraph 57 (Div. Ct.); *Canadian Centre for Bio-Ethical Reform v. Peterborough (City)*, 2016 ONSC 1972 at paragraphs 23-24 (Div. Ct.).

[37] **Compendium, Tab 5**. Bird Affidavit, paragraph 3 and Exhibit "A", GD2-23 to GD2-24. AR, page 55.

[38] **Compendium, Tab 22.** Decision at para 86. See also **Compendium, Tab 15**, GD Decision at para 29; GD6-1 to GD6-3; GD3-44 to GD3-45. **AR, pages 1030; 581; 112-113; 139-141.**

40. It cannot be seriously disputed that the Decision to deny the Applicant EI Benefits in these circumstances is a more than trivial or insubstantial coercive burden on the Applicant's exercise of his sincere religious beliefs.[39]

41. Because government violations of *Charter* protections can only be allowed where they are "reasonable limits" that can be "demonstrably justified in a free and democratic society",[40] the Decision which violated the Applicant's *Charter* freedom of religion must be justified in order to be upheld by this Court: this burden of justification is on the government decision maker.[41]

42. The Decision failed to account for this foundational constitutional context, and instead chose to narrowly focus on the issue of whether "the question of misconduct is an exercise of statutory discretion to which the *Doré* analysis applies."[42]

43. This narrow focus was incorrect.

44. The Applicant maintains that the *Doré* analysis applied to the Decision; however,even if the *Doré* analysis did not strictly apply, the government, including the Tribunal Member, was required to consider whether the infringement of the Applicant's *Charter* rights by the denial of his EI Benefits was justified. This is illustrated by a 2021 decision from British Columbia, where Justice Morellato addressed whether a contractual decision that violated *Charter* protections was

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[39] See *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713 at para 96; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at para 95; *Syndicat Northcrest v. Amselem*, 2004 SCC 47, at 56-59. The Applicant also explained how his Charter rights under section 7 (particularly with respect to his view that on the facts of this case, he was unable to provide "informed consent" to the proposed vaccination regime), 8 and 15 were engaged by the Decision to deny him EI Benefits. See **AR, pages 204-206; 281-282**. See also the Applicant's written representations submitted to Member McQuade, **AR, pages 783-823**. In particular, on this point see pages 813-821.

[40] *Charter* section 1: "The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

[41] See *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12 [2015] 1 S.C.R. 613 para 38: "The Charter enumerates a series of guarantees that can only be limited if the government can justify those limitations as proportionate."

[42] Compendium, Tab 22; Decision at para 164. AR, page 1042.

justified by "applying the criteria of minimal impairment and the proportionate balancing of *Charter* protections, viewed through the lens of reasonableness."[43]

The Decision Exerted Statutory Discretion Rendering *Doré* Applicable

45. The Decision was wrong to hold that a "misconduct" analysis under s. 30(1) of the EI Act is not an exercise of statutory discretion necessitating the utilization of the *Doré* analysis where, as here, it engaged the Applicant's *Charter* rights. The Decision's analysis between paragraphs 201-228 (but in particular, at paragraphs 210-212; 216-220; 225) misses the mark in several ways.

46. The question of *whether or not* misconduct is present in a given case in the first place is necessarily a discretionary decision. Tribunal members are charged by the EI Act with the responsibility of considering and weighing evidence in deciding whether a claimant has committed "misconduct". Indeed, section 64(1) of the Tribunal's home statute, the *Department of Employment and Social Development Act*,[44] grants the Tribunal the power to "*decide any question of law or fact that is necessary for the disposition of any application made or appeal brought under this Act*." This provision gives Tribunal members wide latitude to consider – in their broad discretion - the particular circumstances of a given case in order to determine whether a particular applicant for EI Benefits lost his or her employment as a result of "misconduct."

47. The Decision incorrectly relies on the "lack of permissive language in section 30(1) of the EI Act" to hold that the decision about misconduct is not discretionary.[45] In a 2019 British Columbia Court of Appeal decision involving an application for approval of a diagnostic facility, the Court directly addressed a similar concern about the lack of permissive language in the statutory criteria:

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[43] *The Redeemed Christian Church of God v New Westminster (City)*, 2021 BCSC 1401 [*Redeemed Christian*], at paras 102-110, reversed on other grounds, 2022 BCCA 224.
[44] *Department of Employment and Social Development Act*, SC 2005, c. 34.
[45] Compendium, Tab 22.; Decision at paras 210-215; AR, pages 1050-1051.

