Court File No.

FEDERAL COURT

BETWEEN:

KIMBERLY JEGLUM

Applicant

-and-

ATTORNEY GENERAL OF CANADA

Respondent

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

NOTICE OF APPLICATION

TO THE RESPONDENT: THE ATTORNEY GENERAL OF CANADA

A PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the Applicant. The relief claimed by the Applicant appears below.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the Applicant. The Applicant requests that this application be heard 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
Department of Justice Canada
ESDC Legal Services
140 Promenade du Portage
Phase IV, 11th Floor
Gatineau, QC K1A 0J9

APPLICATION

This is an application for judicial review in respect of

Tribunal: Social Security Tribunal of Canada – Appeal Division

Date of Decision: October 6, 2023

Date Decision Communicated to Applicant: October 6, 2023

Details of Decision: Decision denying leave to appeal decision of the Social Security Tribunal of Canada – General Division

Date of General Division Decision: July 18, 2023

The applicant makes application for: an order quashing the AD Decision denying leave to appeal the GD Decision and directing the Commission to release to the Applicant the amount of employment insurance benefits to which she is entitled, or, in the alternative, an order sending the decision back to the Appeal Division to be decided with the benefit of the Court's reasons.

The grounds for the application are: the SST committed errors of law and fact pursuant to section 58(1)(b) and section 58(1)(c) of the *Department of Employment and Social Development Act*, SC 2005, c 34.

This application will be supported by the following material: Affidavit of Kimberly Jeglum; transcript of June 26, 2023 General Division hearing and/or audio recording of June 26, 2023 General Division hearing.

The applicant requests the Social Security Tribunal of Canada to send a certified copy of the following material that is not in the possession of the applicant but is in the possession of the Social Security Tribunal of Canada to the applicant and to the Registry: audio recording of June 26, 2023 General Division hearing; internal Social Security Tribunal correspondence, checklists, intake forms, *et cetera*.

OVERVIEW

1. This is an application for judicial review of a decision of the Appeal Division of the Social Security Tribunal ("SST"), brought by Kimberly Jeglum (the "Applicant"). On July 18, 2023, the General Division issued a decision (the "GD Decision") denying the Applicant's appeal of the decision of the Canada Employment Insurance Commission ("Commission") to deny her EI benefits on the basis of misconduct.

2. On October 6, 2023, the Appeal Division denied the Applicant leave to appeal the GD Decision to the Appeal Division of the SST (the "AD Decision").

3. The Applicant submits the SST committed errors of law and fact which attract the intervention of the Federal Court.

RELIEF REQUESTED

4. The Applicant seeks an order quashing the AD Decision denying leave to appeal the GD Decision and directing the Commission to release to the Applicant the amount of employment insurance benefits to which she is entitled, or, in the alternative, an order sending the decision back to the Appeal Division to be decided with the benefit of the Court's reasons.

BACKGROUND

5. On September 12, 2019, the Applicant was hired as a lodge attendant by the Bethany Group of Camrose ("TBG") to perform laundry, housekeeping and meal service duties at Bashaw Meadows in Bashaw, Alberta.

6. On September 10, 2021, TBG issued Workplace Accommodation Policy CPT 12-07 (the "Accommodation Policy") recognizing its duty to accommodate employees possessing protected characteristics to the point of undue hardship pursuant to the *Alberta Human Rights Act* ("*AHRA*").

7. On September 13, 2021, TBG issued a memo purporting to adopt the mandatory covid immunization policy of Alberta Health Services ("AHS") for contracted operators. The memo stated that all TBG employees were required to be fully vaccinated by October 16, 2021, outlined a course of action for unvaccinated staff without medical or religious

accommodation, and stated that any TBG employee unable to be immunized due to a protected ground pursuant to the *AHRA* "may apply for an exemption or accommodation up to the point of undue hardship".

8. On September 20, 2021, TBG adopted Immunization of Workers for COVID-19 Policy CPT 03-25 (the "Immunization Policy"), eventually revised on October 25, 2021. The Immunization Policy stated that any TBG employee unable to be immunized due to a protected ground pursuant to the *AHRA* "will be reasonably accommodated, up to the point of undue hardship, in accordance with the TBG Workplace Accommodation Policy".

9. On October 7, 2021, TBG released a memo outlining an administrative leave procedure for unimmunized employees while inviting exemption/accommodation applications from staff claiming a protected ground pursuant to the *Alberta Human Rights Act*.

