Cour fédérale  Federal Court

Date: 20241125

Docket: T-1704-23

Citation: 2024 FC 1888

Ottawa, Ontario, November 25, 2024

PRESENT: Mr. Justice Pentney

BETWEEN:

DAROLD STURGEON

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] Darold Sturgeon is a deeply religious person. He lost his job at British Columbia Interior Health ("Interior Health") because he refused to get a COVID-19 vaccine. This was contrary to his employer's policy, which it had adopted to comply with the order issued by the Provincial Health Officer ("PHO"). Mr. Sturgeon had asked for a religious exemption but was turned down because the PHO order only allowed medical exemptions.

[2] Mr. Sturgeon then applied for Employment Insurance ("EI") benefits, but his request was denied on the basis that he had lost his employment due to misconduct. In this context,

"misconduct" refers to his deliberate and knowing failure to comply with an employer's vaccination policy when he knew that doing so could result in his termination. His appeal to the Social Security Tribunal – General Division ("SST-GD") was denied, and the Social Security Tribunal – Appeal Division ("SST-AD" or "Appeal Division") denied his application for leave to appeal.

[3] Mr. Sturgeon seeks judicial review of the Appeal Division's decision. He argues that decision-makers at every step of the way failed to address his freedom of religion claim, contrary to the relevant jurisprudence of the Supreme Court of Canada. He submits that he did not refuse to comply with his employer's policy, but rather he was unable to do so because of his religion, which is protected by the *Canadian Charter of Rights and Freedoms* (*"Charter"*). Mr. Sturgeon argues that the concept of misconduct in this area of the law must evolve to take into account *Charter* values.

[4] The Respondent claims that the decision is reasonable because Mr. Sturgeon did not raise his *Charter* claim in his appeal to the SST-GD or his request for leave before the SST-AD. In light of the case law on the limited jurisdiction of these administrative decision-makers, the Respondent argues that the Appeal Division's decision is reasonable.

[5] For the reasons set out below, this application for judicial review will be dismissed. Mr. Sturgeon argues that the SST-GD and SST-AD were required to examine his *Charter* claim that the term misconduct could not apply to his case because he was exercising his freedom of religion. As explained below, I cannot accept this argument for several reasons.

[6] Mr. Sturgeon told the SST-GD that his *Charter* claim was directed towards his employer's policy, not the *Employment Insurance Act*, SC 1996, c 23 [*EI Act*]. He did not raise the *Charter* in his appeal materials before the Appeal Division. In the circumstances, the Appeal Division was not required to consider, on its own, whether the definition of misconduct needed to be re-examined in light of the *Charter*.

[7] In addition, Mr. Sturgeon's other arguments about the validity of his employer's policy also fall outside of the mandate of the Appeal Division. For the reasons set out below, Mr. Sturgeon's application for judicial review will be dismissed.

I. Background

[8] Mr. Sturgeon is a deeply religious person, who lives by his faith and abides by his understanding of the core tenets of his religion. He is the father of seven children and has been married for over 30 years. Mr. Sturgeon believes that one of his key responsibilities is to protect his life so that he can provide care and support for his family. This case arose because he felt compelled by his understanding of his religion to not abide by the COVID-19 vaccination policy adopted by his employer.

[9] Mr. Sturgeon began to work for Interior Health as a senior executive in May 2007. At the start of the COVID-19 pandemic, in March 2020, he began to work remotely on a full-time basis. Mr. Sturgeon says he was able to perform all of the duties of his job from home because he did not have direct contact with patients or medical staff. Things changed after the British Columbia

PHO issued an order on October 14, 2021, requiring all health care workers to receive a COVID-19 vaccination. On the following day, Interior Health issued a memorandum to all employees setting out its Policy in conformity with the PHO order (the "Policy").

[10] The Policy required all employees to receive the COVID-19 vaccine by November 15, 2021, failing which their employment might be terminated. The Policy indicated that the only exception was for employees who sought approval from the PHO for a medical deferral or exemption. Mr. Sturgeon received this policy on October 15, 2021. He has not disputed that upon reading the policy he realized he might lose his job if he failed to comply with it.

[11] On October 24, 2021, Mr. Sturgeon made a request to Interior Health for accommodation on the basis of his sincerely held religious beliefs. He indicated that his "religious belief system interferes with and prevents [him] from taking experimental and/or genetic altering vaccines such as the COVID-19 mRNA therapy treatments." He set out his understanding of Christian doctrine as the basis for his belief that he was required to "resist oppression and injustice… including any immoral or unethical development such as coercive vaccination programs…"

[12] Mr. Sturgeon noted that the Supreme Court of Canada held, in *Syndicat Northcrest v Amselem*, 2004 SCC 47 [*Amselem*] that a religious belief or practice must be protected if an individual sincerely asserts that the belief or practice is grounded in their religion, regardless of whether it was required by a religious authority. He added the following clarification:

> Considering the above, the vaccination mandate is a violation of my rights as protected within the Canadian Charter of Rights and Freedoms. Saying this, I am willing to follow necessary safety protocols when I am in work locations with other staff and/or

> clients including wearing masks, washing hands, and performing rapid tests if required.