> [86] In my view, the Commission's decision regarding the factors set out in s. 40(1) of the *Regulation* was a discretionary administrative decision. Although the Commission "must not" approve a facility unless the criteria are met, it has some discretion in deciding whether the criteria are met based on the evidence before it in each particular case. In particular, s. 5.1 of the *Act* requires the Commission to carry out its duties in conformity with the principles underlying the concept of universal healthcare as set out in the *Canada Health Act*. Section 5.7 of the *Act* requires the Commission to have regard to principles of sustainability. Although s. 40(1) is largely a fact finding exercise, the overall decision involves a balancing of these principles. Even if the Commission's decision were to be considered a wholly fact finding one, then the result of this appeal would not differ. It is only discretionary adjudicative decisions that are or may be subject to a *Charter* balancing—itself a discretionary analysis. The decision under the *Act* is a determination the Commission is tasked to make based on its unique expertise. This distinction between discretionary administrative decisions and statutory interpretive decisions becomes clear when one considers that the issue on the judicial review was not whether the Commission correctly interpreted the meaning of the words "sufficient medical need", "quality of diagnostic services", or "potential conflict of interest". There was no disagreement as to the meaning of these terms. Rather, the question was whether the Commission's conclusion regarding the criteria in this particular case was reasonable. This was a discretionary decision based on a particular set of facts, where the law did not dictate a specific outcome.
>
> [87] Accordingly, the Commission's decision was one which potentially engaged the *Doré* framework.[46]

48. Likewise in *Gordon v. British Columbia (Superintendent of Motor Vehicles)*,[47] the British Columbia Court of Appeal addressed the following argument, analogous to the Decision's reasoning:

> The respondents suggest that because the *MVA* delineates a narrow set of criteria for confirming or revoking an ADP [administrative driving prohibition] and a Superintendent's delegate "must" either confirm or revoke the driving prohibition based on those criteria, a decision under s. 94.6 is not discretionary. Consequently, the *Doré* and *Loyola* framework has no application.

Justice DeWitt-Van Oosten, writing for the unanimous panel, held as follows:

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[46] *Pacific Centre for Reproductive Medicine v. Medical Services Commission*, 2019 BCCA 315 at paras 86-87 [emphasis added]. In *Pacific Centre*, the Court found that the first step in the in the *Doré* analysis, to determine whether a decision engages the *Charter* by limiting its protections, was not met.

[47] *Gordon v. British Columbia (Superintendent of Motor Vehicles)*, 2022 BCCA 260 (CA). See also *Gonzalez v. Alberta (Driver Control Board)*, 2003 ABCA 256, where the Alberta Count of Appeal described at paragraph 64 the power of the Alberta Transportation Safety Board to confirm or revoke an administrative licence suspension (as part of a scheme similar to that considered in *Gordon*) as "discretionary".

> I disagree. In deciding whether to confirm or revoke an ADP, a delegate considers whether the statutory criteria for a confirmation or revocation have been met, as informed by the particular circumstances of the case. This is an individualized assessment.
>
> In reviews such as the one sought by Mr. Gordon, a delegate decides whether the facts of the case support a claim of reasonable excuse. In reaching that conclusion, they are entitled to "determine the weight to be given" to any evidence adduced in the review (MVA, s. 94.5(2.2)). In supplemental submissions filed in the appeal, the respondents acknowledge that weighing evidence involves an element of discretion. I also agree with Mr. Gordon that the adjudicative process at issue here is a discretionary decision of the nature described in *Pacific Centre* , namely, "a discretionary decision based on a particular set of facts, where the law [does] not dictate a specific outcome": at paras. 85 — 86, *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at para. 52.
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> […]
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> In my view, the Superintendent does exercise discretion under s. 94.6 of the *MVA* and, as a result, delegates who conduct a review of an ADP are obliged to do so in a manner consistent with *Charter* rights and values. When a *Charter* interest properly arises, delegates must therefore balance the severity of any alleged interference with that interest against the statutory objectives of the ADP scheme.[48]

49. The Applicant relies, as it did below, on three decisions from the Tribunal itself, where in each case the Tribunal member referred with approval to the applicability of the *Doré* analysis: *P.C. v. Minister of Employment and Social Development*, ; *J.L. v. Canada Employment Insurance Commission*; and *M.D. v. Minister of Employment and Social Development*.[49]

50. Following the above jurisprudence, the Applicant submits that the Tribunal's "misconduct" analysis is no different in principle than any of the types of decisions at issue in *Pacific Centre*, *Gordon* and *Gonzalez*. In each case, the decision maker was tasked with considering and weighing evidence, making findings of fact, and applying those findings to a set of statutory principles. As quoted in *Pacific Centre* at paragraph 85, these types of decisions (including the Decision in this

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[48] *Gordon v. British Columbia (Superintendent of Motor Vehicles)*, 2022 BCCA 260, at paras 59-60 and 62 [emphasis added].

[49] *P.C. v. Minister of Employment and Social Development*, 2016 SSTGDIS 99; *J.L. v. Canada Employment Insurance Commission*, 2017 SSTGDEI 189; *M.D. v. Minister of Employment and Social Development*, 2017 SSTADIS 553.

case) involve the exercise of discretion because the decision makers are "*given the power to make a decision that cannot be determined to be right or wrong in any objective way*", and consequently such decisions which engaged *Charter* protections require the application of the *Doré* framework.

