

This document contains a transcript of a short segment from the official audio recording of the judicial review hearing in [Hickey v. Canada \(Attorney General\)](#) 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.

*The full audio recording of the hearing is available at the following link:
https://ocla.ca/wp-content/uploads/2026/03/FC_FGL_T-1769-25_20260223.m4a*

*Key documents from Hickey's case are available at the following link:
<https://ocla.ca/ei-act-misconduct-regarding-employee-refusals-to-be-vaccinated/>*

[44:30] Joseph Hickey: In *Sullivan*, when the SST Appeal Division held that the General Division determined that [the Claimant's] medical proof had to be satisfactory to the employer and the claimant's note was not, here we can see the irrationality of the formulaic application of the recent test for misconduct. 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 after 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?

[45:34] Justice Fothergill: Probably, because the Tribunal could say that's the kind of concern you should raise in the context of a grievance.

[45:41] Joseph Hickey: Even in a case where the medical note said that he would have a 50% chance of dying?

[45:45] Justice Fothergill: Probably, because of the difference in roles.

[45:52] **Joseph Hickey:** Well that, in my submission, that illustrates the irrationality of the formulaic test, and the absurd result -- it's an example of the kind of absurd result...

[46:05] **Justice Fothergill:** You would like the Tribunal to have a larger jurisdiction than it seems to have. The Tribunal looks at intentionality, and if you've got a labour law complaint, you take that somewhere else. You would like the Tribunal to have a broader scope of authority than something that the Tribunal thinks it has.

[46:25] **Joseph Hickey:** I think the Tribunal is restrained to...

[46:30] **Justice Fothergill:** Yes...

[46:31] **Joseph Hickey:** ...making decisions that are pursuant to the Employment Insurance Act...

[46:34] **Justice Fothergill:** Mm-hmm...

[46:35] **Joseph Hickey:** ...and when it makes those decisions, those decisions have to be consistent with the meaning and intent of the Act. They also have to be consistent with Charter rights and Charter values. These decisions cannot have results that clearly would infringe on people's Charter rights. That has to be part of the analysis. If the employer is asking the employee to cause harm to some other person, that is illegal, that is clearly -- and then that person gets fired for not complying -- and then that the person is not entitled to receive Employment Insurance benefits, that scenario would clearly be an absurd result of this formulaic application of the test, and I submit that that is also the case in my case. Respectfully, it is clear from such a case as *Sullivan*, 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 deciding misconduct.