10. On October 12, 2021, the Applicant submitted an application for religious exemption pursuant to the Immunization Policy and the Workplace Accommodation Policy (the "Policies"), on the basis of fetal cell line testing of the available vaccines.

11. On October 17, 2021, the employer requested additional information, which the Applicant provided.

12. On October 22, 2021, TBG released a memo announcing that 80 percent of its employees had submitted proof of full immunization and that AHS had extended the immunization deadline to November 30, 2021. The memo stated that as of December 1, 2021, employees not fully immunized would be placed on an unpaid leave of absence "except where a workplace accommodation is approved for an employee".

13. On October 25, 2021, TBG issued an updated version of the Immunization Policy notifying employees of the requirement to be fully vaccinated. The updated Policy stated that "[a]ny TBG employee who is unable to be immunized" on account of a "protected ground under the Alberta Human Rights Act…will be reasonably accommodated, up to the point of undue hardship, in accordance with the TBG Workplace Accommodation Policy".

14. The Immunization Policy further disclosed:

> Except where a workplace accommodation applies, failure to comply with this Policy shall result in…if the worker remains non-compliant with this Policy, the worker being placed on an unpaid leave-of-absence for the period of time required to become Fully Immunized; and…after January 10, 2022, if the worker has no plan or intention to become fully vaccinated, employment with The Bethany Group will be terminated.

15. On November 16, 2021, TBG wrote to the Applicant stating, "We have accepted your information as supporting your request. We will be scheduling a meeting with you and your union representative to discuss potential accommodation options".

16. On November 29, 2021, TBG made the Applicant an offer of accommodation involving placing her on an unpaid leave of absence ("LOA"), to be recorded as "Leave of Absence" on the Applicant's record of employment, and a review of said accommodation before February 28, 2022.

17. On or about November 30, 2021, the Applicant proposed to TBG that it place her on a paid LOA, as she was fit and able to work. The Applicant received no response to her counter-proposal of accommodation.

18. On December 1, 2021, the Applicant was placed on an unpaid LOA.

19. In early January 2022, AHS began permitting unvaccinated staff to use rapid testing as an alternative to vaccination. TBG maintained its mandatory Immunization Policy and extended the deadline for vaccination to January 31, 2022.

20. On January 11, 2022, the Applicant applied for employment insurance (EI) benefits, and filed a report every two weeks until October 14, 2022, at which time she was no longer able to submit reports until her case was decided.

21. On January 24, 2022, TBG communicated to the Applicant that TBG employees would not be permitted to use rapid testing as an alternative to vaccination, despite the AHS policy permitting rapid testing as an alternative to vaccination.

22. On February 7, 2022, the Applicant was offered work from home 2 days per week as part of the Applicant's religious accommodation.

23. On March 31, 2022, TBG issued a memo declaring that despite AHS having dropped its vaccination policy and having begun returning staff to work, TBG would maintain the mandatory vaccination requirement.

24. On April 20, 2022, TBG informed the Applicant that a new vaccine unlinked to fetal cell lines in its development, production, or testing had been approved in Canada, and that the Applicant was expected to become fully vaccinated.

25. On April 27, 2022, TBG informed the Applicant it had fulfilled her accommodation. The Applicant informed TBG that the Novavax vaccine had undergone fetal cell line testing, citing the source of that information. TBG informed the Applicant she could submit another exemption request, and the Applicant requested the scientific basis on which TBG had developed a vaccination policy different from the AHS vaccination policy. TBG informed the Applicant that everyone knows vaccination is the only way to stop covid.

26. On May 4, 2022, the Applicant submitted a second application for religious exemption to TBG, including information concerning the fetal cell line testing of the Novavax vaccine and the source of that information.

27. On May 17, 2022, TBG notified the Applicant that her second accommodation request was denied and the offer of accommodated work would cease May 31, 2022.

28. On June 1, 2022, the Applicant was placed on an unpaid administrative leave of absence, during which TBG intended she become fully vaccinated.

29. The Applicant's religious beliefs had not changed.

30. On July 4, 2022, TBG terminated the Applicant's employment. During the termination meeting, the Applicant again informed TBG of the fetal cell line testing of the Novavax vaccine and the source of that information, and that her religious beliefs had not changed—only the employer's position had changed.