51. The "misconduct" analysis under s. 30(1) generally follows the well-known common law test established by this Court, elements of which allow Tribunal members wide latitude to determine whether the test is met. The relevant defining principles are as follows:

(a) in order to constitute "misconduct" under section 30(1), the act complained of must be wilful, or at least of such a careless or negligent nature that one could say the employee wilfully disregarded the effects his or her actions would have on job performance: *Tucker v Canada (A-G)*[50]

(b) however, a wrongful intent is not necessary for a given behaviour to amount to misconduct. It is sufficient that the reprehensible act or omission be made "wilfully", i.e. consciously, deliberately or intentionally: *Canada (A-G) v. Secours*[51]

(c) there is a need for a causal link between the impugned conduct and the dismissal. It is not sufficient for the alleged misconduct to be a mere excuse or pretext for the dismissal: *Canada (A-G) v. Brissette*[52]

(d) in addition to the causal relationship, the misconduct must be committed by the employee while he or she was employed by the employer, and must constitute a breach of a duty that is express or implied in the contract of employment: *Canada (A-G) v. Brissette*[53]

(e) the misconduct in question is not a mere breach by the employee of any duty related to his employment; it is a breach of such scope that its author could normally foresee that it would be likely to result in his dismissal: *Canada (A-G) v. Langlois*[54]

(f) put another way, there will be misconduct where the claimant knew or ought to have known that his conduct was such as to impair the performance of his duties

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[50] *Tucker v. Canada (Attorney General)*, [1986] 2 FC 329 at paragraphs 4 and 7 (FCA).
[51] *Canada (Attorney General) v. Secours* (1995), 179 N.R. 132 at paragraph 2 (FCA). Note: this decision is not available on Canlii; it has been included in the **Compendium at Tab 23**.
[52] *Canada (Attorney General) v. Brissette*, [1994] 1 FC 684 at paragraphs 12-13 (FCA).
[53] *Canada (Attorney General) v. Brissette*, [1994] 1 FC 684 at paragraph 14 (FCA).
[54] *Canada (Attorney General) v. Langlois* (1996), 63 ACWS (3d) 196 at paragraph 4 (FCA). Note: this decision is not available on Canlii; it has been included in the **Compendium at Tab 24**.
See also *Canada (Procureur general) c. Richard*, 2005 FCA 339 at paragraph 5 (FCA). See also *Canada (Attorney General) v. Pearson*, 2006 FCA 199 (FCA) to similar effect.

owed to his employer and that, as a result, dismissal was a real possibility: *Mishibinijima v. Canada (A-G)*[55]

(g) in determining whether the claim had lost his employment by reason of his misconduct, the Board is bound to consider all of the relevant circumstances leading to his dismissal: *Mishibinijima v. Canada (A-G)*[56]

(h) the question is not whether the dismissal is justified under the meaning of labour law but, rather, of determining, according to an objective assessment of the evidence, whether the misconduct was such that its author could normally foresee that it would be likely to result in his or her dismissal: *Canada (P-g) c. Lemire*[57]

52. One can immediately see that many of the considerations at play ask Tribunal members to use their judgment and their discretion. For example, in a given case, was the claimant's conduct "willful"? Was the conduct a breach of a duty that was express or implied in a contract? Could such a breach be normally foreseen to result in dismissal? These questions are all matters of discretion for Tribunal members to determine as they consider appropriate.

53. Tribunal members are, accordingly, not simply checking items off of a list, and mindlessly coming to a yes/no result without any control as to whether those items on the checklist were present or not. With respect, that characterization cheapens the Tribunal's work in this area. Paraphrasing *Pacific Centre*, Tribunal members "*ha[ve] some discretion in deciding whether the criteria are met based on the evidence before it in each particular case. […] This [is] a discretionary decision based on a particular set of facts, where the law [does] not dictate a specific outcome."* Paraphrasing *Gordon*, "*in deciding whether to [find misconduct], a [Tribunal member] considers whether the statutory criteria for a [finding of misconduct] have been met, as informed by the particular circumstances of the case. This is an individualized assessment*."

This Court Should Find that Violation of the Applicant's *Charter* Freedom of Religion Has Not Been Justified

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[55] *Mishibinijima v. Canada (Attorney General)*, 2007 FCA 36 at paragraph 14 (FCA).
[56] *Mishibinijima v. Canada (Attorney General)*, 2007 FCA 36 at paragraph 24 (FCA).
[57] *Canada (Procureur general) c. Lemire*, 2010 FCA 314 at paragraph 15 (FCA).

54. Ultimately, if the Court agrees that a "misconduct" analysis under the EI Act involves the exercise of discretion, then the *Doré* analysis should have been undertaken. It was not, by either Tribunal member. This was incorrect; accordingly, this matter must either be sent back to the Tribunal for further consideration, or this Court must intervene to perform the *Doré* analysis now.

