Citation: *DD v Canada Employment Insurance Commission*, 2023 SST 976

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	D. D.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (543589) dated October 17, 2022 (issued by Service Canada)

Tribunal member:	Marc St-Jules
Type of hearing:	In person
Hearing date:	April 12, 2023
Hearing participant:	Appellant
Decision date:	May 3, 2023
File number:	GE-22-3562

Decision

[1] I am dismissing the appeal. The Tribunal disagrees with the Appellant.[1]

[2] In this appeal the Canada Employment Insurance Commission (Commission) has proven that the Appellant's employer suspended him because of misconduct. In other words, because he did something that caused him to be suspended from his job.

[3] This means that the Appellant isn't entitled to receive Employment Insurance (EI) following his suspension. This is what the Commission decided. In other words, the Commission made the correct decision in his EI claim.

Overview

[4] The employer put the Appellant on an involuntary unpaid leave of absence starting November 2, 2021. The Appellant returned to work on September 18, 2022, after the employer suspended its vaccination policy. The Commission is saying the employer put him on leave of absence because he didn't follow its mandatory COVID vaccination policy (vaccination policy).

[5] The Commission decided that the Appellant was suspended from his job for a reason the *Employment Insurance Act* (EI Act) considers to be misconduct. Because of this, the Commission was unable to pay him EI benefits from June 6, 2022, until September 16, 2022.[2]

[6] The Appellant disagrees. His suspension was not a disciplinary action by the employer. The employer can not require genetic testing as per the Genetic Non-discrimination Act.

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[1] In my decision, I use "Appellant," rather than the "Claimant." I am doing this because the Appellant is the person who requested the appeal. The Commission uses "Claimant" because the Employment Insurance Act (EI Act) uses the word "claimant," meaning a person who has made a claim for EI benefits.
[2] The suspension from work occurred in November 2021. The disentitlement starts in June 2022 as this is when the Appellant applied for benefits.

[7] I have to decide whether the Appellant was suspended from his job for misconduct under the EI Act.

Matters I have to consider first

The hearing was adjourned more than once

[8] The Appellant was originally scheduled to attend in person on February 15, 2023. The Appellant replied that he was unable to wear a mask as required by the Commission (aka Service Canada).

[9] In response to this, a teleconference was then scheduled for February 21, 2023. The Appellant replied to this notice of hearing. He communicated that his issue with masks was mostly an auditory one. When individuals where masks, he is unable to hear properly.

[10] I decided that an attempt at a Case Conference to discuss options would be best to enable a hearing to take place. A case conference was then scheduled rather than a teleconference hearing. The purpose of this was to discuss options and dates.

[11] The case conference was scheduled for January 30, 2023. The Appellant attended as invited. The Appellant was advised that the Tribunal has no discretion regarding the mask requirements in Service Canada offices. The Appellant communicated his preference to hold an in-person hearing. The Appellant agreed that a teleconference or videoconference hearing was possible but would prefer in person.

[12] It was decided that a tentative hearing would be scheduled by videoconference for March 29, 2023. This would be tentative only. If the mask requirements are lifted, the hearing would be changed for an in-person hearing. This hearing was two months into the future which allowed for additional time for the mask requirements to change.

[13] On March 2, 2023, the Appellant was sent a new Notice of Hearing for an In-Person hearing. The Tribunal had been notified that the mask requirement was changed from a requirement to a recommendation only. March 29, 2023, was selected at it was the same date as the tentative videoconference hearing.

[14] Because of a situation outside of the Tribunal`s control, the Tribunal Member was no longer available for an In-Person hearing on March 29, 2023. The Tribunal communicated with the Appellant on March 28, 2023. The Appellant was given the option to hold a videoconference hearing on March 29, 2023. The alternative would be an In-Person hearing on April 12, 2023. This was two weeks later.

[15] The Appellant opted to have an In-Person hearing on April 12, 2023. The new hearing took place in person as scheduled with the Appellant in attendance.

Issue

[16] Was the Appellant`s suspension misconduct under the EI Act?

Analysis

[17] The law says that you can't get EI benefits if you lose your job because of misconduct. This applies when the employer has let you go or suspended you.

[18] I have to decide two things. I have to decide why was the Appellant suspended from his job. I then need to decide if this is considered misconduct under the EI Act.

[19] 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 reason the Appellant was suspended

[20] I find the Appellant's employer suspended him because he didn't comply with its vaccination policy.

