Court File No.

FEDERAL COURT

BETWEEN:

REBECCA ABDO

Applicant

-and-

ATTORNEY GENERAL OF CANADA

Respondent

APPLICATION UNDER section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7

APPLICATION FOR JUDICIAL REVIEW

TO THE RESPONDENT: THE ATTORNEY GENERAL OF CANADA

A PROCEEDING HAS BEEN COMMENCED by the Applicant. The relief claimed by the Applicant appears on the following pages.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the Applicants. The Applicants request that this application be heard virtually.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or a solicitor acting for you must file a notice of appearance in Form 305 prescribed by the *Federal Courts Rules* and serve it on the Applicant's solicitor WITHIN 10 DAYS after being served with this notice of application.

Copies of the *Federal Courts Rules*, information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at

Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

Date _____ Issued by _____
(Registry Officer)

Address of
local office:

TO: Attorney General of Canada

OVERVIEW

1. This is an application for judicial review of a decision of the General Division of the Social Security Tribunal ("SST"), brought by Rebecca Abdo (the "Applicant"). On November 23, 2022, General Division member Bret Edwards (the "Member") issued his decision (the "Decision") denying the Applicant's appeal of the Canada Employment Insurance Commission's decision to deny her EI benefits on the basis of misconduct.

2. On March 18, 2023, the Applicant was denied leave to appeal the Decision to the Appeal Division of the SST.

3. The Applicant submits the Member committed errors of fact, law and mixed fact and law in his Decision which attract the intervention of the Federal Court.

RELIEF REQUESTED

4. The Applicant seeks orders quashing the Decision and directing the Employment Insurance Commission to release to the Applicant the amount of employment insurance benefits to which she is entitled.

BACKGROUND

5. The Applicant was employed by Canadian Blood Services ("CBS") between May 13, 2011 and November 16, 2021.

6. 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)". The Policy further stated, "in 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".

7. On September 28, 2021, the Applicant submitted a request for accommodation, explaining she was unable to be vaccinated on the basis of her sincerely-held religious beliefs. The Applicant also included a supporting letter from a pastor.

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

9. On October 22, 2021, CBS denied the Applicant'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 the Applicant 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 also asserted accommodating the Applicant would cause undue hardship in the form of an unspecified risk to herself and fellow employees.

10. On November 1, 2021, the Applicant was placed on a 10-day unpaid leave of absence.

11. On November 16, 2021, the Applicant's employment was terminated. CBS recorded the termination as "dismissal with cause".

12. On December 20, 2021, the Applicant applied for Employment Insurance benefits, which the Employment Insurance Commission (the "Commission") denied on or around April 11, 2022, citing as its reason that the Applicant had lost her employment as a result of her own "misconduct".

13. On May 11, 2022, the Applicant 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 the Applicant EI benefits on the basis of misconduct.

14. On August 12, 2022, the Applicant appealed the decision of the Commission to the General Division of the SST. On November 23, 2022, the General Division of the SST dismissed the Applicant's appeal.

15. On December 23, 2022, the Applicant applied for leave to appeal to the Appeal Division of the SST. On March 18, 2023, the Appeal Division denied the Applicant's leave to appeal.

Decision to Be Reviewed

16. 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)…because she refused to comply with her employer's mandatory COVID-19 vaccination policy".

17. The Member relied entirely on the statement of the employer in the Applicant's termination letter in reaching his conclusion, stating the termination letter disclosed no evidence the Applicant had been fired by reason of the denial of her religious accommodation request, and that the Applicant had not "provided any other evidence to counter what the letter says". 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".

18. The Member explained his understanding of misconduct in the employment insurance context, basing his exposition on case law, namely: *Canada (Attorney General) v McNamara*, 2007 FCA 107; *Paradis v Canada (Attorney General)*, 2016 FC 1282; and *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

19. 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.

20. The Member ruled that he had to determine why the Claimant lost her job, then determine whether the law considers that reason to be misconduct. He stated, "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 and that there was a real possibility of being suspended because of that".

21. The Member pointed to the willfulness component of the test for misconduct and found the Applicant's conduct was willful. The Member also pointed to the predictability the willful conduct would lead to suspension of the Applicant's employment and found the Applicant knew dismissal was a possibility. He therefore found the Applicant's dismissal was the result of her misconduct.

GROUNDS

Law

Standard of Review

22. Pursuant to *Agraira v Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 SCC 36, 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". The standard of review is reasonableness, pursuant to *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65.