55. The Appellant submits, following *Vavilov* at paragraph 142, that this Court should proceed to perform the *Doré* analysis now. There is no need to send this matter back to the Tribunal for reconsideration. The Commission and the Tribunal have failed to provide any evidence that could meet their burden, as government decision makers limiting the Applicant's *Charter* rights, demonstrating that denial of the Applicant's EI Benefits is justified, in light of that facts that the Applicant did not pose a threat of any kind to the health and safety of LHSC patients or staff.

56. The Decision, affirming the previous denials of the Commission and General Division, amounted to 'kicking a man when he's down,' depriving the Applicant of basis sustenance EI Benefits, when he had already lost all income from his employment. The nature of such a decision warrants immediate redress. In this case, the deprivation of subsistence benefits – premised on the Applicant's constitutionally protected adherence to his religious beliefs – has continued already for over 18 months. To force the Applicant to restart the process risks another turn on the "administrative/judicial review merry-go-round" described in *Vavilov*.

Issue #2 - Common Law Test for Misconduct Must Evolve To Respect *Charter* Protections

57. In the alternative, if this Court is of the view that a "misconduct" analysis for purposes of the EI Act does not involve the exercise of discretion, then the common law test for "misconduct" developed by this Court must be allowed to evolve to require Tribunal members to consider *Charter* protections and principles where they arise in the course of a "misconduct" analysis, as in the present case. This issue is properly considered a "constitutional question" and "*a question of*

law of central importance to the legal system as a whole".[58] It is therefore reviewable on a standard of correctness.

58. This argument was raised before Member McQuade, who refused to consider it. She held that the issue had been decided in *Cecchetto v. Canada (Attorney General)*,[59] a recent decision in the Federal Court. With respect, Member McQuade was wrong in so holding. *Cecchetto* does not stand for the proposition that the common law test for "misconduct" should not evolve as needed in order for *Charter* values to be taken into account as required. Rather, the Court simply held in *Cecchetto* that the issues raised by the claimant were outside of the scope of the Tribunal's mandate. That finding is not a statement of general proposition, is not binding on this Court and has no bearing on the issues raised in this proceeding.

59. There is no doubt that the *Charter* does indeed apply to the common law. This was made clear by the Supreme Court of Canada in *Dolphin Delivery Ltd. v. R.W.S.D.U., Local 580.*[60]

60. In *Hill v. Church of Scientology of Toronto*,[61] the Supreme Court also confirmed that the common law must be interpreted in a manner consistent with *Charter* principles, and that the party who is alleging that the common law is inconsistent with the *Charter* should bear the onus of proving both that the common law fails to comply with *Charter* values and that, when these values are balanced, the common law should be modified.[62]

61. Following *Dolphin Delivery* and *Hill*, above, the Applicant further submits that the common law test for "misconduct" is incomplete, to the extent that it does not expressly require decision-makers to consider whether a claimant's *Charter* rights are engaged in a given set of

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[58] *Vavilov* at para 17.
[59] *Cecchetto v. Canada (Attorney General)*, 2023 FC 102 (FC).
[60] *Dolphin Delivery Ltd. v. R.W.D.S.U., Local 580*, [1986] 2 SCR 573 at paragraph 32 (SCC).
[61] *Hill v. Church of Scientology of Toronto*, [1995] 2 SCR 1130 (SCC).
[62] *Ibid.*, paragraphs 94-95; 100-101.

circumstances. The common law must be allowed to evolve, and the test for "misconduct" in this area is no exception.

62. In this case, the balancing of interests called for in *Hill* leads to a similar outcome in the Applicant's case as that compelled by the *Doré* analysis, above. Simply stated, a claimant's *Charter* rights must be considered and respected at all times – even where they are engaged in cases where the Tribunal is asked to rule on whether the claimant committed misconduct. If this were not the case, then the result would be that an employer is free to impose a policy that interferes with its employees' *Charter* rights in any number of ways, and any employees who refuse to comply with that policy could not only be terminated but would also automatically lose their government-administered EI Benefits claims. This result is unjust and unconstitutional.

63. Accordingly, the common law test for "misconduct" must be revised or clarified to ensure *Charter* protections, where they are engaged, must be considered and infringed as little as possible and only to meet compelling statutory objectives.[63] To do anything less would be to disregard a claimant's *Charter* rights in government decision-making.

Issue #3 – Application of Employment Law Principles to the "Misconduct" Analysis

64. The Decision erred in addressing (a) whether the Policy was ambiguous; and (b) whether the Policy was void *ab initio* for failure of the employer to provide fresh consideration to the Applicant in exchange for its imposition on the Applicant, and consequently whether a finding of "misconduct" can be sustained as a result. These questions are *"questions of law of central importance to the legal system as a whole*".[64] They are reviewable on a standard of correctness.