[21] The Appellant and the Commission agree that the Appellant was suspended effective November 2, 2021.[3] The reason was non-compliance with the new mandatory vaccine policy. The parties do not agree on the misconduct part. The Appellant says

[3] In the first letter to the Appellant, the Commission decided that the Appellant had voluntarily left his job without just cause. The Appellant disagreed with this decision when requesting his reconsideration. He says that it was an involuntary leave, and he was forced to take the leave. The Commission now agrees the Appellant was forced to take the leave. They now agree it is a suspension.

that the policy was illegal. He has a right to refuse the testing requirements imposed by his employer.

[22] I have no reason to believe any other reason why the Appellant was suspended from his job. There is nothing in the file or in testimony to make me doubt this finding.

[23] Based on the evidence before me, I find non-compliance with the vaccination policy is the reason the Appellant was placed on unpaid leave.

The reason is misconduct under the law

[24] The Appellant's failure to comply with his employer's vaccination policy is misconduct under the EI Act.

What misconduct means under the EI Act

[25] The EI Act doesn't say what misconduct means. Court decisions set out the legal test for misconduct. The legal test tells me the types of facts and the issues I have to consider when making my decision.

[26] The Commission has to prove it's more likely than not he was suspended from his job because of misconduct, and not for another reason.[4]

[27] I have to focus on what the Appellant did or failed to do, and whether that conduct amounts to misconduct under the EI Act.[5] I can't consider whether the employer's policy is reasonable, or whether a suspension or termination was a reasonable penalty.[6]

[28] The Appellant doesn't have to have wrongful intent. In other words, he doesn't have to mean to do something wrong for me to decide his conduct is misconduct.[7] To be misconduct, his conduct has to be wilful, meaning conscious, deliberate, or

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[4] See *Minister of Employment and Immigration v Bartone*, A-369-88.
[5] This is what sections 30 and 31 of the EI Act say.
[6] See *Paradis v Canada (Attorney General)*, 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107.
[7] See *Attorney General of Canada v Secours*, A-352-94.

intentional.[8] And misconduct also includes conduct that is so reckless that it is almost wilful.[9]

[29] There is misconduct if the Appellant knew or should have known his conduct could get in the way of carrying out his duties toward his employer and knew or should have known there was a real possibility of being let go because of that.[10]

[30] I can only decide whether there was misconduct under the EI Act. I can't make my decision based on other laws.[11] I can't decide whether the Appellant was constructively or wrongfully dismissed under employment law. The same goes for a suspension without pay. I can't interpret an employment contract or decide whether an employer breached a collective agreement.[12] I also can't decide whether an employer discriminated against the Appellant or should have accommodated them under human rights law.[13] And I can't decide whether an employer breached the Appellant's privacy or other rights in the employment context, or otherwise.

What the Commission and the Appellant say

[31] The Commission says that there was misconduct under the EI Act because the evidence shows:

- The employer had a vaccination policy and communicated that policy to all staff.
- Under the vaccination policy, all employees needed to disclose their vaccination status or face leave without pay.
- The Appellant knew what he had to do under the policy.

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[8] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[9] See *McKay-Eden v His Majesty the Queen*, A-402-96.
[10] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[11] See *Canada (Attorney General) v McNamara*, 2007 FCA 107. The Tribunal can decide cases based on the *Canadian Charter of Rights and Freedoms*, in limited circumstances—where an appellant is challenging the EI Act or regulations made under it, the *Department of Employment and Social Development Act* or regulations made under it, and certain actions taken by government decision-makers under those laws. In this appeal, the Appellant isn't.
[12] See *Canada (Attorney General) v McNamara*, 2007 FCA 107 at paragraph 22.
[13] See *Paradis v Canada (Attorney General)*, 2016 FC 1282; and *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

- He also knew his employer could suspend him under the policy if he didn't give agree to the testing requirement set out in the mandatory vaccination policy.
- He made a conscious and deliberate personal choice not to comply with the policy.

[32] The Appellant says there was no misconduct under the EI Act because of the following:

- He was placed on leave without pay based on an illegal vaccination policy.
- The Commission has no legal basis to deny benefits. The Commission is ignoring his right to privacy.[14]
- The employer made it clear that this leave of absence was non-disciplinary.
- The Genetic Non-discrimination Act gives him the legal right to refuse all COVID Testing.[15]
- The Personal Health Information Protection Act, 2004 also protects the Appellant. Consent must be given and can not be obtained by deception or coercion.[16]
- The Appellant`s rights under the Ontario Human Rights were ignored.

[33] The evidence in this appeal is consistent and straightforward. I believe and accept the Appellant's evidence and the Commission's evidence I have no reason to doubt the Appellant's evidence (what he said to the Commission, wrote in his reconsideration request and appeal notice, and his testimony at the hearing). His evidence is consistent. And there is no evidence that contradicts what he said.

