



Citation: *CW v Canada Employment Insurance Commission*, 2023 SST 1157

**Social Security Tribunal of Canada
Appeal Division**

Leave to Appeal Decision

Applicant: C. W.

Respondent: Canada Employment Insurance Commission

Decision under appeal: General Division decision dated May 24, 2023
(GE-22-4293)

Tribunal member: Stephen Bergen

Decision date: **August 23, 2023**

File number: AD-23-566

Decision

[1] I am refusing leave (permission) to appeal. The appeal will not proceed.

Overview

[2] C. W. is the Applicant. I will call him the Claimant because he made a claim for Employment Insurance (EI) benefits. The Respondent, the Canada Employment Insurance Commission (Commission), denied his claim after finding that the Claimant had been dismissed for his misconduct.

[3] The Claimant asked the Commission to reconsider, but it would not change its decision. He next appealed to the General Division of the Social Security Tribunal, which dismissed his claim. He is now seeking leave to appeal to the Appeal Division.

[4] I am refusing leave to appeal. The Claimant has not made out an arguable case that the General Division acted unfairly, or that it made any other error.

Issue

[5] Is there an arguable case that the General Division acted unfairly?

[6] Is there an arguable case that the General Division made an important error of fact by ignoring evidence about abusive co-workers?

I am not giving the Claimant permission to appeal

General Principles

[7] For the Claimant's application for leave to appeal to succeed, his reasons for appealing would have to fit within the "grounds of appeal." The grounds of appeal identify the kinds of errors that I can consider.

[8] I may consider only the following errors:

- a) The General Division hearing process was not fair in some way.
- b) The General Division did not decide an issue that it should have decided. Or, it decided something it did not have the power to decide (error of jurisdiction).
- c) The General Division based its decision on an important error of fact.
- d) The General Division made an error of law when making its decision.¹

[9] To grant this application for leave and permit the appeal process to move forward, I must find that there is a reasonable chance of success on one or more grounds of appeal. Other court decisions have equated a reasonable chance of success to an “arguable case.”²

Procedural Fairness

[10] The only ground of appeal that the Claimant selected in completing his application to the Appeal Division was the ground of appeal concerned with procedural fairness.

[11] However, he has not made out an arguable case that the General Division acted unfairly.

[12] Procedural fairness is concerned with the fairness of the process. It is not concerned with whether a party feels that the decision result is fair.

[13] Parties before the General Division have a right to certain procedural protections such as the right to be heard and to know the case against them, and the right to an unbiased decision- maker.

[14] The Claimant has not said that he did not have a fair chance to prepare for the hearing or that he did not know what was going on in the hearing. He has not said that the hearing did not give him a fair chance to present his case or to respond to the

¹ This is a plain language version of the grounds of appeal. The full text is in section 58(1) of the *Department of Employment and Social Development Act* (DESDA).

² See *Canada (Minister of Human Resources Development) v Hogervorst*, 2007 FCA 41; and *Ingram v Canada (Attorney General)*, 2017 FC 259.

Commission's case. He has not complained that the General Division member was biased or that he had already prejudged the matter.

[15] When I read the decision and review the appeal record, I do not see that the General Division did anything, or failed to do anything, that causes me to question the fairness of the process.

Important error of fact

[16] The Application to the Appeal Division form asked the Claimant to explain why he believed the General Division made an error. Although the Claimant had selected the error concerned with procedural fairness, his explanation suggested that he believed the General Division made an important error of fact.

[17] The Claimant explained that the General Division had not considered evidence that he was bullied at work and that his employer had not supported him or investigated his complaint.

[18] I wrote to the Claimant on August 2, 2023, to explain the grounds of appeal and to ask him to elaborate on his reasons for appealing the General Division decision. I gave the Claimant until August 16, 2023, to provide additional reasons, but he did not respond.

[19] There is no arguable case that the General Division made an important error of fact by ignoring evidence that the Claimant was bullied or that the employer did not support him.

[20] The General Division makes an important error of fact when it bases its decision on a finding that ignores or misunderstands relevant evidence, or on a finding that does not follow rationally from the evidence.³

³ I have tried to make this error more understandable. This ground of appeal is defined in section 58(1)(c) of the DESDA. The General Division will have made an error of fact where it, "based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it."

