

*This document contains the oral submissions of Joseph Hickey made at his judicial review hearing before Federal Court of Canada Justice Simon Fothergill in Ottawa on Feb. 23, 2026.*

*Hickey applied for judicial review of a decision of the Social Security Tribunal of Canada (SST) denying him Employment Insurance benefits after he was suspended without pay by his employer (the Bank of Canada) in November 2021 for refusing COVID-19 vaccination.*

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Good afternoon.

First, I would like to note that I have raised two issues in my application, which are stated at paragraph 29 (ISSUE 1) and paragraph 30 (ISSUE 2) of my Memorandum of Fact and Law.

I would like to withdraw ISSUE 2, which relates to my argument that the Canadian Employment Insurance Commission's decision itself violates my fundamental rights, and which is argued in section 3.3 (paragraphs 122-132) of my Memorandum.

Instead, I will focus entirely on ISSUE 1, which relates to the definition of misconduct as it applies to my case.

I will now begin my submissions.

### **Crux of the matter**

If I FIRST ZOOM OUT, the crux of the matter is that the tribunals and courts have in recent years settled on a definition of the statutory word "misconduct" in the *Employment Insurance Act* to mean any wilful non-compliance knowingly leading to dismissal, irrespective of the nature and context of what is being imposed by the employer.

In cases in which what is being imposed is benign and legal on the face of the facts or is an objectively necessary part of the employment, then application of this adopted definition poses no particular problem.

However, in other cases, the same definition applied formulaically can lead to absurd or untenable results.

My case falls in the latter category and is distinguished from all other cases, for the following reasons:

FIRST, in my case, it is conclusively established by substantial and uncontested documentary scientific evidence on the record, including autopsy studies, that the COVID-19 vaccines can cause serious and potentially fatal harm to a person in my age and sex group, that is, males under 40. (I was 36 in November 2021, when I was suspended without pay for not being vaccinated.)

The said uncontested evidence was brought at every stage from employer through SST General Division (via affidavit) and forward. This is acknowledged by the SST Appeal Division in its following statement at paragraph 26 of its decision denying me leave to appeal:

“As a data scientist, he says he is eminently qualified to speak about the dangers of vaccination. He provided scientific evidence about the risks, particularly for someone of his profile, in taking the vaccine.” (para. 26, SST AD decision denying leave to appeal, dated May 7, 2025).

SECOND, in my case, there was no public health need for me to take the vaccine, since I worked entirely from home with no contact with my colleagues, who also worked entirely from home, which is also uncontested, and acknowledged by the SST Appeal Division (again at paragraph 26, of the decision denying me leave to appeal).

The impugned non-compliance, in my case, was a refusal to receive a preventative medical treatment by injection with proven risk of significant and irreversible harm to me (specifically myocarditis and pericarditis, which can lead to death), while all my colleagues and I worked entirely from home. The said risks to young males are proven by uncontested facts on the record of my case, are not hypothetical, and are publicly recognized by the leading health authorities.

These two facts:

- ◆ heart inflammation risk of death to my age group and sex established on the record, and
- ◆ the proven work-from-home context,

distinguish my case from all other cases that have come before this court or the Federal Court of Appeal.

The SST refused to consider the established and uncontested risk of bodily harm to me from the employer's demand in its calculus of whether my refusal to be vaccinated amounted to misconduct. This error, which is a failure to decide an issue that the SST should have decided, is at the heart of ISSUE 1 of my judicial review. Nothing in the home statute excludes or prevents or makes irrelevant a consideration of this factual context of the nature of the employer's demand in determining statutory misconduct.

Basically, in a nutshell, my argument might be expressed as follows:

- ▶ The tribunal must treat each separate case, not apply generic formulas.
- ▶ The oft quoted analytic rule to exclude as irrelevant whatever the employer demand may be leads to absurdity in cases like mine.
- ▶ The said rule does not come from the statute, and is not, in cases like mine, consistent with the meaning, intent and purpose of the law.

### **ISSUE 1 of this judicial review**

ISSUE 1 is stated at paragraph 29 of my Memorandum of Fact and Law as follows:

"Did my refusal to follow my employer's demand to accept the medical intervention of injecting a substance into the body that can cause long-term or permanent disability and death constitute "misconduct" justifying depriving me of EI benefits pursuant to the EI Act?"

There must be a limit beyond which a deleterious health effect from complying with an employer's demand is unquestionably expressly relevant to the determination of misconduct pursuant to the EI Act. Misconduct in the spirit, purpose and intent of the Act, cannot in all cases be determined irrespective of the nature and consequences of the employer's demand.

In the case of an employer demanding that an employee receive a potentially lethal preventative medical injection (which is unnecessary for competently performing the work), where would the decision maker place that limit?