[34] I accept the Commission's evidence because it's consistent with the Appellant's evidence. And there is no evidence that contradicts it.

[35] In this case, there is no dispute in the evidence. As a Tribunal member, I must rule on the balance of probabilities. The evidence is clear in this case. The parties agree

[14] See GD page 22.
[15] See GD2 pages 5 and 13.
[16] See GD6 page 3.

on the facts. The problem is that that Appellant wants other laws to have been considered but the Tribunal has no jurisdiction on those laws.

[36] The Appellant agrees that the policy was communicated to him in August or September 2021. He agrees he read it and that non-compliance may lead up to termination. He was not sure what exactly the employer would do but agrees it stated it could lead to termination. The employer decided not to terminate his employment but rather place him on unpaid leave.

[37] The test that needs to be met is the EI Act. This legal test is what the Tribunal needs to review. The Commission has proven that the Appellant was advised of the policy, knew the consequences of non-compliance and followed through with his non-compliance knowing it could lead to his suspension. His behaviour was wilful. His actions were conscious, deliberate or intentional.

[38] I find the Appellant had no wrongful intent. Nothing in the evidence suggests this. As mentioned above, for there to be misconduct, the test that needs to be met was wilfulness. There is no need to prove wrongful intent.

[39] I can only decide whether his conduct is misconduct under the EI Act. I can't make my decision based on other laws.[17] So, I can't consider whether his employer's policy or the penalty it applied to him is reasonable or legal under other laws. This includes considering if the COVID vaccination policy is in violation of other laws.

[40] There have also been more recent court cases which support mandatory vaccination policies. In a recent case called *Parmar*,[18] the issue before the Court was whether an employer was allowed to place an employee on an unpaid leave of absence for failing to comply with a mandatory vaccination policy. Ms. Parmar objected to being vaccinated because she was concerned about the long-term efficacy and potential negative health implications.

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[17] See for example the Federal Court of Appeal's decision in *Canada (Attorney General) v McNamara*, 2007 FCA 107.
[18] See *Parmar v Tribe Management Inc.*, 2022 BCSC 1675.

[41] The Court in that case recognized that it was “extraordinary to enact policy that impacts an employee’s bodily integrity” but ruled that the vaccination policy in question was reasonable, given the “extraordinary health challenges posed by the global COVID-19 pandemic.” The Court then went on to say:

> [154]. . . [Mandatory vaccination policies] do not force an employee to be vaccinated. What they do force is a choice between getting vaccinated, and continuing to earn an income, or remaining unvaccinated, and losing their income …

[42] Jurisprudence has confirmed the Tribunal’s limited jurisdiction as mentioned above. Another recent case from January 2023, the Federal Court agrees that the Tribunal has limited authority.[19] The case started with the Commission then went to the Tribunal’s General Division. The Appeal division then upheld the decision. The Federal Court then reviewed the decision. Paragraph 32 has the following:

> [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.

[43] I therefore make no findings with respect to the validity of the policy or any violations of the Appellant’s rights under other laws.

[44] I agree the Appellant can decline vaccination. In the Appellant’s case, he chose not to disclose his vaccination status. I agree the Appellant can also decline to disclose his vaccination status. That is his own personal decision. This is his right. I also agree the employer has to manage the day-to-day operations of the workplace. This includes

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[19] See *Cecchetto v. Canada* (Attorney General) 2023 FC 102.

developing and applying policies related to health and safety in the workplace. The employer has a responsibility to provide a safe workplace.

[45] I also agree that the Appellant can decline to be tested. That is also his personal choice. However, as stated above, the employer has the right to implement policies to ensure the safety of employees and clients.

[46] Based on the evidence, I find that the Commission has proven the Appellant's conduct was misconduct because it has shown that:

- He knew about the vaccination policy, and he knew about his duty to disclose his vaccination status by the deadline. He also knew the consequences if he failed to do the testing.
- He knew that his employer would suspend him if he didn't comply with the policy.
- He consciously, deliberately, or intentionally made a personal decision not to comply by the deadline.

[47] I understand the Appellant may not agree with this decision. Even so, the Federal Court of Appeal dictates that I can only follow the plain meaning of the law. I can't rewrite the law or add new things to the law to make an outcome that seems fairer for the Appellant.[20]

Conclusion

[48] The Commission has proven that the Appellant was suspended from his job for misconduct under the EI Act. This means the Commission made the correct decision in his EI claim.

[49] So, I am dismissing his appeal.

Marc St-Jules
Member, General Division – Employment Insurance Section

[20] See *Canada (Attorney General) v Knee*, 2011 FCA 301, at paragraph 9.