The Policy was Ambiguous

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[63] *Redeemed Christian* at paras 102-110; *Loyola High School v. Quebec (Attorney General),* 2015 SCC 12, at paras 37, 38-40; *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32, at para 55-58, 80-81; see generally *R. v. Oakes*, [1986] 1 S.C.R. 103, 1986 CanLII 46 (SCC); *Multani v. Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6, [2006] 1 S.C.R. 256; *Doré v. Barreau du Québec*, 2012 SCC 12.

[64] *Vavilov*, paragraphs 58-62.

65. In *Holm v. AGAT Laboratories Ltd.*, the Alberta Court of Appeal confirmed that in the realm of employment law, uncertainty ought to be resolved in favour of the employee. Moreover, *contra preferentem* mandates that contractual ambiguities ought to be resolved against the party that drafted the contract. In cases dealing with employment contracts and duties, therefore, uncertainty and ambiguity ought to be resolved against the employer.[65]

66. In this case, the Policy itself was internally inconsistent and ambiguous, and Member McQuade was wrong to conclude that this did not matter in the Applicant's case.

67. As indicated above, the Policy clearly provided that those persons who wished to remain unvaccinated without a valid exemption would be placed on unpaid leave until such time as those persons became vaccinated. However, the Policy also provided that persons who failed to comply with "*this policy*" might be subject to discipline, up to and including termination:

> Failure to comply with the terms of this policy, including falsifying test results, the prohibition on distributing the rapid tests, may result in discipline up to and including termination of employment or revocation of privileges. [Emphasis added.]

68. When given a plain reading, the Policy (and particularly, the words "this policy") is ambiguous. Do the words "*this policy*" mean the *entire* Policy, or do they refer only to that portion of the Policy dealing with self-administered testing?

69. The Applicant submits that the above section of the Policy either (a) clearly refers to disciplinary measures relating only to improper conduct vis-à-vis self-administered testing (for example, employees were forbidden from falsifying test results or giving test kits away); or (b) sets up an ambiguity where the Policy simultaneously advises employees that they both would not be terminated but also might be terminated.

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[65] *Holm v. AGAT Laboratories Ltd.*, 2018 ABCA 23 at paragraph 34 (ABCA). See also *Wood v. Fred Deeley Imports Ltd.*, 2017 ONCA 158 at paragraph 28 (ONCA).

70. Thus, either the Policy was ambiguous, or it was not. If not, then both parts of the Policy dealt with different scenarios, and the Applicant's scenario was the former, meaning that he should only have been placed on unpaid leave.

71. On the other hand, if the Policy was ambiguous, then, according to the above jurisprudence (e.g. *Holm* and *Wood*, above) any ambiguity or uncertainty must be resolved in favour of the Applicant on the basis of the principle of *contra preferentem*.

72. The Applicant submits that the Policy was ambiguous. Accordingly, it was impossible for the Applicant to know that he was in jeopardy of being terminated if he did not comply with the Policy. Any finding of "misconduct" in the Applicant's case on that basis was incorrect.

The "Durston-Arriola Decision"

73. The Tribunal itself has previously agreed with this conclusion in a different case involving the very same employer and the very same Policy. On January 3, 2023, Tribunal Member Elizabeth Usprich issued a decision allowing a claimant's appeal from the Commission's decision that the claimant had committed "misconduct".[66] This decision was forwarded to Member McQuade by the Applicant's counsel on January 9, 2023, but naturally could not have been submitted in advance of the appeal hearing. The decision (and supporting documents, which show that the claimant's name in this case was Marita Durston-Arriola[67]) were obtained by the Applicant from the other claimant directly.

74. The supporting documents[68] to the Durston-Arriola decision show that the decision involved an employee who also worked at LHSC, and who was subject to the same Policy as the Appellant. She was initially denied her EI Benefits by the Commission. However, Member

[66] See **Compendium, Tab 27**. **AR, pages 991-1002**. For reasons unknown, Member Usprich's decision, dated January 3, 2023, is not available on the Tribunal's searchable database of decisions..
[67] See the letter dated August 3, 2022 from the Tribunal to the LHSC, **Compendium, Tab 25**; **AR, page 971.**
[68] Compendium, Tab 26. AR, pages 944-990.

Usprich allowed the claimant's appeal because, in her view, the Policy was ambiguous,[69] and that the only time that the claimant realized that she was in danger of being terminated due to her unwillingness to comply with the Policy was on the day of her termination, which is exactly the same thing that happened to the Applicant:[70]

> [48] The policy does not say that those without an exemption/accommodation who are unvaccinated will be terminated if they do not comply with the policy.
>
> […]
>
> [51] The only piece of evidence about termination of employment came from the Claimant. That document was given to her on the day of her termination. The Claimant testified under oath that she had no knowledge that she would be losing her job until she was given less than one week's notice that she would be terminated. I find no evidence to contradict this.