The population of males under age 40 in Canada as of 2025 is approximately 10 million. Would safety be considered in the decision maker's misconduct analysis if the refused injection was proven to kill 1 person out of 10 million? What if the injection killed 10 people out of 10 million? Or what if it eventually killed 1000 people out of 10 million?

Respectfully, if the risk of significant and irreversible harm is part of both the factual basis and the stated employee's reason for not complying with the employer's demand, then the said risk must be part of the decision maker's calculus in determining misconduct.

In the decisions below, the SST explicitly refused to make any consideration of the nature and personal health consequences of my employer's demand. The SST adopted a so-called "test" for misconduct that excludes any consideration of what was being demanded by my employer and refused by me, while claiming to be bound by court decisions in doing so.

However, none of the cases that have come before this court or the Federal Court of Appeal regarding "misconduct" pursuant to the EI Act due to refusing vaccination have considered **when** an employer's demand could be legitimately refused. In my respectful submission, there must be a limit beyond which it is legitimate to refuse an employer's demand, and employees must be heard in cases in which it is argued that that limit has been surpassed, such as the instant case.

I respectfully ask the court to send the instant case back to the SST so that it can be re-evaluated in light of the need to recognize that, in at least some cases and in my case in particular, the misconduct analysis requires consideration of what was being refused and its potentially grave impact on an employee's health and safety.

### **Overview of the uncontested scientific evidence of potential harm from the COVID-19 vaccines to someone in my age and sex group**

As noted in my Memorandum of Fact and Law at paragraphs 21 and 22, the uncontested scientific evidence on the record before the tribunal and in the instant judicial review includes:

- i. More than 1000 peer-reviewed scientific articles demonstrating harm from COVID-19 vaccines, many of which concern cases of myocarditis in younger males;
- ii. Autopsy studies of death caused by COVID-19 vaccines, especially due to myocarditis in younger males;
- iii. Government health agency studies of serious adverse event reports following COVID-19 vaccination using pharmacovigilance systems such as the Vaccine Adverse Events Reporting System in the United States, Public Health Ontario's adverse events database, and Pfizer's database of adverse event reports made following injection with its COVID-19 vaccine products;

- iv. Numerous peer-reviewed published studies showing the significantly increased risk of dangerous heart inflammation (myocarditis and pericarditis) following COVID-19 vaccination, especially for younger males, which danger is heightened for those who engage in strenuous sports activity with large cardiovascular demand (which I do, as I have affirmed in my affidavit on the record);
- v. Reported announcements of government public health agencies in many countries removing authorization for COVID-19 vaccines due to serious and fatal adverse events, in many cases due to recognition of the significantly increased risk of myocarditis and pericarditis for younger males following COVID-19 vaccination.

### **Examples of how key Federal Court and Federal Court of Appeal cases regarding “misconduct” for refusing vaccination do not have force of precedent in my case**

**Case 1:** *Cecchetto v. Canada (Attorney General)*, [2024 FCA 102](#); *Cecchetto v. Canada (Attorney General)*, [2023 FC 102](#)

The Federal Court decision in the *Cecchetto* case (2023 FC 102) contains the following statement at paragraph 32:

[32] While the Applicant is clearly frustrated that none of the decision-makers have addressed what he sees as the fundamental legal or factual issues that he raises – for example regarding bodily integrity, consent to medical testing, the safety and efficacy of the COVID-19 vaccines or antigen tests – that does not make the decision of the Appeal Division unreasonable. The key problem with the Applicant’s argument is that he is criticizing decision-makers for failing to deal with a set of questions they are not, by law, permitted to address.

Here, the risk of significant and irreversible harm is not part of the factual basis for refusing the employer’s demand in *Cecchetto*, because his employer did not require him to be vaccinated, since Mr. Cecchetto had the alternative option of non-intrusive testing rather than vaccination.

The Federal Court’s statement at paragraph 32 of *Cecchetto* is not the result of a substantive analysis of statutory interpretation of the word “misconduct”, nor is it the result of a substantive analysis of the jurisdictional limits of the tribunal to consider certain types of evidence in determining misconduct. It is not necessary to deal with the issue. Instead, it is an *obiter dictum* statement that can be removed from the decision without changing the result of

the decision.

Also, the case of *Cecchetto* is distinguished from mine in that:

First, Mr. Cecchetto worked in a hospital in various roles, with no option of working from home. Mr. Cecchetto would have necessarily been in contact or proximity to hospital staff, vulnerable patients and other members of the public. Person-to-person contact was required by his work. Whereas, in my case I worked entirely from home, all of my colleagues worked entirely from home, such that I had no contact with any of my colleagues or with any other person as part of my work.