31. On August 15, 2022, the Commission denied the Applicant benefits, claiming the Applicant had been "suspended" for "misconduct" beginning January 10, 2022.

32. On August 29, 2022, the Applicant requested reconsideration of the Commission's August 15 decision, stating that her employer had granted her a religious accommodation at the relevant time.

33. On November 29, 2022, the Commission denied the Applicant's reconsideration request, stating that the Applicant had been suspended for misconduct.

34. On or about November 30, 2022, the Commission released benefits to the Applicant in the amount of $13,841.00.

35. On December 3, 2022, the Commission wrote the Applicant demanding she repay the amount deposited on or about November 30, 2022, which the Applicant did.

36. On December 21, 2022, the Applicant, who did not have legal representation at or prior to that time, submitted a second request for reconsideration to the Commission based on having misunderstood that she ought to have appealed to the General Division of the Social Security Tribunal.

37. On February 3, 2023, the Applicant appealed the Commission's reconsideration denial decision to the General Division of the SST.

38. On July 18, 2023, the General Division of the SST dismissed the Applicant's appeal.

39. On August 10, 2023, the Applicant applied to the Appeal Division of the SST for leave to appeal the GD Decision.

40. On October 6, 2023, the Appeal Division refused the Applicant leave to appeal the GD Decision to the Appeal Division of the SST.

STANDARD OF REVIEW

41. All administrative decisions are subject to the reasonableness standard imposed by the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v Vavilov*, which elucidates precisely how high the threshold for a reasonable decision is.

42. 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. A decision maker must demonstrate it was "actually alert and sensitive to the matter before it".

43. "Justification and transparency require that an administrative decision maker's reasons **meaningfully account for the central issues and concerns raised**" in order to prove it has "actually listened". If the decision "cannot be said to exhibit the requisite degree of justification, intelligibility and transparency", it 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.

44. 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".

45. 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**".

46. 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".

47. *Vavilov* states that "[w]here the meaning of a statutory provision is disputed in administrative proceedings, the decision maker must **demonstrate in its reasons** that it was alive to" the "ordinary meaning" of "precise and unequivocal" words.

48. *Vavilov* further stipulates that where "it is clear that the administrative decision maker may well, had it considered a key element of a statutory provision's text, context or **purpose**, have arrived at a different result, its failure to **consider** that element would be indefensible, and unreasonable in the circumstances".

49. 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 <u>legislative intent</u>**, not to 'reverse-engineer' a desired outcome".

50. *Vavilov* states: "The principle of responsive justification means that if a decision has particularly harsh consequences for the affected individual, the decision maker must explain why its decision best reflects the **<u>legislature's intention</u>**. **This includes decisions with consequences that threaten an individual's life, liberty, <u>dignity</u> or livelihood**".

SST CODE OF CONDUCT

51. Sections 5.1 and 7.1 of the Social Security Tribunal Member Code of Conduct ("Code") state: "As decision-makers at the Tribunal, members must be **experts** in what they do. Members must **constantly improve their knowledge and skills**"; "decid[e] each appeal impartially, based on the **facts** and the **law**"; "look at **<u>all</u>** the evidence"; "see which **laws**, **regulations**, and legal **principles** apply to the evidence" and "be aware of **significant** earlier decisions about **similar** cases". The Code does not leave open to SST decision makers to look at **some** of the facts, **some** of the evidence, and **some** of the law. SST decision makers have a responsibility to meaningfully account for **all** of the relevant facts, evidence and law.

52. *Vavilov* affirms the foregoing in the plainest possible language: SST decision makers are tasked with rendering justified, transparent and intelligible decisions. This means SST decision makers are required to: grapple with the key issues and central arguments an appellant raises; meaningfully account for the central issues and concerns an appellant raises; demonstrate alertness and sensitivity to the matters before them; attend to the full evidentiary record; regard the constellation of law and facts; keep clear of logical fallacies; discern meaning and legislative intent; demonstrate in their reasons that they were alive to the ordinary meaning of precise and unequivocal words where the meaning of a statutory provision is disputed; explain why the decision best reflects the legislature's intention where the decision impacts an appellant's dignity; not misapprehend or fail to account for evidence; not stray from the purpose and intent of the

statute; not adopt inferior interpretations for expediency; and not reverse-engineer a desired outcome.