[13] Interior Health refused to grant Mr. Sturgeon's request for a religious accommodation from the application of the policy, indicating it did not have the authority to grant exemptions for unvaccinated staff under the PHO order because "(a) request for exemption from the PHO must be made to the PHO and may only be made on medical grounds."

[14] Mr. Sturgeon was placed on unpaid leave by Interior Health on October 26, 2021, and his employment was terminated on November 16, 2021. The reasons for termination were explained in the following way:

> Over the past weeks you have been repeatedly advised of the requirement to be vaccinated against COVID-19 in order to work at Interior Health from October 26, 2021 onward. This requirement is based on a public health order by the Provincial Health Officer of BC and is a legal requirement for employees. The Provincial Health Officer has communicated that this step was not taken lightly and was done because of the continued risk of COVID-19 to our patients and employees.
>
> On October 26, 2021 you were placed on an unpaid leave until November 14, 2021, as an employee who had not been confirmed vaccinated as required under the PHO Order. You were also advised that under the terms of the Order, you could return to work 7 days after receiving a first dose of vaccine, provided that you received a first dose by no later than November 14, 2021.
>
> Our records indicate that you are not in compliance with the PHO Order. As a result, your employment with Interior Health is terminated effective immediately.

[15] Mr. Sturgeon applied for employment insurance ("EI") benefits, with a start date of October 26, 2021, the day he was put on unpaid leave. On May 11, 2022, the Canada Employment Insurance Commission (the "Commission") denied Mr. Sturgeon's application for EI benefits, stating that he lost his employment "due to his own misconduct" in not complying

with his employer's policy. He applied to the Commission for reconsideration, but this was denied on October 21, 2022.

[16] Mr. Sturgeon's appeal to the SST-GD was dismissed on May 26, 2023. As a preliminary matter, the SST-GD ruled that it would not consider an additional document submitted by Mr. Sturgeon following the hearing. The document consisted of an application for judicial review that was filed in another case involving the refusal of EI benefits to an employee who was terminated for failure to comply with a COVID-19 vaccination policy. After the document was submitted, the SST-GD requested submissions from both parties about its relevance and whether it should be accepted, but none were received. The SST-GD noted that while the application related to a decision that "may have some similarity to the present case," it was not a binding decision but rather simply legal arguments. Noting that the application for judicial review was dated April 17, 2023, and that Mr. Sturgeon could have submitted it at an earlier time, the SST-GD decided not to accept it.

[17] On the merits of the appeal, the SST-GD ruled that Mr. Sturgeon had engaged in misconduct because the Interior Health policy was communicated to him, he wilfully chose not to comply, and he knew or ought to have known that non-compliance could result in dismissal. The SST-GD acknowledged that Mr. Sturgeon had tried to obtain a religious exemption from his employer but this was denied. It found that he had not established that he was exempt from the policy.

[18] The SST-GD found that its jurisdiction was limited to ruling on whether the denial of EI benefits complied with the *EI Act*. Because of this restriction it could not examine Mr. Sturgeon's other legal arguments, including examining his claim for religious accommodation or determining whether he was wrongfully dismissed. The SST-GD summarized the point in this way: "My role is not to look at the employer's behaviour or policies and determine whether it was right to let [Mr. Sturgeon] go. Instead, I have to focus on what [he] did or failed to do and whether that amounts to misconduct under the Act."

[19] Based on this analysis, the SST-GD dismissed Mr. Sturgeon's appeal. He then applied to the SST-AD for leave to appeal. In his submissions on appeal Mr. Sturgeon argued that he was denied procedural fairness on two grounds. First, he claimed that he was treated unfairly because the SST-GD did not require the Commission to either attend the hearing or provide information in response to questions he had posed about the Commission's treatment of other EI claims. Mr. Sturgeon wanted to know how the Commission had dealt with other claims related to situations where the person's dismissal was the result of a mandatory COVID-19 vaccination policy.

[20] Second, Mr. Sturgeon claimed that the SST-GD acted unfairly by refusing to accept his late submission of the application for judicial review in the other case, even though the Commission did not object to its filing. He said it could not be filed sooner because he only learned of the other matter on May 12, 2023. He submitted that the application added relevant case law that could help to define misconduct and that it was unfair to exclude it.

