



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *KD v Canada Employment Insurance Commission*, 2021 SST 168

Tribunal File Number: AD-21-135

BETWEEN:

**K. D.**

Applicant / Claimant

and

**Canada Employment Insurance Commission**

Respondent / Commission

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**SOCIAL SECURITY TRIBUNAL DECISION**

**Appeal Division**

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Leave to Appeal Decision by: Janet Lew

Date of Decision: April 29, 2021

## DECISION AND REASONS

### DECISION

[1] The Application to the Appeal Division is refused because the appeal does not have a reasonable chance of success.

### OVERVIEW

[2] The Claimant K. D. is appealing the General Division's decision. The General Division found that the Claimant lost her employment at a long-term care facility because of misconduct. The General Division found that the Claimant had deliberately breached the employer's policies and public health authority's orders. She reported to work with COVID-19 symptoms and did not inform her employer of her symptoms. Because of the misconduct, the Claimant was disqualified from receiving Employment Insurance benefits.

[3] The Claimant argues that the General Division made some mistakes and that she should be entitled to receive Employment Insurance benefits. She says that there was no way her employer should have known she was symptomatic, other than for a privacy breach of her medical information. She maintains that she tested negative for COVID-19 and that her symptoms were attributable to allergies. She asserts that her employer had no basis to dismiss her.

[4] I have to decide whether the appeal has a reasonable chance of success based on one of the types of errors listed under section 58(1) of the *Department of Employment and Social Development Act* (DESDA). Having a reasonable chance of success is the same thing as having an arguable case.<sup>1</sup>

[5] I am not satisfied that the appeal has a reasonable chance of success. Therefore, I am refusing the Claimant's Application to the Appeal Division. This ends the Claimant's appeal.

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<sup>1</sup> *Fancy v Canada (Attorney General)*, 2010 FCA 63.

## ISSUES

[6] The issues are:

- i. Is there an arguable case that the General Division exceeded its power when it decided whether there was misconduct?
- ii. Is there an arguable case that the General Division overlooked the fact that there had been a privacy breach involving the Claimant's medical information?
- iii. Is there an arguable case that the General Division made a legal error when it decided whether the Claimant's conduct amounted to misconduct?

## ANALYSIS

[7] There is a two-step process for most appeals at the Appeal Division. At the first step, an applicant has to get permission from the Appeal Division before they can move on to the next and final step. If the Appeal Division grants leave to appeal, it will then make a decision on the merits of the appeal.

[8] Before an applicant can move on to the second step of the appeal, they have to show that the appeal has a reasonable chance of success based on one of the errors listed under section 58(1) of the DESDA. The types of errors are where the General Division:

- (a) Failed to make sure the process was fair;
- (b) Failed to decide an issue that it should have decided, or decided an issue that it should not have decided;
- (c) Made an error of law; or
- (d) Based its decision on an important factual error (perverse, capricious, or without regard for the evidence).

[9] The Claimant argues that the General Division made a jurisdictional error by deciding something that it did not have the power to decide. In particular, she argues that:

... the public health nurse shared her medical information with her employer and this is a breach of confidentiality. Further they accused her of breaching self-isolation which have no proof. Misconduct is not accurate as allergies are not covid positive results!<sup>2</sup>

[10] The Claimant also claims the General Division overlooked the privacy breach. She also claims that the General Division did not properly apply the legal test for misconduct.

**i. Is there an arguable case that the General Division exceeded its authority when it decided whether there was misconduct?**

[11] The Claimant is essentially arguing that the General Division lacked the power to decide if there was misconduct, if her employer learned about her conduct only through a breach of privacy. In other words, if there had been no privacy breach, her employer would have been unaware that she was exhibiting any symptoms. And, if her employer was unaware that she was symptomatic, it would not have dismissed her.

[12] In effect, the Claimant is arguing that her employer should not be able to rely on the breach to be able to dismiss her. And, by extension then, she claims the General Division should not be allowed to decide whether there was misconduct, if her conduct came to light through a privacy breach of her medical information.

