Citation: *BD v Canada Employment Insurance Commission*, 2023 SST 565

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

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

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (512277) dated October 6, 2022 (issued by Service Canada)

Tribunal member:	Jillian Evans
Type of hearing:	Teleconference
Hearing date:	May 16, 2023
Hearing participant:	None
Decision date:	May 18, 2023
File number:	GE-22-3578

Decision

[1] The appeal is dismissed. The Tribunal disagrees with B. D.

[2] The Commission has proven that he lost his job for misconduct.

Overview

[3] The Appellant B. D. was an employee of a federally regulated company. He was placed on an involuntary leave from his job on March 4, 2022.

[4] Under the *Employment Insurance Act*, being placed on an involuntary leave of absence is the same thing as being suspended from your job. In these reasons I will use the terms involuntary leave of absence and suspension interchangeably.

[5] The Appellant's employer introduced a policy in October 2021 that required that employees be fully vaccinated against COVID-19 by no later than November 26, 2021 unless they were exempted from receiving the vaccine.

[6] B. D. asked his employer for an exemption from the vaccination requirement on religious grounds. On March 4, 2022 his employer advised him that he did not have an exemption. They placed him on an unpaid leave from his job for failing to comply with the policy's vaccination requirements.

[7] The Commission decided that because B. D. lost his job for breaching one of his employer's policies, he lost his job due to misconduct. The Commission decided that the Appellant was disqualified from receiving EI benefits.

[8] My job is to decide if the Appellant's actions and behaviours do in fact meet the legal definition of misconduct under the *Employment Insurance Act*.

Matter I had to consider first

On the day of the hearing the Appellant requested an adjournment

[9] I have denied the Appellant's request to adjourn his hearing.

[10] B. D.'s in-person hearing before the Tribunal was initially scheduled for March 1, 2023.

[11] In his Notice of Appeal, B. D. had advised the Tribunal that he did not have access to an email address.

[12] He advised that his only mailing address was a P.O. Box in Belleville, Ontario. He also provided the Tribunal with a telephone number that did not accept voicemail messages.

[13] The Tribunal sent B. D. a copy of his Notice of Hearing and all of the appeal documents by courier. The package was delivered to his P.O. Box on December 21, 2022.

[14] Tribunal staff telephoned B. D. on February 23 and February 28, 2022 to remind him of the scheduled hearing and to confirm his attendance. He did not answer those calls and no voicemail was available.

[15] B. D. did not appear on March 1, 2022 for his scheduled hearing.

[16] On March 6, 2023 the Appellant telephoned the Tribunal, advised that he had misread the Notice of Hearing and incorrectly understood that his hearing was scheduled for March 11, 2023. He asked that his hearing be rescheduled to May 2023.

[17] On March 15, 2023 I granted B. D.'s post-hearing rescheduling request on the condition that the rescheduled hearing would proceed by way of teleconference. He was advised of this decision by mail.

[18] A new Notice of Hearing was prepared, with details of his new hearing date: May 16, 2023 at 9:30 am. This second Notice of Hearing was delivered to B. D.'s P.O. Box on April 3, 2023.

[19] B. D. did not collect the mail from his P.O. Box by April 23, 2023 and so it was returned to the Tribunal unclaimed.

[20] Tribunal staff once again telephoned B. D. on May 4, 9, 10 and 11 to try to confirm his hearing date. All of their calls went unanswered. No answering service was available.

[21] At no point between March 6 and May 16, 2023 did B. D. call the Tribunal to inquire about his new hearing date or to provide updated contact information.

[22] On May 16, 2023 at 9:30 a.m. I convened B. D.'s teleconference hearing as scheduled. B. D. did not join the teleconference.

[23] At 9:36 am I asked Tribunal staff to telephone B. D. to determine whether or not he was planning to attend.

[24] The Appellant answered that call from the Tribunal. When told that his hearing was underway, he advised that he had not received the Notice of Hearing and was not prepared to proceed with his hearing that day. When the Tribunal staff member attempted to provide him with the log in information and to assist him in joining the hearing that was waiting for him, he refused the information.

[25] The Appellant advised the staff member that he wanted another adjournment, and that he would not be prepared to proceed until after May 23, 2023. He confirmed that his mailing address remained the P.O. Box in Belleville, Ontario.

[26] I am denying B. D.'s request for another adjournment of his hearing.

[27] The Tribunal is entitled to rely on the contact information provided by the Appellant[1] and is allowed to proceed with the appeal process even if it cannot reach a party using the contact information the party gave it.[2]

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[1] See section 9 of the *Social Security Tribunal Rules of Procedure*

[2] Section 9 of the *Social Security Tribunal Rules of Procedure* says that "If the Tribunal cannot reach a party, the Tribunal may continue the appeal process even if it cannot reach a party using the contact information the party gave it. The Tribunal may do this without giving further notice to the party."

[28] Here, I find that the Tribunal advised the Appellant that his rescheduling request had been granted. It also made numerous efforts by various means to advise B. D. of each of his hearing dates.