[21] On July 14, 2023, the Appeal Division refused Mr. Sturgeon's application for leave to appeal, finding that he had not met the test for leave because he had not established that he was denied procedural fairness – which was the focus of his submissions. The Appeal Division considered other possible grounds for leave, but concluded that there was no arguable case that the SST-GD had based its decision on an important mistake about the facts or made an error of jurisdiction.

[22] Mr. Sturgeon seeks judicial review of the Appeal Division's decision.

A. Issues and Standard of Review

[23] The main issue raised by Mr. Sturgeon is whether the decision-makers were required to assess the alleged infringement of his *Charter* rights. On this point, he claims that the test for misconduct should evolve so that it complies with the *Charter*. Mr. Sturgeon asserts that this is a legal question of central importance to the legal system, which is therefore subject to review on the standard of correctness under *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]. He asserts that the SST-GD and SST-AD were required to consider his *Charter* claim regardless of whether he specifically put it before them, in accordance with the decisions in *Commission scolaire francophone des Territoires du Nord-Ouest v Northwest Territories (Education, Culture and Employment)*, 2023 SCC 31 [*Commission scolaire 2023*], and *Sullivan v Canada (Attorney General)*, 2024 FCA 7 [*Sullivan*] at para 9.

[24] Mr. Sturgeon has raised several other issues as well, referring to alleged errors in the consideration of British Columbia employment law, the unreasonable finding that his actions amounted to misconduct, and the failure to find a breach of procedural fairness.

[25] According to Mr. Sturgeon, the Appeal Division's failure to address the infringement of his *Charter* rights attracts a correctness standard of review. The Respondent submits that the only issue is whether the Appeal Division's decision is reasonable. None of the exceptions to reasonableness apply, and the Respondent contends that the *Charter* question is also to be reviewed under the *Vavilov* reasonableness framework.

[26] The question of whether the SST-GD and SST-AD were required to apply *Charter* values in interpreting the concept of "misconduct" in the *EI Act* is to be reviewed on a standard of reasonableness: *Commission scolaire 2023* at paras 61, 66-70; *Toth v Canada (Mental Health and Addictions)*, 2023 FC 1283 at paras 93-96.

[27] The other issues raised by Mr. Sturgeon must be assessed under the framework for reasonableness review set out in *Vavilov*, and recently confirmed in *Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21.

[28] In summary, under the *Vavilov* framework, a reviewing court "is to review the reasons given by the administrative decision maker and determine whether the decision is based on an internally coherent chain of reasoning and is justified in light of the relevant legal and factual constraints" (*Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67 at para 2).

An administrative decision-maker's exercise of public power must be "justified, intelligible and transparent" (*Vavilov* at para 95). The onus is on the Applicant to demonstrate flaws in the decision that are "sufficiently central or significant to render the decision unreasonable" (*Vavilov* at para 100). The decision must be assessed in light of the history and context of the proceedings, including the evidence and submissions made to the decision-maker (*Vavilov* at para 94).

II. Legal Framework

[29] The relevant provisions from the *EI Act* are sections 30 and 31, which read, in part, as follows:

Disqualification — misconduct or leaving without just cause	**Exclusion : inconduite ou départ sans justification**
30 (1) 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, unless	**30 (1)** Le prestataire est exclu du bénéfice des prestations s'il perd un emploi en raison de son inconduite ou s'il quitte volontairement un emploi sans justification, à moins, selon le cas :
(a) the claimant has, since losing or leaving the employment, been employed in insurable employment for the number of hours required by section 7 or 7.1 to qualify to receive benefits; or	**a)** que, depuis qu'il a perdu ou quitté cet emploi, il ait exercé un emploi assurable pendant le nombre d'heures requis, au titre de l'article 7 ou 7.1, pour recevoir des prestations de chômage;
(b) the claimant is disentitled under sections 31 to 33 in relation to the employment.	**b)** qu'il ne soit inadmissible, à l'égard de cet emploi, pour l'une des raisons prévues aux articles 31 à 33.
…	[…]

[30] The grounds relevant to the SST-AD's decision are set out in section 58 of the *Department of Employment and Social Development Act*, SC 2005, c 34 [*DESDA*]:

Grounds of appeal — Employment Insurance Section **58 (1)** The only grounds of appeal of a decision made by the Employment Insurance Section are that the Section	**Moyens d'appel — section de l'assurance-emploi** **58 (1)** Les seuls moyens d'appel d'une décision rendue par la section de l'assurance-emploi sont les suivants :
(a) failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;	**a)** la section n'a pas observé un principe de justice naturelle ou a autrement excédé ou refusé d'exercer sa compétence;
(b) erred in law in making its decision, whether or not the error appears on the face of the record; or	**b)** elle a rendu une décision entachée d'une erreur de droit, que l'erreur ressorte ou non à la lecture du dossier;
(c) based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.	**c)** elle a fondé sa décision sur une conclusion de fait erronée, tirée de façon abusive ou arbitraire ou sans tenir compte des éléments portés à sa connaissance.