ERRORS OF LAW

Misconduct Elements Not Satisfied

53. The Appeal Division erred in failing to find the General Division's error of failing to find that the Applicant could not have committed misconduct, having satisfied none of the following required elements of misconduct:

    - The Applicant did not engage in reprehensible conduct, therefore the Applicant did not commit misconduct;
    - The Applicant did not engage in wilful conduct, therefore the Applicant did not commit misconduct;
    - The Applicant did not owe her employer a duty to renounce her faith, therefore the Applicant did not commit misconduct.

No "Reprehensible" Conduct

54. For further certainty, conduct must be reprehensible in order to constitute misconduct, as over thirty years of EI jurisprudence discloses (*Canada (Attorney General) v Tucker*; *Canada (Attorney General) v Brissette*; *Attorney General of Canada v Secours*; *Attorney General v MacDonald*; *Canada (Procureure générale) c Turgeon*; *Canada (Attorney General) v Gagnon*; *Canada (Procureure générale) c Marion*; *Canada (Attorney General) v Wasylka*; *Canada (Attorney General) v Bellavance*; *Mishibinijima v Canada (Attorney General)*; *Canada (Attorney General) v McNamara*; *Canada (AG) v Jolin*; *Canada (Attorney General) v Lemire*; *Karelia v Canada (Human Resources and Skills Development)*; *Canada (Attorney General) v Maher*; *Paradis v Canada (AG)*; *Dubeau v Canada (Attorney General)*; *et cetera*.

55. The Applicant did not engage in reprehensible conduct. The Applicant is religious. Religion is conduct-governing at law (*Syndicat Northcrest v Amselem*) and religion is immutable at law (*Corbiere v Canada (Minister of Indian and Northern Affairs)*). It

matters not that *Amselem* and *Corbiere* were decided outside the EI context, because immutable characteristics are not deemed immutable in some legislative contexts and a matter of choice in others (*Quebec (Attorney General) v A*). The Applicant's religion and the conduct it governs are inseparable (*Amselem*) and not reprehensible.

No "Wilful" Conduct

56. Neither did the Applicant engage in wilful conduct, because again, the Applicant's religion is conduct-governing at law (*Amselem*); religion is immutable at law (*Corbiere*); and immutable characteristics are not deemed immutable in some legislative contexts and a matter of choice in others (*Quebec v A*). Immutable characteristics are not a "true choice" (*Quebec v A*).

No Duty Owed

57. Misconduct in the EI context necessarily involves acts or omissions that impede an employee's ability to carry out the duties **owed** to an employer. No employee owes any employer a duty to renounce her faith, an immutable characteristic (*Corbiere*). No employee owes any employer a duty to contravene her religious beliefs, because religion is conduct-governing (*Amselem*).

Presumption of Constitutional Conformity

58. The Appeal Division erred in failing to find the General Division's error of failing to interpret the disqualification section(s) of the *Employment Insurance Act* ("*EI Act*") in accordance with the presumption of constitutional conformity which applies to all legislative provisions (*McKay v The Queen*; *Schachter v Canada*; *Slaight Communications Inc. v Davidson*) and pursuant to the reasonableness standard set out in *Vavilov*.

59. The implication of the SST's interpretation of the "misconduct" disqualification sections of the *EI Act* in the present case is that the legislators intended to draft a statute that discriminates against a religious minority on the basis of an immutable characteristic, ***against the presumption of constitutional conformity***.

60. Since an interpretation of the disqualification sections that would smear as perpetrators of misconduct all religious minorities whose religious beliefs dictate abstention from some practice or other could not possibly be constitutionally conforming, it was incumbent on the SST to reject such an interpretation in favour of the constitutionally conforming interpretation that the law makers did not intend the EI legislation to wrest from the religious person her very identity. The SST showed no sign of having even grappled with the concept, let alone drawn a reasonable conclusion.

61. Not only are persons in Canada shielded from laws which discriminate on the basis of immutable characteristics—in all legislative contexts; *Vavilov* stipulates that where "it is clear that the administrative decision maker may well, had it considered a key element of a statutory provision's text, context or **purpose**, have arrived at a different result, its failure to **consider** that element would be indefensible, and unreasonable in the circumstances".