[13] The Claimant raises a novel argument, but it has no merit or any legal basis. I am unaware of any law that bars the General Division from considering whether there has been misconduct when an employer discovers the misconduct through a privacy breach or some other means, particularly when it is not responsible for that breach. And, there is nothing in the *Employment Insurance Act* or the case law that protects one's employment due to privacy concerns where there has been misconduct.

[14] The General Division gets its authority or power from the DESDA and the *Employment Insurance Act* (EIA). Section 113 of the EIA states that a party who is dissatisfied with a reconsideration decision of the Commission may appeal that decision to the Social Security Tribunal.

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<sup>2</sup> Application to the Appeal Division, filed April 13, 2021, at AD1A-10.

[15] The reconsideration decision set out the issue over which the General Division had the authority to consider. The Commission's reconsideration decision in this case related to the issue of misconduct.<sup>3</sup> So, the General Division had the authority to decide the issue of misconduct, irrespective of whether the employer discovered it through a privacy breach.

[16] I am not satisfied that there is an arguable case that the General Division acted beyond its power when it decided whether there was misconduct.

**ii. Is there an arguable case that the General Division overlooked the fact that there had been a privacy breach involving the Claimant's medical information?**

[17] Much like her jurisdictional argument, the Claimant submits that the General Division should not be allowed to consider the misconduct issue because the General Division failed to consider the fact that there had been a privacy breach of her medical information.

[18] The General Division acknowledged the Claimant's arguments about the privacy breach. Even so, the General Division noted that the privacy breach did not change the fact that the Claimant admitted that she had falsely completed the screening checklist and had not informed her employer that she was symptomatic or that she had been in close contact with someone who was symptomatic.

[19] In other words, the General Division determined that the privacy breach was an irrelevant factor when it came to assessing whether the Claimant's actions could be considered misconduct. It did not matter how the employer came to learn of the Claimant's actions.

[20] When it came to assessing whether there was misconduct, what mattered was the Claimant's own conduct, and whether that conduct was wilful, i.e. whether that conduct was conscious, deliberate, or intentional.

[21] I am not satisfied that there is an arguable case on the basis that the General Division overlooked the privacy breach. The General Division considered the privacy breach, but determined that it was an irrelevant consideration.

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<sup>3</sup> Commission's reconsideration decision dated February 25, 2021, at GD3-70 to GD3-71 and GD3-72 to GD3-73.

**iii. Is there an arguable case that the General Division made a legal error when it decided whether the Claimant's conduct amounted to misconduct?**

[22] The Claimant argues that the General Division made an error of law when it assessed whether her actions amounted to misconduct. She argues that, one, there was no evidence that she had failed to self-isolate, and two, her symptoms were attributable to allergies, not to COVID-19. She also tested negative on COVID-19 tests.

[23] The Claimant's arguments assume that the General Division found that she was dismissed because she had COVID-19 and had failed to self-isolate.

[24] But, the General Division did not conclude that the Claimant actually had COVID-19, that she had failed to self-isolate, or that her employer dismissed her for either of these two reasons.

[25] Rather, the General Division determined that the Claimant's employer dismissed her for other reasons. As set out at paragraph 8, the General Division found that the Claimant lost her job "because she failed to follow the employer's COVID-19 policies and the provincial public health orders by reporting to work with Covid-19 symptoms, and not informing her employer as required."

[26] At paragraph 23, the General Division confirmed that it found that the misconduct arose because the Claimant had "falsely completed the screening checklist and did not inform her employer that she was symptomatic or that she had been in close contact with someone who was symptomatic." The General Division found that this was a deliberate breach of the employer's policies and public health authority's orders.

[27] In finding that there was misconduct, the General Division said nothing about whether the Claimant had self-isolated, or whether she actually had COVID-19.

[28] The fact that the Claimant was confident that she had allergies and not COVID-19 did not free her from her reporting obligations. Her employer still expected her to report any symptoms, even if the Claimant suspected that she had allergies and later tested negative for COVID-19.

[29] I am not satisfied that there is an arguable case that the General Division applied the wrong legal test for misconduct or that it made a legal error when it decided whether her actions amounted to misconduct.

**CONCLUSION**

[30] The appeal does not have a reasonable chance of success. The Application to the Appeal Division is refused.

Janet Lew  
Member, Appeal Division

REPRESENTATIVE:	K. D., Self-represented
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