III. Analysis

A. *Was the Appeal Divsion required to address the Charter issue?*

[31] Mr. Sturgeon submits that his freedom of religion, which is protected under the *Charter*, was infringed by the decision to deny him EI benefits on the basis that he had committed "misconduct." He says that the SST-GD incorrectly refused to apply the proportionate balancing test required under the *Doré/Loyola* analysis, citing: *Doré v Barreau du Quebec*, 2012 SCC 12, [2012] 1 SCR 395 [*Doré*] and *Loyola High School v Quebec (Attorney General)*, 2015 SCC 12, [2015] 1 SCR 613 [*Loyola*].

[32] While he acknowledges that he did not specifically raise the *Charter* question in his appeal to the SST-AD, Mr. Sturgeon asserts that he has consistently claimed that his actions were based on his understanding of his religion, which is a foundational element for a freedom of religion claim under the *Charter*, as confirmed in *Amselem* at para 56. He says that he explained this to his employer when he asked for a religious exception to their policy, repeated it when he made his claim for EI, and again in his appeal to the SST-GD. I note here that in his original submissions to the SST-GD, Mr. Sturgeon also claimed that his employer's policy violated his right to life, liberty and security of the person under section 7 of the *Charter*, based on his personal history of suffering an adverse reaction to a childhood vaccine and his concerns about the safety and efficacy of the COVID-19 vaccines.

[33] In light of this, Mr. Sturgeon asserts that the SST-GD and SST-AD were required to consider whether the interpretation of the term "misconduct" as it applied in his case infringed his freedom of religion guaranteed by the *Charter* and, if so, whether it constitutes a permissible limitation. He says that this is consistent with the law set out in *Doré*, and confirmed in *Sullivan*, which itself relies on *Commission scolaire 2023*. Mr. Sturgeon claims that the *Charter* issue in his case is, therefore, an exception to the usual rule that new issues cannot be raised for the first time on judicial review.

[34] The Respondent disagrees with Mr. Sturgeon's reliance on *Sullivan* and *Commission scolaire*, arguing that the Applicant cannot raise a new issue for the first time on judicial review: *Sullivan* at para 8, citing *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 SCR 654 [*Alberta Teachers*]. In the view of the Respondent, this case is almost identical to the situation discussed by the Federal Court of Appeal in *Francis*

v Canada (Attorney General), 2023 FCA 217 [*Francis*]. That case also involved a challenge to an SST-AD decision in the context of a refusal to comply with an employer's COVID-19 vaccination policy. Mr. Francis had requested an exemption based on creed but his employer denied his request. He was then denied EI benefits, and his appeal to the SST-GD was not successful. The SST-AD denied Mr. Francis' application for leave to appeal the SST-GD's decision.

[35] In *Francis*, the Court of Appeal noted that many of the applicant's submissions "appeared to suggest that the Court take a fresh approach" to his case (para 4). It declined to do so, noting that it was limited to deciding whether the SST-AD decision was reasonable. The Court of Appeal found the decision to be reasonable. The Respondent urges the Court to adopt the reasoning in the *Francis* decision, because it is legally binding on this Court and the arguments advanced in that case parallel those raised by Mr. Sturgeon in the case at bar.

[36] I cannot accept Mr. Sturgeon's argument, for several reasons. It is important to step back to examine the *Charter* issue in the context of the actual application for judicial review Mr. Sturgeon launched, which is a challenge to the SST-AD's decision denying him leave to appeal the SST-GD's decision. The SST-AD was exercising a very limited mandate, framed by the law and by the grounds of appeal put forward by Mr. Sturgeon. Moreover, the SST-GD decision makes it clear that his *Charter* challenge was directed towards his employer's policy rather than the *EI Act* itself. In my view, that provides a complete answer to Mr. Sturgeon's arguments.