The *Vavilov* Standard

23. While the *Vavilov* court settled on reasonableness as the standard of review in all but the narrowest of exceptions, it made equally clear throughout paragraphs 99-135 how high the standard of reasonableness actually is.

24. 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. "Justification and transparency require that an administrative decision maker's reasons meaningfully account for the central issues and concerns raised" in order to prove he has "actually listened to the part[y]". If the decision "cannot be said to exhibit the requisite degree of justification, intelligibility and transparency", the decision will be unreasonable:

> [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.

25. 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”.

26. 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”.

27. A decision will not be reasonable if it involves an “irrational chain of analysis”: “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”.

28. 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 and is expedient. The decision maker’s responsibility is to discern meaning and legislative intent, not to ‘reverse-engineer’ a desired outcome”.

The Governing Statute: *Employment Insurance Act*

29. According to section 30(1) of the *Employment Insurance 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”.

30. Section 49(2) of the *Employment Insurance 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”.

Law of Misconduct

Digest of Benefit Entitlement Principles

31. 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.

32. 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.

33. The Digest further states: "To establish misconduct, it **must** be shown that the conduct in question constituted a breach of the employer-employee relationship" 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. Whether written, verbal or unstated, this contract is an agreement about the duties and responsibilities each party owes the other". 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 willful: "[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**".

34. 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", and giving "the benefit of the doubt" to the claimant where "the evidence presented by the claimant and by the employer are equally balanced".

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

Misconduct Case Law Relied on by the Member

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

37. Prior to the advent of COVID, cases in which the SST, the court, or both routinely found misconduct involved not only willfulness, and not only the breach of an existing term of employment, but also *objectively* sanctionable behaviour: failure to report fraud contrary to an existing policy (*Canada (Attorney General) v Gagnon*, 2002 FCA 460), conflict of interest (*Canada (Attorney General) v Bellavance*, 2005 FCA 87), manual alteration of a time card contrary to company policy (*Attorney General of Canada v Secours*, A-352-94), absenteeism (*Mishibinijima*), failure of drug tests contrary to existing company policy (*McNamara* and *Paradis*), a contravention of the Criminal Code (*Canada (Attorney General) v Brissette*, [1993] FCJ No. 1371), and substance abuse (*Canada (Attorney General) v Tucker*, [1986] FCJ No. 203); *Canada (Procureure générale) c Marion*, [2002] FCJ No. 711; *Canada (Procureure générale) c Turgeon*, [1999] FCJ No. 1861; *Canada (Attorney General) v Wasylka*, 2004 FCA 219).

Argument

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

Why the Applicant's Employment Was Terminated

39. The Member determined the Applicant'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 human rights grounds. Since the Applicant holds sincere religious beliefs against being vaccinated, 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 the Applicant "refused to comply" with the Policy.

40. Further, insofar as the Member relied on his finding that, "the Claimant believed her employer would automatically approve all exemption requests based on what they said", he also erred. The evidence before the Member was not that the Applicant believed all exemption requests would be automatically approved without regard to their merit, rather that the Applicant believed her employer would follow the law, which required the employer to accommodate the Applicant's legitimate claim, based on her sincerely-held religious beliefs, to the point of undue hardship.

41. The Applicant met her onus pursuant to *Syndicat Northcrest v Amselem*, 2004 SCC 47 to establish her sincerely-held beliefs with a nexus to religion the interference with which would be more than trivial or insubstantial. The Applicant'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 the Applicant that it was dismissing the Applicant 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.

42. It is a blunt misstatement of the facts to conclude the Applicant did not comply with the policy when her request for accommodation was denied and she was dismissed. Precisely because the Applicant'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 the Applicant.

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

willfully ignore circumstances which hold the key to an accurate determination of whether or not the Applicant committed misconduct. In this vein, it was necessary for the Member to look at whether the employer legitimately denied the Applicant's religious accommodation request, not to decide if the employer committed misconduct, but to decide if the Applicant committed misconduct.

44. The Member also erred by failing to apply section 49(2) of the *Employment Insurance Act*. The Commission must give the employee the benefit of the doubt where the employer and employee disagree on the reasons for the termination, that is, whether employee misconduct was a factor. No such benefit was here given, despite the evidence of the Applicant's sincerely-held religious beliefs, the evidence the Applicant 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 the Applicant's favour. The Decision is contrary to both the *Act* and the principles of *Vavilov*, which require not only that the Decision accord with governing legislation, but also meaningfully account for the facts.