***EI Act* "Benefit of the Doubt" Provision**

62. The Appeal Division erred in failing to find the General Division's error of failing to apply the benefit of the doubt provision of the *EI Act* to the facts before it. The *EI Act* is one of the SST's governing statutes. The provisions of the *EI Act* are at all times before SST decision makers. Accordingly, SST decision makers are to have regard to any and all provisions of their governing statute, and particularly, the key provision acting as a counter-weight (section 49(2)) to the disqualification provisions (sections 30-3). Just as the SST does not require an applicant to invoke sections 30-3—provisions to which the SST automatically has regard as a function of performing its duties as a specialized EI tribunal, neither ought expert EI decision makers disregard section 49(2), which requires a weighing exercise in circumstances where an appellant's evidence militating against disqualification balances any evidence ostensibly favouring disqualification.

Invented Definition of "Leave of Absence"

Legal Error

63. The Appeal Division erred in failing to detect the General Division's error of synonymizing the terms "leave of absence" and "suspension" absent legislative justification, and itself continued to use the terms interchangeably.

64. First, the *EI Act* does not define "leave of absence". In projecting onto an administrative leave of absence the meaning of "suspension", the SST at once falsely equated the two and committed the additional logical fallacy of false dichotomy: failing to consider the likelihood that the drafters' silence on non-disciplinary leaves of absence signals that non-disciplinary leaves of absence do not attract disentitlement.

65. Next, Section 31 of the *EI Act* contemplates exactly one type of suspension: a disciplinary suspension. The *EI Act* frames this disciplinary suspension as a "suspension for misconduct". A "suspension for misconduct" doubtless implies that the employer meting out the suspension is of the view the employee has engaged in misconduct worthy of suspension. Presumably such an employer intends to discipline or punish the employee. After all, the Commission does not suspend employees; the SST does not suspend employees: the employer suspends employees. Accordingly, section 31 of the *EI Act* might reasonably be taken to mean that where an **employer** has **suspended** an employee **for misconduct**, that employee will not be entitled to EI benefits. However, the employer in the present case did not suspend the Applicant. The employer at all times used the term "leave of absence", at points modifying the term with the word "administrative".

66. All that might be concluded from the wording of the *EI Act* is that "suspension" means "suspension". Nothing in the *EI Act* suggests that "suspension" is the word used by the *EI Act* for an administrative leave of absence. Neither does anything in the *EI Act* imply that the drafters intended to punish, by a denial of benefits, an employee whose employer places her on an administrative leave of absence. It was not open to the SST to project onto the legislation its own definition of "leave of absence", nor to alter the legislative definition of "suspension" to include an administrative leave of absence, nor to categorize

a non-disciplinary leave of absence as what can only be "disciplinary" according to the legislation. In this way, the SST erred in law.

67. It was further not open to the SST to replace throughout its decisions the term "administrative leave of absence" with the weighted term "suspension" in an effort to imply the Applicant ***must have*** committed misconduct. "Misconduct" is antecedent to "suspension" in the legislative provision. Characterizing an **administrative** leave of absence—which the SST at times admits the Applicant's leave of absence in fact was—as the section 31 "suspension" the *EI Act* specifies as having been on account of misconduct puts the cart before the horse. The SST cannot simply invoke the word "suspension" to assert that a leave of absence involved misconduct. "Suspension **for** misconduct" clearly contemplates misconduct as the ***necessary condition*** for a "suspension **for misconduct**". Misconduct drives whether the separation qualifies as a suspension, not the other way around. A suspension does not prove misconduct; the separation is a ***suspension for misconduct*** if and only if there ***is misconduct***.

Factual Error

68. The employer's usage of **only** the term "leave of absence" throughout its communications, up to and including the Applicant's record of employment, which discloses the Applicant was not suspended, rather that the Applicant was placed on an administrative leave of absence, militates against the SST's factual finding that the Applicant was suspended.

69. For further certainty, every memo, letter, email and other piece of correspondence from TBG reveals that what it had in mind for the Applicant was a leave of absence.

70. What is more, the reason codes for "leave of absence" and "suspension" occupy separate and distinct categories on the ROE form. In fact, "suspension" shares a reason code with "Dismissal"; "Leave of absence" is its own category. There is also a category called "Other", wherein the employer is at liberty to record explanatory remarks. The employer selected as its reason "Leave of absence" with no further comment on the Applicant's ROE, even though it could have opted for "Dismissal or suspension" or "Other". In this

way, the employer further established the leave of absence as purely administrative and not to be confused with a "suspension for misconduct".