[37] There is recent, abundant and unanimous case law of this Court, as well as the Court of Appeal, confirming the specific and narrow role played by the SST-GD and SST-AD in the

legislative scheme. This is in contrast to other mechanisms that deal with broader questions. These decisions all concern judicial reviews of the denial of EI benefits where employees were terminated because of their failure to comply with their employer's COVID-19 rules: see e.g. *Francis*; *Sullivan*; *Zhelkov v Canada (Attorney General)*, 2023 FCA 240; *Lalancette c Canada (Procureur général)*, 2024 CAF 58; *Khodykin v Canada (Attorney General)*, 2024 FCA 96; *Kuk v Canada (Attorney General)*, 2024 FCA 74; *Cecchetto v Canada (Attorney General)*, 2024 FCA 102; *Murphy c Canada (Procureur général)*, 2024 CF 1356. Some of these decisions were released after the hearing in this matter, but I did not ask for further submissions from the parties on them because the subsequent decisions simply confirmed prior jurisprudence, including decisions that were cited by the parties: e.g. *Cecchetto v Canada (Attorney General)*, 2023 FC 102 [*Cecchetto FC*]; *Milovac v Canada (Attorney General*), 2023 FC 1120.

[38] The unbroken line of authority cited above confirms several key propositions. First, the focus of the SST-GD and SST-AD is on the conduct of the employee seeking EI benefits, not on the justification for the employer's policy or its compliance with the *Charter*, applicable human rights (anti-discrimination) laws, provincial or federal labour legislation or the common law of wrongful dismissal.

[39] Second, the SST-AD's statutory mandate limits the scope of its inquiry in deciding whether to grant leave. I summarized the applicable law in *Cecchetto FC*:

> [22] Pursuant to section 58 of the *Department of Employment and Social Development Act*, SC 2005, c 34, , (the *DESDA* or the *Act*), the SST-AD was empowered to set the SST-GD's decision aside only if it found the latter to have failed to observe a principle of natural justice, erred in law, or based its decision on an erroneous finding of fact made in a perverse or capricious manner without

> regard to the material before it (*Cameron v Canada (Attorney General)*, 2018 FCA 100 at para 2 [*Cameron*]). The SST-AD was first required to decide whether to grant the Applicant leave to appeal.
>
> [23] Pursuant to subsection 58(2) of the *Act*, leave may be granted only where the appellant satisfies the SST-AD that the proposed appeal has a reasonable chance of success on one of the three grounds listed above (*O'Rourke v Attorney General of Canada,* 2019 FCA 60 at para 9). As this Court stated in *Osaj v Canada (Attorney General)*, 2016 FC 115, at paragraph 12: "having a 'reasonable chance of success' in this context means having some arguable ground upon which the proposed appeal might succeed."

[40] Third, arguments that the SST-GD or SST-AD decisions are unreasonable because they failed to examine the legality of, or justification for, the employer's policy cannot succeed because those questions fall outside of the mandate of those bodies. Such matters can be pursued through other legal avenues. Instead, the SST-GD and SST-AD are required by law to focus on the conduct of the employee when examining the denial of EI benefits for misconduct. In light of this, as explained below, it will not be necessary to deal with several of Mr. Sturgeon's arguments about the validity of the employer's policy.

[41] Mr. Sturgeon sought to distinguish some of the prior decisions, in particular *Cecchetto FC*. He argued that the facts of his case were significantly different than those in *Cecchetto FC*, pointing to differences in the policies adopted by the respective employers. He also submitted that no *Charter* argument had been advanced in *Cecchetto FC*, and therefore that decision was of limited value in regard to his claim. I agree with Mr. Sturgeon that the employer's policy at issue in *Cecchetto FC* was different than the one Interior Health adopted. I am not persuaded, however, that the core findings of *Cecchetto FC*, as confirmed in the case law cited above, are therefore not applicable to his case. In particular, the cases are unanimous that the focus of the

SST-GD and SST-AD must be on whether the conduct of the employee amounts to misconduct, not on whether the employer's policy was valid. This was also confirmed in *Cecchetto FCA*.

[42] According to Mr. Sturgeon, a crucial distinction between the other case law and his claim is that he does not seek to challenge the employer's policy, but rather argues that the SST-GD and SST-AD were required to interpret the concept of "misconduct" in light of the *Charter* guarantee of freedom of religion. Simply stated, Mr. Sturgeon questions how he can be said to have committed misconduct when he refused to follow a rule because it contravened his freedom of religion. He argues that the earliest decisions interpreting the term misconduct focused on morally reprehensible or objectionably sanctionable conduct, including for example: consumption of alcohol contrary to the employer's policy (*Nelson v Canada (Attorney General)*, 2019 FCA 222); failure to report fraud contrary to an existing policy (*Canada (Attorney General) v Gagnon*, 2002 FCA 460; conflict of interest (*Canada (Attorney General) v Bellevance*, 2005 FCA 87, and contravention of the *Criminal Code* (*Canada (Attorney General) v Brissette)*, 1993 CanLII 3020 (FCA), [1994] 1 FC 684).