75. Member Usprich referred to a meeting that took place on October 15, 2021 between LSHC management and the claimant, where the claimant (like the Applicant) was asked whether she was aware of the Policy, to which she answered yes. The claimant was then asked whether she planned to take the vaccine, to which she answered no. She was then told that she was terminated, effective October 22, 2021.[71]

76. These are identical circumstances to those of the Applicant. And, in her decision, Member Usprich found that the claimant did not lose her job because of "misconduct". The same result should have obtained in the Applicant's case.

77. Member McQuade's failure to consider this decision was unreasonable. Her failure to explain why she refused to do so demonstrates a lack of procedural fairness. Similarly, the absence of this decision on the Tribunal's database amounts to a lack of transparency.

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[69] Compendium, Tab 27, paragraph 48. AR, page 1001.
[70] *Ibid.*, paragraph 51. **AR, page 1002.**
[71] *Ibid.*, paragraph 31. **AR, page 997-998.**

78. Aside from completely ignoring the Durston-Arriola decision, Member McQuade was also wrong in purporting to "explain away" the Policy's ambiguity by suggesting that any such ambiguity was cured by the meeting that took place between the Applicant and LHSC management on October 13, 2021. At paragraphs 74-79 of the Decision, Member McQuade essentially agreed with Member Losier's conclusion that whether or not the Policy was internally ambiguous was irrelevant, since LHSC and the Applicant had a meeting on October 13, 2021, where the LHSC advised the Applicant that he was being terminated effective October 22, 2021.

79. With respect, this reasoning demonstrates a serious error in logic, on both Members' parts. Their conclusion engages the hallmarks of "justifiability" and "intelligibility" that are intended to be addressed on judicial review.

80. The Policy indicated that if employees chose to remain unvaccinated, they would be placed on "*unapproved, unpaid leave of absence until they are 14 days past being fully vaccinated*." These words mean *something*; the Applicant submits they mean exactly what they say.

81. It was therefore contrary to the explicit terms of the Policy for LHSC to advise the Applicant on October 13, 2021 that he was being terminated. For Member McQuade to find otherwise, she either had to (a) disregard the explicit language in the Policy and the ambiguity it created, which was unreasonable; or (b) implicitly find that LHSC's Policy was unilaterally changed, whereby the above language no longer applied. However, in the latter case, again there is no indication that the Applicant received any consideration for LHSC's unilateral change in the Policy (the implications of which are discussed below).

82. The bottom line, therefore, is that, as was the case in the Durston-Arriola decision, the Applicant didn't know that he was liable to be terminated for not complying with the Policy. As a matter of law, the Policy was ambiguous, and the Tribunal's reasons finding that the ambiguity was irrelevant were based on incorrect logic.

Applicant's Employment Contract was Unilaterally Changed Without Fresh Consideration

83. Another important principle in the employment law context is the requirement for fresh consideration where an employer changes the terms of an employment contract with an employee. As the Ontario Court of Appeal wrote in *Braiden v. La-Z-Boy Canada Ltd.*[72] at paragraph 49:

> The requirement of consideration to support a change to the terms of an agreement is especially important in the employment context where, generally, there is inequality of bargaining power between employees and employers. Some employees may enjoy a measure of bargaining power when negotiating the terms of prospective employment but once they have been hired and are dependent on the remuneration of the job, they become more vulnerable.

84. By introducing the Policy with its mandatory vaccination requirement, LHSC unilaterally changed its contract of employment with the Applicant. However, LHSC failed to provide the Applicant with any additional consideration for this new requirement. As is clear in the jurisprudence (e.g. *Moffatt* and *Braiden*, above), continued employment alone does not constitute "fresh consideration".

85. The analysis at paragraphs 40-46 of the Decision is flawed. An employer is not permitted to introduce policies that unilaterally change the terms of an employee's employment contract without fresh consideration.

86. Moreover, the assertion in the Decision that the Applicant was obligated to provide his employment contact to demonstrate that LHSC did not have a contractual ability to impose policies such as the Policy is incorrect. This constitutes a reversal of the onus of proof in a misconduct analysis under the EI Act: it is for the *Commission* to demonstrate that misconduct has occurred, *not the Applicant* to demonstrate that it has not. The Applicant relies on the *Lance* case in support of its position, where Tribunal Member Leonard discussed these concepts at length.[73]

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[72] *Braiden v. La-Z-Boy Canada Ltd.*, 2008 ONCA 464 at paragraph 49 (CA). This principle is well-established in the jurisprudence. See also, e.g., *Moffatt v. Prospera Credit Union*, 2021 BCSC 2463 at paras. 38 and following (BCSC).
[73] *AL v. Canada Employment Insurance Commission,* 2022 SST 1428 at paragraphs 30, 40-49(SST) [*Lance*].

