



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *Y. D. v Canada Employment Insurance Commission and X*, 2019 SST 311

Tribunal File Number: AD-18-581

BETWEEN:

Y. D.

Appellant

and

Canada Employment Insurance Commission

Respondent

and

X

Added Party

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Valerie Hazlett Parker

DATE OF DECISION: April 1, 2019

DECISION AND REASONS

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] Y. D. (Claimant) worked for a number of years as a nurse. She was dismissed for misconduct for forging another employee's signature and failing to follow proper protocols for the destruction of narcotics. The Claimant applied for Employment Insurance benefits. The Canada Employment Insurance Commission (Commission) refused the claim because of the Claimant's misconduct. The Claimant appealed this decision to the Tribunal. The Tribunal's General Division dismissed the appeal. The General Division made an error in law. The decision that the General Division should have given is made, and the appeal is dismissed.

ISSUES

[3] Did the General Division make an error in law because it failed to refer to relevant case law?

[4] If so, should the Appeal Division give the decision that the General Division should have given?

ANALYSIS

[5] The *Department of Employment and Social Development Act* (DESD Act) governs the Tribunal's operation. It sets out only three grounds of appeal that the Appeal Division can consider. They are that the General Division failed to observe a principle of natural justice or made a jurisdictional error, made an error in law, or based its decision on an erroneous finding of fact made in a perverse or capricious manner or without regard for the material before it.¹

[6] The issue in this appeal is whether the General Division made an error under the DESD Act because it failed to refer to any case law on the issue of the Claimant's misconduct. The

¹ DESD Act s. 58(1)

General Division decision states that the Claimant admitted to knowing the employer's policies and procedures for disposing of narcotics, that she did not follow the procedure and signed another's name to dispose of some narcotic medication.² On this basis it decided that the Claimant committed misconduct.³ The General Division did not refer to any court or tribunal decisions regarding what misconduct is or whether the Claimant's conduct met the legal test for this.

The Appeal Division granted leave to appeal the General Division's decision because the failure to refer to case law may have been an error in law. The Commission conceded that this was an error in law, and that the decision was not transparent and intelligible.⁴ I agree. The General Division did not explain what the legal test is for misconduct under the *Employment Insurance Act*, or how it was applied to the facts before it. The appeal to the Appeal Division must therefore be allowed.

REMEDY

[7] The DESD Act sets out what remedies the Appeal Division can give when an appeal is allowed. This includes referring the matter back to the General Division for reconsideration or giving the decision that the General Division should have made.⁵ In this case it is appropriate to give the decision that the General Division should have. The facts are not in dispute and the record before the Tribunal is complete. The DESD Act also states that the Tribunal can decide any questions of law or fact that are necessary to dispose of an appeal.⁶

[8] The facts are summarized as follows:

- The Claimant was employed as a nurse for approximately seven years
- The employer has a policy for disposing of narcotics that requires the signature of two authorized employees and disposal in a particular bin
- The Claimant was aware of this policy

² General Division decision para. 9

³ *Ibid.*

⁴ AD4-3

⁵ DESD Act s. 59(2)

⁶ DESD Act s. 64(1)

- On one occasion the Claimant disposed of narcotics (approximately 20 pills), and signed another employee's name as the second authorized employee
- The Claimant admitted to this and acknowledged that it was contrary to policy and procedures
- The Claimant was dismissed for misconduct

[9] A claimant is disqualified from receiving Employment Insurance benefits if they lose their employment by reason of their own misconduct.⁷ Misconduct occurs where the claimant knew or ought to have known that their conduct was such as to impair the performance of the duties owed to the employer and that, as a result, dismissal was a real possibility.⁸ The misconduct must be wilful or deliberate or so reckless as to approach willfulness⁹, meaning that it was conscious and deliberate. In this case the Claimant deliberately forged another employee's name to the document for disposing of narcotics.

[10] In addition, there must be a causal link between the misconduct and the employment such that the Claimant knew or ought to have known that she would be dismissed for this conduct.¹⁰ This requirement is also met. It is undisputed that dismissal would result from a breach of the narcotics disposal policy.

[11] Therefore, the Claimant's conduct meets the legal test for misconduct. The Claimant stated that she knew the employer's policy for disposal of narcotics, and that signing another employee's name on the disposal document could result in her dismissal. Her conduct was willful, and there is a direct causal link between this conduct and the Claimant's dismissal from employment. The Claimant is disqualified from receiving Employment Insurance benefits.

CONCLUSION

[12] Therefore, the Claimant's appeal is dismissed.

Valerie Hazlett Parker
Member, Appeal Division

⁷ *Employment Insurance Act* s. 30

⁸ *Canada (Attorney General) v. Maher*, 2014 FCA 22

⁹ *Canada (Attorney General) v. Caul*, 2006 FCA 251

¹⁰ *Locke v. Canada (Attorney General)*, 2003 FCA 262

METHOD OF PROCEEDING:	Questions and answers
SUBMISSIONS:	Y D., Appellant Sue Prud'Homme, Representative for the Respondent