[43] I cannot accept Mr. Sturgeon's arguments, for several reasons. First, he did not advance a *Charter* claim in his appeal submissions to the SST-AD. Instead, his appeal was based entirely on procedural fairness arguments. Mr. Sturgeon set out his grounds of appeal in the following manner:

> The General Division didn't follow a fair process; I was not informed that the Employment Insurance Commission was going to be absent from my hearing. On December 15, 2022, I provided the General Division two questions (GD06 Page 1) to ensure the Commission provided information prior to my hearing. The questions I posed were both relevant to my case and relevant to

> define "misconduct". The General Division failed to observe a principle of natural justice by not requiring the Commission to provide answers to the two questions posed. Since I did not receive the answers to those two questions by the date of my hearing (May 10, 2023), I was unable to be given a fair process. I was also not able to ask the Commission those questions at my hearing, nor any potential follow-up questions, due to the Commission's absence. I had the right to see all the evidence asked of the Commission to make my case.
>
> I am also concerned that the General Division did not accept a late submission (GD09) even though the Commission did not object to the addition. Contrary to the Decision Paragraph 9, I did provide the document wishing it to be added as evidence. Also contrary to Paragraph 10, I only was made aware of the judicial review filing on May 12, 2023, not April 17, 2023. The General Division refused to add relevant information that used case law to help define misconduct. I would like the chance discuss further.

[44] On this point, it is worth noting that the form applicants must complete to launch their appeal to the SST-AD lists several grounds, including that the SST-GD did not follow procedural fairness (a box Mr. Sturgeon checked); that it “made an error of jurisdiction” or an “error of law” (boxes which Mr. Sturgeon did not mark). His written submissions on the appeal do not mention the *Charter* arguments he had presented to the SST-GD, or ask that the Appeal Division re-consider the interpretation of the term misconduct.

[45] I will return to Mr. Sturgeon’s argument that the Court should deal with the *Charter* claim even where the decision-makers below did not. At this stage, I simply note that under the long-accepted approach to judicial review, a party cannot raise new arguments on judicial review as a basis for finding a decision to be unreasonable subject to very limited exceptions, none of which apply here: *Klos v Canada (Attorney General)*, 2023 FCA 205 at para 8, citing *Alberta Teachers*. The rationale for this approach is laid bare by the following question: how can a

decision be unreasonable for failing to deal with an argument that was never put forward in the previous proceeding?

[46] In his case before the SST-GD, Mr. Sturgeon set out an argument about why his conduct did not amount to misconduct, and also explained the rationale for his personal decision not to comply with the COVID-19 vaccination policy. He advanced several arguments about why the term misconduct should not apply to his case, including that his non-compliance was not ill-intentioned or reprehensible, that it had no impact on his ability to carry out his duties, and it was only a single instance of not following his employer's rules. He also argued that the Interior Health policy was unreasonable because there was no proof that the COVID-19 vaccine prevented infection or transmission of the virus, especially given his personal safety concerns and sincerely held religious beliefs as protected by the *Charter*.

[47] Mr. Sturgeon explained the religious basis for his refusal to follow his employer's policy and argued that the employer's COVID-19 policy contravened the *Charter*, the *Canadian Bill of Rights*, SC 1960, c 44, the *Canadian Human Rights Act*, RSC 1985, c H-6, as well as the *Health Care (Consent) and Care Facility (Admission) Act*, RSBC 1996, c 181. While he mentioned that the federal government, including Service Canada and the Commission, were required to respect the *Charter* in its actions and decisions, he did not elaborate on that point.

[48] The SST-GD refused to deal with Mr. Sturgeon's arguments about the validity of the employer's policy under the *Charter* or other laws, finding that such matters would need to be

dealt with by another court or tribunal. The SST-GD provided the following important clarification at para 65 of its decision:

> This Tribunal can consider whether a section of the Employment Insurance Act (or its regulations) infringes the rights that are guaranteed by the Charter. The Appellant [Mr. Sturgeon] hasn't stated that he is challenging any part of the *Employment Insurance Act*. Rather, he feels that his employer's policy infringed the Charter or human rights [legislation].

[49] From this it becomes clear that Mr. Sturgeon never argued that the SST-GD should revise the accepted definition of the concept of misconduct in regard to eligibility for EI benefits to bring it into conformity with the *Charter*. Instead, he focused his arguments on the validity of the employer's policies and how his conduct did not meet the definition of misconduct as it had been applied in prior cases. The *Charter* issue was therefore not addressed by the SST-GD, and as set out above, Mr. Sturgeon never raised it in his appeal to the SST-AD. Therefore, this Court cannot deal with it for the first time on judicial review, under long-accepted case law.