71. Accordingly, in addition to being an error of law, the SST's synonymous treatment of the terms "leave of absence" and "suspension" is also a perverse and capricious disregard for the facts, that is, an error of fact, because at all times before the SST was a fulsome record which never once employed the term "suspension" and deployed the term "leave of absence" dozens of times—and which both decision makers acknowledged by invoking it in their own decisions whenever they were not errantly dispensing the term "suspension".

Jurisdictional Error

72. That the SST projected a disciplinary essence onto what the employer characterized as a merely administrative matter is also an error of jurisdiction, because it does what the SST elsewhere in the decision insisted it has no jurisdiction to do: look behind the employer's decision and redecide the matter. Moreover, whether an unpaid leave imposed by an employer is administrative or disciplinary in nature is a matter of labour and employment law—precisely the areas on which the SST insisted it lacked the competence to pronounce.

Employer Caused Employee "Misconduct"

73. The Appeal Division erred in failing to find the General Division's error of failing to distinguish between ***employer instigated employee conduct*** subsequently characterized by the Commission and SST as "misconduct" and ***employee misconduct*** (*Astolfi v Canada (Attorney General)*). The employer's Immunization Policy held out an alternative method by which to comply, and by which alternative method the Applicant in fact did comply: the Applicant submitted a *bona fide*, meritorious religious exemption request; provided all additional information required by the employer, including information the Supreme Court of Canada has held is unnecessary to deciding a religious claim; and provided additional information beyond the information requested by the employer to assist the employer in accurately assessing her claim. The employer reneged on satisfying the conditions of its own Policies, which EI jurisprudence discloses will not

be used to disqualify a claimant from benefits (*MacDonald*). The employer's contravention of the terms of its own Policies placed the employer out of compliance with the Policies, not the Applicant. In the alternative, if the Applicant was placed out of compliance with the employer's Policies, the only reason for that was the employer's failure to honour the terms of its own Policies, in which case the Applicant's conduct was triggered by the employer's conduct, and accordingly, the Applicant is not disqualified from EI benefits (*Astolfi*).

74. *Astolfi* discloses: "The statement that the GD had to 'focus on the conduct of the claimant, not the employer' is problematic for a number of reasons. First, it is a narrow application of the legal test for misconduct and led the GD to misinterpret the case law". *Astolfi* is clear that "once employee misconduct is established, there is no obligation for the GD to question whether the dismissal was justified"; however, "there is an important distinction between an employer's conduct after alleged misconduct, and an employer's conduct which may have led to the 'misconduct' in the first place":

> [A] reasonable decision required some consideration of the employer's conduct prior to the "misconduct" in order to properly assess whether the employee's conduct was intentional or not…the GD, and therefore the AD, did not undertake the necessary analysis…The AD decision in affirming the GD decision is unreasonable because it does not fall within a range of possible, acceptable outcomes, defensible on the facts and the law. The SCC reaffirms this in *Vavilov…*.

75. The Appeal Division's statement in the present case that "an employer's lack of accommodations is not relevant to the misconduct issue" is the exact error the Federal Court identified in *Astolfi,* premised as it is on a false assumption that cases of employer conduct leading to employee "misconduct" will be treated the same as cases where employee misconduct preceded employer conduct—a false assumption to which the *Astolfi* court put paid.

Misapplication of EI Precedents

76. The Appeal Division erred in failing to find the General Division's error of failing to correctly apply the EI precedents by having regard to ***all the circumstances*** of the case

(*MacDonald*; *Mishibinijima*; *et cetera*), including the circumstance of ***employer*** misconduct, which itself includes an employer's retraction of its commitments to an employee, and is not to be condoned by depriving an employee of benefits (*MacDonald*).

77. While *Astolfi* ***explicitly*** rules that employer conduct will come under scrutiny in situations where employer conduct has instigated employee "misconduct", every other Federal Court case over the past three decades reveals the same ***implicit*** finding: in no case has employer-caused "misconduct" attached to the employee. Where the Federal Courts have found employee misconduct, it has never been such as could credibly be argued as employer-caused: *Tucker*; *Brissette*; *Secours*; *Turgeon*; *Gagnon*; *Marion*; *Wasylka*; *Bellavance*; *Mishibinijima*; *McNamara*; *Jolin*; *Lemire*; *Karelia*; *Maher*; *Paradis*; *Dubeau*; *et cetera*.