Blinders Not Necessary and Not Permitted

45. The Member conflated his directive to *focus* on the Applicant's misconduct with a purported obligation to remain completely blind to the employer's conduct—the latter of which is not the requirement, as is made plain in the case law cited by the Member, the legislation, and the Digest's specific guidance.

46. In its discussion of how misconduct might be established, the Digest points to a decision of the Federal Court of Appeal, *The Attorney General of Canada v MacDonald, J, Laurie*, A-152-96, which upheld the decision of the umpire, who stated the Commission is not at liberty to condone the employer's misconduct by depriving the claimant of benefits. In conflating the requirement to *focus* on the Applicant's conduct with an absolute prohibition on noticing the employer's conduct, the Member failed to "adapt [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 the Applicant's religious accommodation request.

47. While the role of the Member is not to make any finding concerning an employer's misconduct, he is not obliged to completely ignore the employer's error, and he is certainly not obliged to effectively hold a claimant responsible for an employer's error. The Member's misapprehension of this issue comes into sharp relief when he pointed, in support of his assertion "[t]he law doesn't say I have to consider how the employer behaved", to a section of the *Act* which in fact says ***nothing on the topic whatsoever***. The legislation itself is, in fact, silent on how far the Member might delve into the actions of the employer.

48. 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. In fact, the *Mishibinijima* court stated that "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 failed to account for this portion of the court's statement immediately preceding the portion the Member employed to give the opposite impression. Beyond this, the Digest, in recognition of the nuances of the jurisprudence, also instructs *against* the approach of refusing to consider the relevant circumstances.

49. The fact of whether the Applicant held a sincere religious belief against receiving COVID vaccines and whether her employer erred in denying her request for accommodation 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*.

No Misconduct Absent Breach or Objectively Sanctionable Conduct

50. Even had the Member been correct in his assessment that the Applicant had not taken proper steps to comply with the policy, however, he would still have failed to demonstrate that her conduct met the first step of the test, according to the case law and 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**".

51. 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 and that there was a real possibility of being suspended because of that" is the idea that in order to ground a finding of misconduct, a duty must be owed in the first place. The Member failed to address whether the Applicant actually owed a duty to her employer either to abandon her religious beliefs or to be 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 to begin with, the first step of the test for misconduct, the step on which all other steps depend, is not met.

52. Similarly, the Member failed to consider whether the conduct was objectively sanctionable, even though the case law he cited in support of his finding consistently acknowledges breaches of employment contracts and/or objectively sanctionable behaviour as a necessary ingredient for a finding of misconduct.

53. The cases of *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. The case of *Mishibinijima* involved a claimant who had several times run afoul of his employer's requirement that he show up for work. Without exception, the court deciding these cases pointed to objectively sanctionable behaviours as grounding the EI Commission's finding of misconduct.

54. Further, the other cases in which the Tribunal and the courts have found misconduct have involved conduct which breaches the employment contract and/or objectively sanctionable behaviour, for example: *Gagnon, Bellavance, Secours, Brissette, Tucker, Marion, Turgeon* and *Wasylka*. Conspicuously absent from the list is, for example, declining to act contrary to sincerely-held religious beliefs or declining to submit to an unwanted medical treatment. The Member in the present case failed to acknowledge the Applicant's conduct was neither in breach of her employment contract nor objectively sanctionable.

55. Not only does the necessity of objectively sanctionable behaviour to ground a finding of misconduct appear in the case law; it is a matter of logic that not all willful behaviour that happens to lead to dismissal can be misconduct. Were it otherwise, an employee could be denied benefits because she willfully refused an employer's sexual advances or willfully refused to engage in fraudulent activity. In this light, it is obvious the law cannot countenance a finding of misconduct premised on willfulness and predictable dismissal alone. Yet, that is precisely how the Member found misconduct in the present case.

Willfulness in the Context of Religious Belief

56. The Member having pointed to no existing term of the employment contract which the Applicant breached, the willfulness element of his considerations, upon which he heavily relied in finding misconduct, is somewhere between premature and irrelevant. However, even if the Member's finding of willfulness were not irrelevant, arguably religious belief is not a "choice" in the sense that "willfulness" has been contemplated by the courts.

57. 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 matters of religious belief, ingrained and impenetrable, which go to a person's very identity, sense of meaning, and reason for being. In fact, 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. By extension, arguments that a religious person can avoid a charge of misconduct by abandoning her sincerely-held religious beliefs and practices must also be rejected. To hold otherwise is to render religious protection illusory.