[50] Mr. Sturgeon submits that the SST-GD and SST-AD should have considered the *Charter* issue even if he did not specifically assert it, under the authority of *Sullivan*. That case also concerned the denial of EI benefits because the applicant had not complied with the employer's COVID-19 vaccination policy. The SST-AD rejected the applicant's claim that he did not engage in misconduct because the employer's policy was invalid. Applying the relevant court jurisprudence, the Appeal Division held that the test for misconduct focuses on the employee's conduct rather than the employer's policy. The Court of Appeal found the Appeal Division's analysis of that issue to be reasonable.

[51] In the course of its reasons, the Court of Appeal noted that the applicant had raised the *Charter* in support of his claim in his appeal. He had previously raised *Charter* arguments before the SST-GD but expressly withdrew them, and so the SST-GD decision did not deal with the question. Following the long-accepted case law discussed previously, the Court of Appeal found the new issue was inadmissible on appeal. However, in light of the Supreme Court of Canada's decision in *Commission scolaire 2023,* which was released shortly before the hearing in *Sullivan*, the Court of Appeal invited submissions on whether the SST-GD and/or SST-AD should have taken into account any *Charter* values in this case.

[52] In response to the Court of Appeal's invitation, Mr. Sullivan invoked *Charter* values such as "freedom" or "equality" in support of his challenge. The Court of Appeal found this argument was too vague; it also ruled that *Charter* values cannot be used to invalidate legislative provisions. In light of this, the Court of Appeal found no error in the failure of the SST-GD and SST-AD to conduct a *Charter* analysis, and concluded that the decision was reasonable.

[53] In support of his argument that the Appeal Division should have taken the *Charter* issue into account even though he did not specifically raise it, Mr. Sturgeon relies on the following passage from *Sullivan* at para 9, where the Court of Appeal states that in *Commission scolaire 2023*, "the Supreme Court held that decision-makers, at least in some circumstances, must take into account values resident in the *Charter* and that reviewing courts can consider them even where administrators have not considered them." Mr. Sturgeon submits that in light of this, the Appeal Division was required to consider whether the interpretation of the concept of

misconduct as it applies to denial of EI benefits should be revised in light of his freedom of religion claim.

[54] There are several problems with Mr. Sturgeon's claim. On the face of it, the denial of EI benefits where an employee has been terminated for misconduct does not implicate any particular *Charter* right or value. The EI system is set up as a type of insurance scheme; employees and employers contribute to it, and benefits are paid out upon the loss of employment, subject to various restrictions and conditions. One of those restrictions is that the employee cannot claim EI benefits if they quit their job voluntarily. Another is that no benefits will be paid where an employee is terminated for misconduct. As I stated in *Cecchetto FC*:

> [24] An employee who loses their job due to "misconduct" is not entitled to receive EI benefits; the term "misconduct" in this context refers to the employee's violation of an employment rule. The Federal Court of Appeal has stated that "the breach must have been performed or the omission made wilfully, that is to say consciously, deliberately or intentionally" (*Canada (Attorney General) v Bellavance*, 2005 FCA 87 [*Bellavance*] at para 9).

[55] Certain restrictions in schemes based on insurance principles, such as restrictions relating to age, gender or prior disability, may give rise to obvious human rights concerns triggering an obligation to consider *Charter* values in the interpretation of the relevant legislation: see *Tétreault-Gadoury v. Canada (Employment and Immigration Commission)*, 1991 CanLII 12 (SCC), [1991] 2 SCR 22; *Schachter v. Canada*, 1992 CanLII 74 (SCC), [1992] 2 SCR 679. However, the denial of benefits for those whose employment is terminated for misconduct is not, on its face, of the same nature. There is no obvious *Charter* right or value, or ground of discrimination, that is triggered by such a provision.

[56] The law that flows from the *Doré/Loyola* analysis, as expressed in *Commission scolaire 2023* and *Sullivan*, does not require administrative decision-makers to conjure up every conceivable *Charter* right or value that might be affected by their decision. It would be unrealistic, as a matter of law and from a practical perspective, to impose such a burden on administrative decision-makers. Indeed, in *Sullivan* the Court of Appeal expressly stated that this obligation only arose "in some circumstances" (*Sullivan* at para 9).

[57] In this case, Mr. Sturgeon is asking this Court to overturn the SST-AD's decision on the basis of a *Charter* argument he expressly chose not to advance (before either the SST-GD or SST-AD), and in doing so to ignore the *Charter* claim he did present to the SST-GD. In my view, he seeks to stretch the doctrine too far in his favour. I am not persuaded that the Appeal Division's decision can be set aside because it failed to undertake a *Charter* analysis of the term misconduct.