Accommodation Versus Compliance

78. The Appeal Division erred in failing to find the General Division's error of focusing on the issue of accommodation to the exclusion of the issue of compliance. The employer's duty and failure to accommodate are arguably relevant in the present case, since none of the EI case law deeming the accommodation issue irrelevant deals with circumstances wherein an employer has reneged on its own explicit bargain to accommodate on grounds specifically enumerated in the employer's own policies, thus ***causing*** the "misconduct" (*Astolfi*). But even leaving aside employer-caused "misconduct" *vis-à-vis* an employer's express ***prior*** commitment to accommodate, it is a blunt misstatement of the facts to claim the Applicant did not comply with the Immunization Policy. Whether or not the employer's failure to accommodate is relevant, the Applicant's compliance with the Immunization Policy certainly is relevant.

79. The General Division answered the wrong question, which was not whether the employer's failure to accommodate is relevant, but rather whether the Applicant complied with the Immunization Policy, irrespective of what the employer did or did not do. Launching into a discussion of the irrelevance of accommodation in no way answers the question of what ***compliance*** actually ***meant*** in the circumstances. If the Applicant complied with the Immunization Policy, no misconduct properly issues to the Applicant regardless of whether the employer accommodated or failed to accommodate, and

regardless of whether the accommodation issue is relevant or irrelevant. An employer's inability or unwillingness to accommodate an employee who has followed the exemption procedures required to adhere to a policy is not properly outsourced to the employee with an automatic finding of misconduct. The General Division struggled with this question, ultimately treating it as an either-or. It never was an either-or. It is eminently possible for an employee at once to have been refused accommodation and to have committed no misconduct, as the Applicant explained to the General Division, as the General Division failed to grasp, and as the Appeal Division failed to correct.

80. Indeed, the Appeal Division's statement that "[t]he General Division did not make a legal error when it determined that it could not consider whether the Claimant's employer should have made…ongoing accommodations or [*sic*] for her…I am not satisfied that there is an arguable case that the General Division made a legal error over the accommodation issue" misses the point, which was not about "the accommodation issue". Irrespective of whether the employer accommodated, the Applicant complied with the Immunization Policy by submitting a *bona fide*, meritorious religious exemption request—which the Immunization Policy invited, which the Policies committed to honouring, and which the employer had accepted the first time. **Moreover, it fails to answer the question hovering over the entire case: whether the Applicant's conduct-governing, sincerely held religious beliefs—an immutable characteristic—could ever be rightly characterized as misconduct in any event.**

ERRORS OF FACT

81. The Appeal Division erred in failing to find the General Division's error of fact in finding that the Applicant was dismissed for failing to comply with the Immunization Policy, an error resulting from a failure to meaningfully grapple with the key facts of the case, being:

    - The employer, which issued an Immunization Policy contemplating exemption for sincerely religious employees, rejected the Applicant's May 4, 2022 religious claim, which was premised on the exact same religious objection as the Applicant's October 12, 2021 religious claim, the sufficiency of which the employer had accepted;

- The Applicant provided evidence of the fetal cell line testing the Novavax vaccine had undergone, which was ***the*** crucial fact to a correct determination of whether the Applicant failed to comply with the Immunization Policy, which contemplated exemption for holders of sincere religious beliefs.

82. The Appeal Division's comments are problematic, because they reveal it had regard exclusively to the employer's version, in no way addressing the Applicant's key issues, central arguments and concerns raised, let alone "meaningfully grappl[ing]" with them as required on the *Vavilov* standard.

83. The Appeal Division stated: "The Claimant argues that the General Division overlooked some of the evidence" before launching into an explanation **that itself overlooks the Applicant's evidence** by focusing solely on the **evidence privileging the employer**:

    - "The General Division addressed this point. **The General Division noted the evidence**, that on April 20, 2022, **the employer wrote** and asked whether the Claimant still qualified for an accommodation";

    - "The General Division also noted that **the employer wrote** on May 17, 2022, advising that it would not continue her accommodation after May 31, 2022. If she was not fully vaccinated by then, it would suspend her. And, if she did not have a plan or intention to get vaccinated by July 4, 2022, it would dismiss her from her employment";

    - "It is clear from the evidence that **the employer let the Claimant know** that if she did not comply with her employer's vaccination policy or receive an accommodation, that **the employer would place the Claimant** on an unpaid administrative leave effective June 1, 2022";

    - "**The employer also let her know** that, if by July 4, 2022, the Claimant had no plan or any intention to become fully immunized, it would terminate her employment for not complying with its vaccination policy";

    - "**Given the evidence before it, the General Division was entitled to conclude** that the Claimant knew or should have known that, unless she received an

accommodation or complied with her employer's vaccination policy, that dismissal was a possibility".