58. Failure of the Member to meaningfully analyze the differences between the conduct explored in his exemplar cases and the Applicant's sincerely-held religious beliefs violates the *Vavilov* standard. Whereas the Applicant understands the concept of the Policy and her sincerely-held religious beliefs as inextricably linked, the Member severs one from the other, making it possible for him to adopt the impoverished view that the Applicant's religious inability to be vaccinated was a simple act of misconduct because it "willfully" contravened the employer's policy. A more accurate and robust conception of the matter is that submitting to vaccination and abandoning her religious beliefs are, for

the Applicant, *one and the same*. In other words, the Applicant was not expected merely to receive a vaccine; she was expected to abandon her sincerely-held religious beliefs on pain of dismissal from her employment. That the Member failed to consider the very real implications to the Applicant of the Policy, choosing instead to oversimplify her objection as a mere 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, justification and transparency will not be achieved—and where justification and transparency are not achieved, a decision will not be reasonable.

59. 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" not only reveals his failure to account for the fact vaccination at no time formed a part of the employment agreement and accordingly a declination to be vaccinated could not constitute a breach necessary to ground misconduct, but also his failure to meaningfully grapple with the Applicant's dilemma of being caught between the demands of her employer and the demands of her sincerely-held religious beliefs.

Recent Tribunal Decisions

60. While the Member is not alone in his misapprehension of the legal principles surrounding denial of EI benefits, as several recent decisions reveal, one decision of particular interest does address some of the issues explored herein: *Lance v Canada*, GE-22-1889.

61. In the words of SST General Division Member Mark Leonard:

> The issue of the Covid-19 vaccinations and dismissals resulting from noncompliance is an emerging issue. No specific case law currently exists on the matter that guides decision makers.
>
> Indeed, I could not find a single case where a claimant did something for which a specific right, supported in law, exists, and subsequently that action was still found to be misconduct simply because it was deemed willful.
>
> In the absence of a [Federal Court of Appeal] decision that provides such guidance, I am persuaded that the Claimant has a

> right to choose whether to accept any medical treatment. Despite that fact that her choice contradicts her Employer's policy, and led to her dismissal, I find that exercising that "right" cannot be characterized as a wrongful act or undesirable conduct sufficient to conclude misconduct worthy of the punishment of disqualification under the *EI Act*.

62. The claimant in Mr. Leonard's decision had, in his view, a good reason for declining to be vaccinated against COVID. She did not claim the human rights and *Charter*-protected ground of religion. Nevertheless, Mr. Leonard found that declining vaccination could not be seen as objectively sanctionable—which is what conduct must be in order to constitute misconduct. The Applicant submits Mr. Leonard has properly articulated what the law on this "emerging issue" ought to be and commends his brief analysis to this Court.

Conclusion

63. The question is not whether the Applicant's employer engaged in misconduct, as all past jurisprudence makes plain. The question is whether the Applicant engaged in anything that can be objectively characterized as "undesirable conduct" and therefore as "misconduct" pursuant to the *Act*. However, in order to determine whether the Applicant engaged in objective misconduct, it is necessary to determine, at a minimum:

    a. whether the Applicant owed a duty to her employer to abandon her sincerely-held religious beliefs on pain of dismissal from her employment;

    b. whether the Applicant 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; and

    c. whether refusal to abandon one's sincerely held religious beliefs is a "willful" act, given that matters of religion to those who sincerely hold religious beliefs are matters of life and death—or more accurately, eternal life and eternal death.

64. The Member's focus on the willfulness and predictability requirements of the test for misconduct to the exclusion of the most obvious component of any test for misconduct—whether the behaviour objectively attracted sanction—fails on the *Vavilov* standard.

65. Neither can the decision maker adopt an impoverished interpretation of the facts before him. Since the Member is charged with determining whether the Applicant committed misconduct and can plainly see: that the employer adopted the incorrect standard for religious infringement; that the religious infringement and the Policy are inextricably linked; that the Policy constitutes a novel term of employment unilaterally imposed upon the Applicant; that the component of objectively sanctionable conduct is missing; and that in general there is doubt about the employer's dismissal designation sufficient to trigger section 49(2) of the *EIA*, he has an obligation to fully consider those facts and not to "'reverse-engineer' a desired outcome". The Member was made aware that for the Applicant, submitting to vaccination and abandoning her religious beliefs were *one and the same*. Stating that all the evidence shows the Applicant was fired for refusing to comply with her employer's policy is disingenuous and raises the spectre of a reverse-engineered outcome.

EVIDENCE TO BE RELIED ON

66. Affidavit of Rebecca Abdo.

67. Certified copy of Tribunal record(s).

Dated: April 14, 2023 at Airdrie, AB

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