[58] In this case, Mr. Sturgeon did make it clear in his claim for EI benefits and his subsequent appeal to the SST-GD that his refusal to abide by his employer's COVID-19 vaccination policy was based on the exercise of his freedom of religion. However, as noted above, the SST-GD specifically stated that Mr. Sturgeon had stated that his *Charter* claim was directed against the employer's policy, not to the *EI Act* itself. Mr. Sturgeon never put forward a Charter claim that asked the SST-GD to re-assess the interpretation of the term misconduct as it applied under the law. He also did not invoke this as a basis for his appeal to the Appeal Division; instead, he focused his appeal entirely on procedural fairness.

[59] Based on all of this, there was no obligation on the Appeal Division to consider whether the definition of the concept of misconduct triggered *Charter* rights or values, or to assess whether any *Charter* infringement was reasonable and proportionate. Mr. Sturgeon did not ask the SST-AD to do that. He made clear before the SST-GD that his *Charter* claim was focused on the validity of his employer's COVID-19 vaccination policy, and the refusal to grant him an exception or an accommodation based on his religious beliefs. Based on this, it is difficult to understand how the Appeal Division could be required to consider, on its own motion and without submissions on the point, how the interpretation of misconduct in the EI benefits scheme might affect *Charter* rights.

[60] There is now a long and unbroken line of case law indicating that this type of question falls outside of the mandate of the SST-GD and SST-AD. Mr. Sturgeon could have pursued his challenge to the employer's policy through other avenues, including by advancing a *Charter* claim, wrongful dismissal suit and/or labour grievance, or by filing a complaint to the British Columbia Human Rights Commission. The point is, there were other avenues available to pursue the *Charter* question; this decision does not cut off the only avenue of relief.

[61] While the restrictions on the scope of the inquiry the SST-GD and SST-AD are mandated to undertake may appear to be highly technical, it bears repeating that there is a powerful rationale for this approach. The rationale was explained in the following way in *Sullivan*:

> [6] We would add that the court jurisprudence makes sense. Were the applicant's submissions to be upheld, the Social Security Tribunal would become a forum to question employer policies and the validity of employment dismissals. Under any plausible reading of the legislation that governs the Tribunal, it is a forum to determine entitlement to social security benefits, not a forum to

> adjudicate allegations of wrongful dismissal. We note that the applicant in fact has pursued remedies elsewhere for wrongful dismissal and has made a human rights complaint.

[62] For the reasons set out above, I am unable to find the Appeal Division's decision to be unreasonable. The Appeal Division conducted the analysis that was required by the law, and it considered the facts of Mr. Sturgeon's case as set out in his appeal materials. The SST-AD has a limited statutory mandate, and its decision must be understood in that context. There was no requirement for it to conduct an independent analysis of whether the term misconduct as it was applied to Mr. Sturgeon's case infringed the *Charter*, and thus no need for it to consider whether the definition amounted to a limitation that was reasonable and proportionate.

[63] Mr. Sturgeon advanced other arguments about the validity of the employer's policy, based on a variety of grounds, but none of these support a finding that the Appeal Division's decision is unreasonable. These submissions all fall outside of the limited mandate of the SST-GD and SST-AD, as set out in the *DESDA* and confirmed in case law.

[64] Therefore, Mr. Sturgeon's application for judicial review will be dismissed.

IV. Conclusion

[65] As noted earlier, a core aspect of Mr. Sturgeon's argument is that neither the Commission, nor the SST-GD or SST-AD, have ever considered the basis for his refusal to comply with Interior Health's COVID-19 vaccination policy. No one has doubted that he acted based on his understanding of his religious obligations, and he asserts that this means that his

conduct falls within the *Charter* protection for freedom of religion, under the doctrine set out in *Amselem*. He says he is simply asking someone to analyze his *Charter* argument. Mr. Sturgeon will likely be disappointed with the outcome and the reasoning set out here. However, as explained above, the limits imposed by the law reflect both the choice of Parliament (in regard to the limited mandates of the SST-GD and SST-AD) as well as Mr. Sturgeon's decisions about how he wished to advance his claim.

[66] Mr. Sturgeon ably advanced his arguments before this Court, in both written and oral submissions. However, despite his sincere and thoughtful arguments, the binding jurisprudence requires that I find against him.

[67] The Respondent did not seek its costs in this matter, and in light of the circumstances no costs will be awarded. Each party shall bear its own costs.

JUDGMENT in T-1704-23

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. No costs are awarded. Each party shall bear its own costs.

"William F. Pentney"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1704-23
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APPEARANCES:

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