87. Moreover, contrary to Member McQuade's assertion, there is no "general duty" on the Applicant's part to comply with the Policy, whether by virtue of the so-called "Directive #6" issued by Ontario's Chief Medical Officer of Health on August 17, 2021, or anything else. The Applicant also relies on all of the reasoning set out in *Lance* in support of this proposition.[74]

88. Accordingly, the Policy was void, not only because it was ambiguous, but also because it had the effect of imposing a change in the fundamental conditions of employment without providing any additional consideration, whether (a) upon its implementation at first instance; or, alternatively (b) once LHSC decided that it could modify the Policy unilaterally and terminate the Applicant on October 13, 2021.

89. Either way, no new consideration was provided to the Applicant. As such, it cannot be considered "misconduct" for an employee to fail to abide by the terms of a Policy, which changes the fundamental terms of an employment contract and interferes with an individual's freedom of bodily integrity, religion and personal choice, that was never valid in the first place. It cannot be lawful to force an employee to adhere to a policy that is void, simply in order to preserve his right to claim EI Benefits. Indeed, such a proposition displays circular reasoning since adherence to such a policy would mean that the employee would not be terminated at all. Suppose that a given employer's policy required the employee to actively break the law in some fashion, which would undoubtedly also be void *ab initio*. If the employee refused to comply with such a policy, could he fairly be said to have engaged in misconduct and lose his EI Benefits? The answer must surely be "no". The same reasoning applies in this case.

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[74] *Ibid.*, paragraphs 61-62; 72-80.

Issue #4 - The Decision was Unreasonable

90. The Applicant also submits that for the following reasons, the discrete elements of the common law test for finding misconduct under section 30(1) were not met in this case. The Decision was therefore unreasonable in concluding otherwise.

91. **First**, the Applicant's conduct was not deliberate. Following the established jurisprudence in this area, the Applicant accepts that "wrongful intent" is not needed for conduct to be "deliberate" or "wilful". Yet, in this case, it still cannot fairly be said that the Applicant's conduct was in fact deliberate or wilful. The Applicant did not "deliberately", "wilfully", "consciously" or "intentionally" fail to comply with the Policy in any reasonable sense of those words.

92. It must be borne in mind that the Applicant *tried to comply* with the Policy: he requested an exemption and although it was incumbent on LHSC to investigate the matter fairly,[75] his request was summarily ignored.

93. Having been denied an exemption, the Applicant was faced with an unresolvable dilemma: take the vaccines against his will and religious beliefs, or run the risk of discipline under the Policy. The Applicant did not wish to fail to comply; at the same time, he was unable to comply due to his religious and other beliefs.

94. How, in the circumstances, can it reasonably be said that the Applicant intended to "deliberately", "wilfully" or "consciously" fail to comply with the Policy? The reality is that the Applicant was **unable** to comply with the Policy. Being unable to do something cannot amount to the same thing as freely choosing not to that thing. That is a fundamentally different proposition. The Applicant only "consciously" or "wilfully" chose to fail to comply with the Policy in the same

[75] See, e.g., *Lowe v. Landmark Transport Inc.*, 2007 FC 217 at paragraph 28 (FC).

sense that a person would turn over their wallet to a robber at knifepoint: in truth, that person, much like the Applicant in this case, *had no real choice*.

95. The Applicant submits that this concept is especially true in religious matters. If a Jewish or Muslim person declines to eat pork, or if a Sikh person declines to remove his turban, can it fairly be said that such people would be committing "misconduct" if the employer had a policy mandating the consumption of pork or the removal of headwear? Surely not. The same reasoning applies here; there is no meaningful difference between these examples and the Applicant's case.

96. Accordingly, the Applicant's conduct was not "deliberate" within the meaning of the section 30(1) test for misconduct. It would be unreasonable to come to any other conclusion.

97. **Second**, as discussed above, the Policy was internally inconsistent and ambiguous, meaning that the Applicant was not reasonably aware that he might be terminated for not complying with the Policy.

98. Moreover, it was unreasonable to conclude that the Applicant gained the requisite knowledge during the October 13, 2021 meeting. With respect, this was "too little, too late". In fact, the jurisprudence contains many instances where the employee in question was given <u>several</u> warnings before being terminated, and thus was taken to have known that termination was a real possibility. For example, in *Canada (Procureur general) c. Richard*, an employee was repeatedly absent from work due to problems with alcohol and had received several notices of suspension informing him at the same time that failure to take corrective action would eventually lead to dismissal. Moreover, his employer had more than once offered the employee assistance, which was refused. The Court held, citing *Langlois*, that in the circumstances, "*the respondent could not*

have been unaware that the breach of his obligations under his employment contract was of such scope that it was normally foreseeable that it would be likely to result in his dismissal."[76]

99. The Applicant also relies on cases such as *Mishibinijima*, *Canada (Procureur-general) c. Bergeron*,[77] *Gauvreau c. Canada (Procureur general)*,[78] and *Canada (Attorney General) v. Pearson*[79] for the same principle. In each case, the employee was given many warnings and was aware that further transgressions could result in dismissal. That did not happen in this case.

