



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *J. W. v Canada Employment Insurance Commission*, 2019 SST 1379

Tribunal File Number: AD-19-802

BETWEEN:

**J. W.**

Applicant

and

**Canada Employment Insurance Commission**

Respondent

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**SOCIAL SECURITY TRIBUNAL DECISION**

**Appeal Division**

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Leave to Appeal Decision by: Janet Lew

Date of Decision: November 27, 2019

## **DECISION AND REASONS**

### **DECISION**

[1] The application for leave to appeal is refused.

### **OVERVIEW**

[2] The Applicant, J. W. (Claimant), is seeking leave to appeal the General Division's decision. Leave to appeal means that an applicant has to get permission from the Appeal Division before they can move on to the next stage of the appeal process.

[3] The General Division determined that the Claimant lost his job at a recycling facility because of misconduct. The Claimant argues that the General Division made several mistakes. This includes overlooking the real reason his employer dismissed him. He claims that a third party made false allegations against him.

[4] I have to be satisfied that the appeal has a reasonable chance of success before granting leave to appeal. I am not satisfied that the appeal has a reasonable chance of success and I am therefore refusing the application for leave to appeal.

### **ISSUES**

[5] The following issues are before me:

- Is there an arguable case that the General Division made factual mistakes in paragraph 3 of its decision?
- Is there an arguable case that the General Division failed to consider whether the dismissal was justified?
- Is there an arguable case that the General Division overlooked the real reason the Claimant's employer dismissed him from his job?

## ANALYSIS

[6] Before the Claimant can move on to the next stage of the appeal, I have to be satisfied that the Claimant's reasons for appeal fall into at least one of the types of errors listed in subsection 58(1) of the *Department of Employment and Social Development Act* (DESDA). They are:

1. The General Division did not follow procedural fairness.
2. The General Division did not decide an issue that it should have decided. Or, it decided something that it did not have the power to decide.
3. The General Division made an error of law when making its decision.
4. The General Division based its decision on an important error of fact.

[7] The appeal also has to have a reasonable chance of success. A reasonable chance of success is the same thing as an arguable case at law.<sup>1</sup> This is a relatively low bar because claimants do not have to prove their case; they simply have to show that there is an arguable case. At the actual appeal, the bar is much higher.

### Background history

[8] The Claimant managed a recycling facility.

[9] The employer alleged that the Claimant allowed his friend to drive a company truck. The friend did not have a valid driver's licence. He received a parking ticket, which led to the vehicle being towed. The Claimant paid to have the truck released to him.<sup>2</sup> A separate investigation revealed that the police stopped the friend who was driving the truck, and that the police seized and towed the vehicle.<sup>3</sup>

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<sup>1</sup> This is what the Federal Court of Appeal said in *Fancy v. Canada (Attorney General)*, 2010 FCA 63.

<sup>2</sup> See Supplementary Records of Claim dated March 13, 2019 (GD3-20) and March 26, 2019 (GD3-23), and letter dated March 15, 2019, addressed "To whom it may concern," at GD3-21.

<sup>3</sup> Investigative report dated July 17, 2019, at GD3-34.

[10] The Claimant did not report any of this to his employer. When the employer learned about the incident, it no longer trusted the Claimant. It dismissed the Claimant.

[11] The Claimant denied the employer's allegations. He claimed that S. was a former employee. He hired S. to replace someone who was sick. He was unaware that S. had a suspended driver's licence. He hired S. strictly for work purposes. As the site manager, he felt he was authorized to hire anyone.<sup>4</sup>

[12] The employer denied the Claimant's statements. In particular, it denied that it had ever employed S. or that the Claimant had any authority to hire anyone.<sup>5</sup>

[13] The Claimant applied for Employment Insurance regular benefits. The Respondent, the Canada Employment Insurance Commission (Commission) turned down his application for benefits. It found that the Claimant had lost his employment because of misconduct. The Claimant asked the Commission to reconsider its decision, but it did not change its mind.

[14] The Claimant appealed to the General Division which also found that he had lost his job because of misconduct. The Claimant argues that the General Division made several errors.

### **Whether the General Division made factual mistakes at paragraph 3**

[15] The Claimant argues that the facts set out by the General Division in paragraph 3 are wrong. He argues that his employer learned about the incident through S.'s wife. He denies that his employer learned about the incident through any court proceedings. He denies that there have been any court proceedings against S..

[16] The Claimant's employer may have learned of the incident involving S. and the truck from a third party, rather than through any court proceedings. However, the General Division did not base its decision on whether the Claimant's employer learned of the incident from a third party or from court proceedings. The General Division found that the employer dismissed the Claimant because it lost trust in him once it learned that the Claimant had failed to report the

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<sup>4</sup> See Supplementary Records of Claim, dated March 26, 2019 (GD3-22) and April 10, 2019 (GD3-24).