84. Nowhere in the foregoing does the Applicant's evidence receive even cursory mention, let alone the full accounting required by *Vavilov* and by the SST's own Code. This is not having regard to **all** the evidence. This is a perverse and capricious disregard for every key fact tendered by the Applicant, facts that would indeed have made a "difference" to the outcome of the decision, once the law had been properly applied to the facts—all the facts—of the case.

85. Neither did the Appeal Division detect the General Division's error of characterizing the exemption as having been "rescinded". On the evidence, the Applicant's exemption had not been "rescinded", which implies the employer changed its mind about whether the Applicant was entitled to religious exemption ***in the first place***. Rather, the employer, based on facts the Applicant strenuously argued were incorrect, took the position the Applicant's accommodation had been "fulfilled", absent regard to the Applicant's evidence that the "new" vaccine from which she sought to be exempted was as tainted as the original vaccines from which she had been exempted. These were not facts tangential to the issues; these were facts the disregard of which, if the Applicant's evidence proved correct, constituted palpable and overriding errors. The outcome of the Applicant's case indeed turned on these facts.

86. Further, both the General Division and the Appeal Division ignored that the Applicant ultimately received **no benefits for the period of time they tacitly agreed she was in compliance** with the Immunization Policy, inventing the arbitrary date of "January 10" as some phantom cut-off, while being fully aware the Applicant's employer was on board with her religious inability to vaccinate until at least May 31, 2022.

87. The SST displayed perverse and capricious disregard for **all** of the Applicant-favouring facts. The General Division did so with a kindly affect, but it clearly dropped the thread early on in its decision-making process. The Appeal Division did no better.

CONCLUSION

88. In order to have determined whether the Applicant engaged in misconduct pursuant to the *EI Act,* it was necessary for the SST to ***meaningfully*** grapple with, at a minimum:

    a. whether adhering to one's conduct-governing, sincerely held religious beliefs, an immutable characteristic, can be "reprehensible" conduct attracting "punishment";

    b. whether declining to abandon one's conduct-governing, sincerely held religious beliefs is a "wilful" act, given that religion is an immutable characteristic and immutable characteristics are not a "true choice" in any legislative context;

    c. whether the Applicant owed a duty to her employer to abandon her conduct-governing, sincerely held religious beliefs, an immutable characteristic, on pain of dismissal from her employment;

    d. whether interpreting the disqualification sections of the *EI Act* in a non-constitutionally conforming manner accords with the presumption of constitutional conformity and is a reflection of legislative intent;

    e. whether the evidence proffered by the Applicant militating against a finding of misconduct balanced the evidence favouring a finding of misconduct;

    f. whether the drafters of the *EI Act* intended to treat administrative leaves of absence as synonymous with suspensions for misconduct;

    g. whether the Applicant's conduct later characterized as misconduct was employer caused;

    h. the proper method of comparing three decades of EI precedents disclosing reprehensible behaviour as antecedent to a finding of misconduct with a case wherein an appellant possesses an immutable characteristic;

    i. the Applicant's principle concern, being not the employer's failure to accommodate, rather her own satisfaction of the criteria for complying with the Immunization Policy;

j. the Applicant's evidence of the employer's approval of her exemption request on an identical basis to its subsequent denial of her religious exemption request;

k. the Applicant's evidence of the fetal cell line testing of the Novavax vaccine, which formed the basis of her continued religious inability to vaccinate; and

l. the SST's own acknowledgement of a period during which the Applicant could not possibly have been out of compliance with the Immunization Policy, by its own definition, yet was denied benefits.

EVIDENCE TO BE RELIED ON

89. Affidavit of Kimberly Jeglum.

90. Transcript and/or audio recording of June 26, 2023 General Division hearing.

91. Certified copy of Tribunal record(s).

Dated: November 1, 2023 at Airdrie, AB

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