[29] The Tribunal is also allowed to go ahead with a hearing without a party if the party had notice of the hearing.[3]

[30] I find that B. D. had fair notice of both the first hearing (which he misread as being scheduled for March 11, 2023) and of the second hearing (when he received a call from the Tribunal on the morning of May 16, 2023).

[31] In each case, B. D. declined to attend at the scheduled time.

[32] As such, I proceeded with the May 16, 2023 hearing in his absence. I am declining his request for a third, new hearing date.

Issue

[33] Was the Appellant suspended from his job because of misconduct?

Analysis

[34] The law says that you can't get EI benefits if you lose your job because of misconduct.[4] This applies whether the employer has let you go or suspended you.[5]

[35] To answer the question of whether B. D. was suspended because of misconduct, I have to decide two things:

- First, I have to determine the reason that the Appellant was placed on a leave of absence by his employer.

[3] Section 58 of the *Social Security Tribunal Rules of Procedure* say that, "An oral hearing may take place without a party if the Tribunal is of the opinion that the party received the notice of hearing."
[4] See section 30 of the Act.
[5] See section 31 of the Act.

- Then, I have to determine whether the *Employment Insurance Act* considers that reason to be misconduct.

Why was B. D. suspended from his job?

[36] The Appellant and the Commission agree about why B. D. was suspended from his job.

[37] The Appellant was employed by a federal agency. His employer introduced a policy in October 2021 that required all employees to be fully vaccinated against COVID-19 by no later than November 26, 2021.[6]

[38] The policy allowed employees to apply for an exemption from the policy on medical or religious grounds.[7]

[39] B. D. does not dispute that he was provided with a copy of the policy, which stated that employees that did not comply with the policy would face discipline "up to and including termination."[8]

[40] The Appellant says that he did comply with the policy. He says that he requested a religious accommodation and that at first, his employer granted him the exemption on the condition that he continue to test negative for COVID-19 during twice weekly tests.[9]

[41] He says that about 3 months later, however, he was suddenly told by his employer that his exemption was no longer valid.[10] Without the exemption, the policy required that he provide proof that he had received the COVID-19 vaccinations.

[42] As he had not received the vaccinations, his employer considered him to be in breach of the vaccination policy. They suspended him from his job.

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[6] GD3-37
[7] GD3-37
[8] GD3-22
[9] GD3-22
[10] GD3-31

[43] B. D. and the Commission agree that this was the reason that he was suspended from his job: B. D.'s employer concluded that he was not complying with their COVID-19 policy and placed him on an unpaid leave as a result.

[44] There is no evidence before me that says otherwise. Although B. D. argues that the decision to "stop recognizing"[11] his religious exemption was unfair, he agrees that it was the reason that he was suspended.

[45] I find, therefore, that the reason the Appellant was placed on leave was because he was not in compliance with his employer's vaccination policy.

Is the reason he lost his job misconduct?

[46] The Appellant's failure to comply with his employer's COVID-19 policy requirements is misconduct under the EI Act.

[47] The *Employment Insurance Act* (Act) doesn't say what misconduct means. But case law (decisions from courts and tribunals) shows us how to determine whether the Appellant's actions amount to misconduct under the Act. The Act sets out the legal test for misconduct. In some circumstances, for example, the term "misconduct" refers to the employee's violation of an employment rule.

[48] Where the Commission takes the position that a worker seeking benefits has engaged in misconduct, the Commission bears the burden of proof. It has to prove this on a balance of probabilities. In B. D.'s case, this means that the Commission has to show that it is more likely than not that he was suspended from his job because of misconduct.[12]

[49] I have to focus on what B. D. did or didn't do and whether his conduct amounts to misconduct under the EI Act. I can't make my decision based on other laws.

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[11] GD3-31
[12] See *Minister of Employment and Immigration v Bartone*, A-369-88.

[50] I can't decide, for example, whether a worker was constructively or wrongfully dismissed under employment law: the Federal Court has been clear that the Tribunal does not have the authority to decide whether the employer's policy was fair or whether an employee's dismissal under that policy was justified or reasonable.[13] The Federal Court has said that workers have other legal avenues to grieve an employer's conduct or to challenge the legality of what the employer did or didn't do.

[51] The Tribunal's jurisdiction is limited to the *Employment Insurance Act*. So, I must focus on the Appellant's behaviour and actions, and whether those behaviours amounted to misconduct.[14]

[52] Case law says that to be misconduct, an Appellant's behaviour has to be wilful. This means that the conduct was conscious, deliberate, or intentional.[15]

[53] The Appellant doesn't have to have wrongful intent. B. D. doesn't have to mean to do something illegal, dangerous or wrong for me to decide his conduct is misconduct.[16]

[54] The case law also says that there is misconduct if the Appellant knew or should have known that their conduct could get in the way of carrying out their duties toward their employer and that there was a real possibility of being suspended or let go because of that.[17]

The Commission's and the Appellant's positions in this case

[55] The Appellant and the Commission agree on a number of key facts. Much of the evidence from the parties in this appeal is not in dispute. I have reviewed the record and here is what I find the evidence shows:

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[13] See *Canada (Attorney General) v Marion,* 2002 FCA 185 at paragraph 3
[14] See, for examples of cases that say this, *Canada (Attorney General) v Caul*, 2006 FCA 251 at paragraph 6; *Canada (Attorney General) v Lee*, 2007 FCA 406 at paragraph 5; and *Paradis vs. Canada (Attorney General)*, 2016 FC 1282 at paragraph 31
[15] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[16] See *Attorney General of Canada v Secours*, A-352-94.
[17] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

- The employer had a COVID-19 policy and communicated that policy to all staff (including the Appellant) in approximately October 2021.[18]

- The Policy required that all employees provide proof that they were fully vaccinated by November 26, 2021.[19]

- The policy permitted employees to apply for an exemption from the policy on medical or religious grounds.[20]

- The policy provided that an employee who had not complied with the policy would be placed on a leave without pay until they provided proof of vaccination.[21]

- B. D. requested an exemption on religious grounds and provided his employer with one or more letters from his religious leader before November 26, 2021 to support this request.[22]

- B. D. continued to work at his job throughout December, January and February. During these months, he was required to undergo COVID-19 testing twice a week.[23]

- In March 2022 B. D. was told that he was not exempted from the policy and that he was being placed on a leave without pay for failing to comply with it.[24]

- He remained on unpaid leave until he was recalled to his job on July 6, 2022.

[56] The Appellant and the Commission disagree about one issue:

- B. D. says that his religious exemption **was** initially granted in November or December 2021 and then "suddenly" revoked by his employer in March 2022

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[18] GD3-22
[19] GD3-30
[20] GD3-37
[21] GD3-25
[22] GD3-32
[23] GD3-22
[24] GD3-22

"without explanation."[25] He says that he no longer has the letters from his employer that confirm that they did originally grant him his exemption, nor the letter advising him why they later suspended him.

- The Commission says that there is no proof that B. D. was ever granted a religious exemption. The employer did not respond to requests for clarification on this issue and so there is no evidence that B. D.'s religious accommodation was ever granted.

[57] The Commission says that these facts show that the Appellant engaged in misconduct: he knowingly decided not to follow his employer's policy regarding vaccination, was told that he was not exempt from the policy and still declined to get vaccinated.

[58] He knew that if he did not follow the policy there was a real chance that he would lose his job.

[59] The Commission says that this meets the definition of misconduct under the *Employment Insurance Act*.

[60] The Appellant says that the above facts do not amount to misconduct.

[61] The Appellant says that he did comply with the policy. He requested a religious exemption and it was originally granted. He says that his employer's decision later to change their position about his religious accommodation is not fair and does not show that he engaged in misconduct.

I find that the Commission has proven misconduct.

[62] Based on the evidence, I find that the Commission has proven that B. D.'s behaviour amounted to misconduct. It has shown that he:

- knew about the vaccination policy

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[25] GD2-4

- knew that he could lose his job if he was not granted an exemption from the vaccine requirements.
- was advised that he was not **or** was no longer exempted from the policy
- understood that without an exemption he was in breach of the policy
- chose not to get vaccinated despite not being **or** no longer being exempted.

[63] On the evidence before me, I am unable to determine whether or not B. D. was in fact originally granted a religious exemption.

[64] As I mentioned above, B. D. did not attend at his hearing. As such, I must rely entirely on the documents provided by both parties. These documents do not answer this question one way or another.

[65] However, I do not need to make a determination on this question in order to decide this matter.

[66] It is undisputed that at some point, B. D. was told by his employer that he was not exempted from the vaccination policy. The consequences of not being exempted from the policy were clear to B. D.. He knew that without an exemption, he would be placed on leave until he could show that he had been vaccinated or might be terminated.

[67] He maintained his decision not to get vaccinated.

[68] Whether or not the employer ‘changed their mind’ is not relevant to the question of whether or not B. D. was in breach of the policy on March 4, 2022 when he was suspended from his job.

[69] I find that as of March 4, 2022, B. D. was in breach of his employer’s policy.

[70] As I explained above, I do not have the jurisdiction to decide if the policy was scientifically sound or whether the employer’s policy or process for granting exemptions

was fair or reasonable. I am limited to interpreting and applying the *Employment Insurance Act*. I can't make my decision based on other laws.

[71] The courts have said that employees who believe that they have been wrongfully suspended from their job or treated unfairly by their employer have other options available to them and can pursue actions against their employer in other forums. Unionized employees have the right to file grievances. Others can file lawsuits. These solutions penalize the employer's behaviour rather than having taxpayers pay for the employer's actions through the Employment Insurance regime.[26]

[72] I have applied the EI Act and I find that the Appellant's voluntary decision not to comply with his employer's vaccination policy meets the definition of misconduct.

[26] See *Canada (Attorney General) v. McNamara*, 2007 FCA 107

Conclusion

[73] The Commission has proven that the Appellant lost his job because of misconduct under the EI Act. He isn't entitled to get EI regular benefits.

[74] The appeal is dismissed.

Jillian Evans
Member, General Division – Employment Insurance Section