100. The Applicant relies on this Tribunal's decisions in both the Durston-Arriola decision (discussed above) and *DL v. Canada Employment Insurance Commission*[80] as persuasive authority on this issue. The Applicant submits that the various points considered by Members Usprich and Conrad in those cases are strikingly similar to those in this case, and a similar result should therefore obtain in this case. It was unreasonable for Member McQuade not to appreciate this.

101. **Third**, the Decision was unreasonable to the extent that it failed to appreciate that the alleged "misconduct" in question in this case simply did not have any bearing on the Applicant's ability to perform his essential job functions. The jurisprudence is clear (see, e.g. *Mishibinijima*, above) that in order for an employee's conduct to constitute "misconduct", it must be conduct that is "*such as to impair the performance of his duties*".

102. In this case, there was no link whatsoever between taking a vaccine and the impairment of the Applicant's duties. Vaccination status has *absolutely nothing* to do with an employee's job duties. It would be disingenuous to suggest otherwise. The evidence clearly shows that the Applicant had been working at home for years, without the vaccine, and without any negative

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[76] *Canada (Procureur general) c. Richard*, 2005 FCA 339 at paragraph 5 (FCA). See also *Canada (Attorney General) v. Pearson*, 2006 FCA 199 (FCA) to similar effect.
[77] *Canada (Procureur-general) c. Bergeron*, 2011 FCA 284 (CA).
[78] *Gauvreau c. Canada (Procureur general)*, 2021 FC 92 (FC).
[79] *Canada (Attorney General) v. Pearson*, 2006 FCA 199 (FCA).
[80] *DL v. Canada Employment Insurance Commission*, 2022 SST 281 (SST).

impact on his job performance. In fact, LHSC was happy with the Applicant's work. Moreover, even after his formal termination meeting, the Applicant was permitted to work at home for an additional week, while unvaccinated, and with no detrimental impact on his job performance.

103. The Applicant's situation is markedly different from that of other employees in other cases. For example, in *Brissette*, an employee (a truck driver) lost his driver's licence when he failed a breathalyzer test while off duty. The Federal Court of Appeal agreed that he had committed misconduct because the conduct in question breached an express duty in his employment contract:

> In the case at bar, the employee was required, as an essential concrete condition of his employment, to hold a valid driver's licence. By losing it as a result of his wrongful act, he breached an express duty in the contract of employment. This breach was a direct result of his misconduct.[81]

104. Similarly, in *Masic v. Canada (Attorney General)*,[82] a cash room operator engaged in misconduct when she had been dismissed for stealing some of the employer's money. And in *Canada (Attorney General) v. Lee*,[83] a telephone call centre employee engaged in misconduct when she was terminated for disconnecting customer calls before responding to their inquiries.

105. Thus, for the Applicant's conduct to constitute "misconduct", it would need to be demonstrated that the Applicant's central employment duties were impaired by reason of his failure to comply with the Policy. As argued above, this is simply not the case. A person's decision to become vaccinated or not has no bearing at all on how quickly or well that person can perform the essential tasks of his employment. To suggest otherwise is to fundamentally alter the law in this area. It cannot be the law in Canada that an employer has the right to require an employee to take a medical treatment (particularly absent fresh consideration) in order to keep his job, and that employees who cannot comply must categorically lose their EI Benefits.

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[81] *Canada (Attorney General) v. Brissette*, [1994] 1 FC 684 at paragraph 16 (FCA).
[82] *Masic v. Canada (Attorney General)*, 2011 FCA 212 (CA).
[83] *Canada (Attorney General) v. Lee*, 2007 FCA 406 (CA).

106. Thus, considering all of the above circumstances, as the Tribunal is obligated to do following *Mishibinijima*, above, the only conclusion is that the Applicant cannot be reasonably said to have known that his conduct might lead to termination, as is required by the test.

107. Accordingly, there is no credible way to conclude that the Applicant's conduct meets the necessary requirements for "misconduct" to be found under s. 30(1) of the EI Act.

PART IV – ORDER SOUGHT

108. For all of the above reasons, the Applicants asks this Court for an order:

(a) granting this application for judicial review;

(b) setting aside the Decision and directing the Commission to accept the Applicant's claim for EI Benefits, from the date of his original application;

(c) alternatively, referring this matter back to the Tribunal for reconsideration in accordance with such directions as this Court is minded to provide; and

(d) granting the Applicant his costs of this proceeding.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Date: July 4, 2023

CHARTER ADVOCATES CANADA
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PART V – LIST OF AUTHORITIES AND STATUTES CITED

AUTHORITIES

TAB	CASE
1.	*AL v. Canada Employment Insurance Commission*, 2022 SST 1428
2.	*Braiden v. La-Z-Boy Canada Ltd.*, 2008 ONCA 464
3.	*Canada (Attorney General) v. Brissette*, [1994] 1 FC 684
4.	Canada (Attorney General) v. Langlois (1996), 63 ACWS (3d) 196 (FCA)
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