<sup>5</sup> See Supplementary Record of Claim dated March 26, 2019, at GD3-23.

incident involving S. and the truck. It did not matter to the employer how it learned of the incident, but that the incident occurred and that the Claimant had failed to report it.

[17] I am not satisfied that there is an arguable case that the General Division may have misstated the evidence regarding how the employer found out about the incident, because it did not base its decision on that evidence.

**Whether the General Division failed to consider whether the Claimant's dismissal was justified**

[18] The Claimant says that he held a lot of responsibilities with the company. He ran the day-to-day operations. The only time he ever had to sought his employer's approval was if he had to purchase anything over \$5,000. He did not expect to nor did he report on all of his daily dealings. Hence, he did not think he had to report the incident involving S. and the truck to his employer.

[19] The Claimant argues that the amount for towing the truck was insignificant. He personally paid the towing bill of \$250. He denies that the employer lost any money or that it suffered damages in any way.

[20] The Claimant argues that the incident was "too petty" and that it happened too long ago, in September 2018, to justify his employer's dismissal of him in January 2019. He claims that the General Division failed to consider whether his dismissal was justified. He suggests that by failing to consider this issue, the General Division applied the wrong test for "misconduct."

[21] However, the two issues of unjust dismissal and misconduct are not related. Misconduct is not defined by whether a claimant's dismissal is justified.

[22] And, as the General Division pointed out, it did have any jurisdiction to determine whether the dismissal was justified. Its role was to decide whether the Claimant committed the action he was accused of, whether that action amounts to misconduct under the *Employment Insurance Act*, and whether the misconduct was the real cause of the Claimant's dismissal.

[23] I see no error on the part of the General Division when it did not address whether the dismissal was justified.

[24] If anything, the Claimant disagrees with the General Division's assessment that the incident constituted misconduct. Essentially, the Claimant is asking me to reconsider the General Division's decision and to give a different decision that is favourable to him. However, subsection 58(1) of the DESDA does not allow for a reassessment of the evidence or a rehearing of the matter.

[25] The Claimant's evidence at the General Division centred on the incident involving S. and the truck and whether it was even necessary for him to report the incident to his employer. It is clear that the incident was why the employer dismissed the Claimant, even if the Claimant feels that the incident was not such a big deal.

[26] As I noted above, the General Division concluded that the employer lost trust in the Claimant after learning about the incident. The General Division also concluded that the Claimant's actions or omissions which led to his employer to lose trust in him constituted misconduct under the *Employment Insurance Act*. The Claimant may have considered the incident minor but, as the General Division concluded, it was enough for the employer to lose trust in the Claimant

### **Why the Claimant's employer dismissed him from his job**

[27] The Claimant argues that his employer dismissed him because S.'s spouse made several false allegations against him. He suggests that the General Division failed to consider this evidence. He suggests that this evidence was important because it would show that this was the real reason his employer dismissed him and that it did not have any basis to find any misconduct.

[28] I see from the Notice of Appeal to the General Division that the Claimant argued that there was no misconduct. He claimed that a "disgruntled individual" was maliciously trying to sabotage his career with his employer.<sup>6</sup>

[29] I have listened to the audio recording of the General Division hearing. I have also reviewed the General Division file. There is no reference to any "disgruntled individual" or of S.'s spouse feeding false allegations to the Claimant's employer in any of the evidence.

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<sup>6</sup> See Notice of Appeal, at GD2-2.

[30] The Claimant did not provide any other reasons at the General Division hearing to explain why his employer might have dismissed him, other than the incident involving S. and the truck. Therefore, it cannot be said that the General Division failed to consider the false allegations or the disgruntled individual. It could not have failed to consider these claims because there was no evidence of any false allegations or a disgruntled individual.

[31] The Claimant is bringing up new information that the General Division did not have. Generally, the Appeal Division does not consider new evidence. However, there are exceptions to this general rule. But, there are very limited exceptions.

[32] If I should find that the new evidence relates to one of the reasons grounds or reasons for appeal under subsection 58(1) of the DESDA, then I may consider that evidence. That is not the case here. The Claimant does not seem to rely on this new information to show that the General Division's process was unfair, that it erred in law or that it made a factual error.

[33] Above all, I do not have any authority to consider new evidence for the purposes of reassessing the Claimant's appeal. In short, I cannot consider this new information.

[34] I am not satisfied that there is an arguable case that the General Division failed to consider whether anyone was trying to sabotage the Claimant's career or was making false allegations against him. There simply was no evidence of this before the General Division.

**CONCLUSION**

[35] The application for leave to appeal is refused.

Janet Lew  
Member, Appeal Division

APPLICANT:	J. W., Self-represented
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