[21] To find that the Claimant should be disqualified from receiving EI benefits for misconduct, the General Division needed to find that the Claimant's behaviour met the legal definition of misconduct, and that his misconduct was the reason for his dismissal.

[22] The General Division correctly stated the law related to misconduct for EI purposes. It identified that misconduct is willful, or conduct so reckless as to be almost willful, and said that it may be found in the absence of wrongful intent. It stated that misconduct is found where a claimant knows or ought to know that their conduct could interfere with the duty they owe to their employer, and that dismissal was a real possibility.⁴

[23] The General Division considered what was written in the employer's warnings, as well as the Claimant's evidence. It found that the Appellant "regularly belittled staff, used vulgar language in front of guests, regularly made a scene in the dining room, and harassed his colleagues."⁵ It also found that this behaviour was causing concerns for staff and guests.⁶

[24] The General Division noted that the Claimant said he was just playing around, but it found that the Claimant's behaviour was causing morale problems with staff, embarrassing the employer, and threatening the reputation of the (employer's) restaurant. The General Division found that the Claimant had received warnings and was aware that he could be dismissed for his behaviour, but that he continued with the behaviour.⁷

[25] In other words, the General Division accepted that the Claimant's behaviour met the definition of misconduct. He willfully engaged in behaviour that he knew or ought to have known interfered with his duty to his employer, and he knew or ought to have known that dismissal was a real possibility.

⁴ See para 15 and 16 of the General Division decision.

⁵ See para 13 of the General Division decision.

⁶ See para 18 of the General Division decision.

⁷ See para 21 of the General Division decision.

[26] The General Division also found that the Claimant's behaviour was the reason the employer dismissed him.

[27] The Claimant has not disagreed with the manner in which the General Division characterized his behaviour or challenged the basis for any of its findings. He focused his argument on how the General Division ignored evidence of the behaviour of his co-workers, and of his employer's response to his complaint.

[28] In discussion with the Commission, the Claimant did not say that he was bullied. Nor did he claim that the employer was not investigating his complaints of harassment.⁸ He did not mention either concern when he wrote a letter to the Commission explaining why he was asking for a reconsideration.⁹

[29] The only evidence of these concerns is found in the Claimant's testimony to the General Division. He said that he made a complaint to head office because of mistreatment and verbal abuse from other staff. He said the employer was supposed to do an investigation, but that nothing happened.¹⁰ He also acknowledged that he made the complaint in November, after he was terminated.¹¹

[30] The General Division member asked him if he had complained about a "toxic" workplace before the November complaint. The Claimant responded by saying that he complained that other staff were not doing their jobs.¹²

[31] The Claimant did not elaborate on what other staff were doing that was abusive or harassing. The General Division had no evidence of the nature or extent of this abuse.

⁸ See notes of the Claimant's conversations at GD3-22, 39.

⁹ See GD3-36.

¹⁰ Listen to the audio recording of the General Division hearing at timestamp 22:15.

¹¹ Listen to the audio recording of the General Division hearing at timestamp 21:00.

¹² Listen to the audio recording of the General Division hearing at timestamp 22:55.

[32] The Claimant made his complaint to the employer after he was terminated. The courts have held that the conduct of the employer, particularly conduct occurring after a claimant's misconduct, is not relevant to whether a claimant's actions are misconduct.¹³

[33] Therefore, it is not surprising that the General Division did not mention the Claimant's testimony about the employer's apparent failure to investigate his complaint. It could not have affected the General Division's findings. Likewise, the Claimant's opinion that his co-workers were abusive in some undefined way, proved little about whether his own actions were misconduct, and could not have affected the General Division's findings.

[34] This evidence was not relevant to any finding necessary to the General Division's decision that the Claimant had been dismissed for misconduct. Even if it had some relevance, it would be of such little importance to the General Division's findings that it would not be an error for the General Division to have omitted to mention it. The General Division is normally presumed to have considered the evidence. It is not required to refer to each and every piece of evidence.¹⁴

[35] The Claimant's appeal has no reasonable chance of success.

Conclusion

[36] I am refusing permission to appeal. This means that the appeal will not proceed.

Stephen Bergen
Member, Appeal Division

¹³ See the decisions in *Paradis v Canada (Attorney General)*, 2016 FC 1282; *Astolfi v Canada (Attorney General)*, 2020 FC 30.

¹⁴ *Simpson v. Canada (Attorney General)*, 2012 FCA 82.