And secondly, Mr. Cecchetto's employer offered him the option of rapid antigen testing instead of being vaccinated. Therefore, the employer in *Cecchetto* **did not require** that the employee become vaccinated. Whereas, in my case my employer did not offer me the option of testing instead of vaccination. My employer required me to be vaccinated.

**Case 2: *Sullivan v. Canada (Attorney General)*, [2024 FCA 7](#)**

In the case of *Sullivan*, the FCA panel stated, at paragraphs 4 and 5:

[4] The Appeal Division rejected the applicant's argument. Following applicable court jurisprudence (e.g., *Canada (Attorney General) v. McNamara*, 2007 FCA 107 at paras. 22-23, *Paradis v. Canada (Attorney General)*, 2016 FC 1282 at paras. 30-31 and *Cecchetto v. Canada (Attorney General)*, 2023 FC 102), the Appeal Division held that the test for misconduct focuses on the employee's knowledge and actions, not on the employer's behaviour or the reasonableness of its work policies. It added that the applicant could pursue remedies elsewhere if he considered that his employer treated him improperly.

[5] In our view, the Appeal Division's decision is reasonable. It is supported by the evidentiary record before it and applicable court jurisprudence.

The case of *Sullivan* is distinguished from mine. The claimant worked as a security guard with no option of working from home.

In the *Sullivan* case, the claimant submitted to the Tribunal a medical note from a doctor dated several months prior to his employer's implementation of its vaccination mandate

stating that the claimant should not receive a COVID-19 vaccine due to his past history of allergic reactions to vaccines (SST GD decision at paras. 31-32).

The SST Appeal Division held the following, at paragraph 30:

[30] The General Division considered the note from the Claimant's doctor and specifically refers to it in its decision. The Claimant was asked questions about the note. **The General Division determined that, according to the policy, the medical proof had to be satisfactory to the employer and the Claimant's note was not.** [Footnote22]

Here, the irrationality of formulaic application of the recent "test" for misconduct is revealed.

The claimant in *Sullivan* provided a medical note stating he should not receive a COVID-19 vaccine due to past allergic reactions to vaccines. The employer wasn't satisfied with the note, and on this basis the SST found the employee had committed misconduct.

What if the medical doctor's note had stated the employee had a 10% or a 50% chance of dying upon receiving a COVID-19 vaccine? Would the Tribunal still find that the employer's rejection of the employee's medical note constituted "misconduct" on the part of the employee? And would the Tribunal still consider itself to be acting in a manner consistent with the meaning and intent of the *Employment Insurance Act*?

Respectfully, it is clear from such a case that if the risk of significant and irreversible harm is part of both the factual basis and the stated employee's reason for not complying with the employer's demand, then the said risk must be part of the decision maker's calculus in determining misconduct.

The Federal Court of Appeal panel in *Sullivan* did not make any mention of the employee's medical note, and rather framed the issue on judicial review as follows, at paragraph 3 of the FCA decision:

[3] The applicant argued before both [SST] Divisions that he did not engage in misconduct on the job. **Among other things, he focused on the validity of the employer's vaccination policy.**

Therefore, the issue of whether the risk of significant and irreversible harm, when it is part of both the factual basis and the stated employee's reason for not complying with the employer's demand, must be part of the decision maker's calculus in determining misconduct was not at

issue before the Federal Court of Appeal in *Sullivan*. As such, the *Sullivan* FCA decision cannot be binding on the Court in my instant judicial review.

I will also add that, in *Sullivan*, the claimant's medical note related to his past medical history regarding allergic reactions to previous vaccines, which were not COVID vaccines. Mr. Sullivan had not provided any scientific documentation regarding potential harm to him from a COVID-19 vaccine, which is another factor distinguishing the case of *Sullivan* from my case.

### **Case 3: *Wong v. Canada (Attorney General)*, [2025 FCA 63](#)**

The claimant in *Wong* argued at the Tribunal that one of the reasons her refusal to be vaccinated was not misconduct was because the vaccine was dangerous to her health (for example, at paragraph 17 of the SST General Division decision).

However, there is no indication in any of the SST GD, SST AD, Federal Court, or Federal Court of Appeal decisions in *Wong* that the claimant entered any evidence to document potential harms from the COVID-19 vaccines.

The claimant worked at the Toronto Public Library, and there is no indication in any of the decisions in *Wong* that the claimant worked from home.

Therefore, *Wong* is distinguished from my case.

As such, the FCA panel's statement in *Wong* (at paragraph 5) that "the meaning of misconduct for the purposes of the [EI] Act is settled by the jurisprudence of this Court and we are bound by it" is not a statement that is binding on my case, because the factual matrix and legal issues at play in *Wong* (as well as in all the cases cited by the FCA panel in paragraph 5 of *Wong*) distinguish it from my case.

None of those cited cases involve a factual context in which: the first-instance and forward records contain received evidence of significant risk of serious permanent harm from the COVID vaccines and the employee was working entirely from home.

### **Other cases**

None of the other cases of "misconduct" pursuant to the EI Act for refusing vaccination are binding on the Court in the instant case, because the pivotal facts and/or the addressed legal issues in those cases are different.

## **Addressing two specific points in the Respondent's submissions**

### First point:

At paragraph 6 of the Respondent's Memorandum of Fact and Law, the Respondent makes the following statement, which referred solely to my initial letter of November 12, 2021 to my employer requesting an exemption to its vaccination policy:

"The Applicant offered no evidence of a condition that would prevent him from receiving the vaccine. Instead, his exemption request largely relied on news articles to represent that he, as a male in his 30s, was at the highest risk of adverse impacts from the vaccine."

Therefore, the Respondent is implicitly admitting that the safety of the COVID vaccines is relevant to the SST's determinations in my case.

More importantly, the Respondent's statement is misleading, because it completely ignores my March 2022 internal appeal submitted to my employer (and included in the record before the SST General Division), which contains extensive scientific evidence about the health risks of the vaccine to males under 40 (my age and sex group) including many peer-reviewed scientific articles, as I have summarized earlier in these oral submissions. My employer received and evaluated my March 2022 internal appeal and provided responses maintaining its decision to deny me an accommodation, which are also on the record (pages 797-799 and 813-817 of my Record for this judicial review).

Also, in my initial exemption request to my employer dated November 12, 2021 (beginning at page 254 of my Record for this judicial review), I cited Public Health Ontario's "Weekly surveillance summary: adverse events following immunization for COVID-19 in Ontario", which showed that males in my age group (I was 36 at the time) were at higher risk of adverse events following vaccination than older males, older females, or younger females. Public Health Ontario is a government agency.

I also cited several media articles reporting that many countries around the world had cancelled their recommendations of some COVID-19 vaccines, including mRNA COVID-19 vaccines for younger males.

I submitted my March 2022 internal appeal (as well as the November 12, 2021 initial exemption request letter) to the CEIC, and they formed part of the documentary record on which the CEIC made its final decision to deny me EI benefits, issued on June 17, 2022.

Second point:

At paragraph 26 of the Respondent's Memorandum, the Respondent states:

"The Applicant's assertion that misconduct requires criminal intent, morally abhorrent or reprehensible behaviour is wrong in law."

This is a misrepresentation. Contrary to the Respondent's statement, I am not arguing that criminal intent, morally abhorrent or reprehensible behaviour is required in order for there to be "misconduct" pursuant to the EI Act.

Instead, I wrote the following in my Amended Application for Leave to Appeal to the SST Appeal Division, at paragraph 30 (page 2319 of my Record in this judicial review):

"The incorrect and explicit methodology for determining misconduct applied by Member Bourgeois (carving out the employer directive being refused by the employee) leads to absurd results when one considers cases that go beyond traditional workplace misconduct such as theft or consuming alcohol or illegal drugs during working hours."

My statement was about how the *methodology* applied by the tribunal for determining misconduct can lead to absurd results in cases where the employer's demand is NOT benign or legal on the face of the facts or is not an objectively necessary part of the employment. I mentioned "theft" or "consuming illegal drugs during working hours" as examples of situations where the tribunal's chosen methodology for determining misconduct *would* be appropriate.

The Respondent included a footnote (footnote-52) at its said statement at paragraph 26 of its Memorandum. Footnote-52 refers to paragraph 26 of the SST Appeal Division decision denying leave to appeal in my file. At her paragraph 26, SST Appeal Division Member Janet Lew states:

"The Claimant argues that misconduct typically involves criminal, morally abhorrent or reprehensible behaviour, such as stealing, consuming alcohol, or taking illicit drugs during working hours. The Claimant says that unless any conduct is of this nature, then that conduct does not qualify as misconduct."

This statement by Member Lew shows that she incorrectly understood and misrepresented my argument. I did not argue that "unless any conduct is of this nature [criminal or morally reprehensible or abhorrent], then that conduct does not qualify as misconduct".

Rather, I argued that carving out the employer's demand as irrelevant — that is, categorically refusing to consider the nature of the employer's demand — can lead to absurd results in some cases, which includes cases in which the employer's demand requires that the employee expose himself to unnecessary risk of harm as severe as death, as is the case with mandatory COVID-19 vaccination for an employee who is in an age and sex group exposed to scientifically proven health risks from the vaccine while working entirely from home with no physical contact with any colleague or any other person as part of his work.

This completes my submissions.