Citation: *MA v Canada Employment Insurance Commission*, 2023 SST 1416

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

Applicant:	M. A.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	General Division decision dated May 24, 2023 (GE-22-4241)

Tribunal member:	Solange Losier
Decision date:	October 26, 2023
File number:	AD-23-631

Decision

[1] Leave (permission) to appeal is refused. The appeal will not proceed.

Overview

[2] M. A. is the Claimant in this case. He worked in a warehouse. When he stopped working, he applied for Employment Insurance (EI) regular benefits.

[3] The Canada Employment Insurance Commission (Commission) decided that he could not get EI regular benefits from March 12, 2022 because he was dismissed from his job due to misconduct.[1]

[4] The General Division came to the same conclusion.[2] It found that the Claimant operated a reach machine that he wasn't authorized or trained to operate, which led to an accident and some damage. It said that his conduct breached the employer's policy about unauthorized machines and he knew or ought to have known his job was at risk. Because he was dismissed due to his own misconduct, he was not entitled to get EI regular benefits.

[5] The Claimant is now asking for permission to appeal the General Division decision to the Appeal Division.[3] He argues that the General Division made an error of jurisdiction when it decided the issue of misconduct. He says that the General Division should have focused on the employer's conduct, the harassment he was experiencing and how it led to the accident and his dismissal.

[6] I am denying the Claimant's request for permission to appeal because it has no reasonable chance of success.[4]

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[1] See pages GD3-31; GD3-49 and GD4-2. Also see, paragraphs 3, 7 and 71 of the General Division decision. Initially, the Commission made a clerical error when it wrote that he was not entitled to EI benefits from March 6, 2022 because the correct date was March 12, 2022.
[2] See General Division decision at AD1A-1 to AD1A-13.
[3] See application to the Appeal Division at AD1-1 to AD1-6; AD1B-1 to AD1B-10.
[4] See section 58(2) of the *Department of Employment and Social Development Act* (DESD Act) says that I must refuse leave to appeal if I am satisfied that the appeal has no reasonable chance of success.

Issue

[7] Is there an arguable case that the General Division made an error of jurisdiction when it decided the issue of misconduct?

Analysis

[8] An appeal can proceed only if the Appeal Division gives permission to appeal.[5]

[9] I must be satisfied that the appeal has a reasonable chance of success.[6] This means that there must be some arguable ground upon which the appeal might succeed.[7]

[10] The possible "grounds of appeal" to the Appeal Division are that the General Division:[8]

- proceeded in a way that was unfair;
- acted beyond its powers or refused to exercise those powers;
- made an error of law;
- based its decision on an important error of fact.

[11] For the Claimant's appeal to proceed, I have to find that there is a reasonable chance of success on one of the above grounds of appeal.

I am not giving the Claimant permission to appeal

[12] An error of jurisdiction means that the General Division didn't decide an issue it had to decide or decided an issue it did not have the authority to decide.[9]

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[5] See section 56(1) of the DESD Act.
[6] See section 58(2) of the DESD Act.
[7] See *Osaj v Canada (Attorney General),* 2016 FC 115.
[8] See section 58(1) of the DESD Act.
[9] See section 58(1)(a) of the DESD Act.

– The Claimant argues that the General Division made an error of jurisdiction

[13] A summary of the Claimant's main arguments to the Appeal Division are as follows:[10]

- The General Division failed to decide that the employer had an equal obligation of providing a safe environment and workplace. The employer was negligent for knowingly not resolving the problem over an extended period of time which led to the accident and dismissal. This resulted in the General Division also disregarding and violating his rights.

- The General Division based its ruling on what the employer told the Commission. It failed to mention, question or decide on the employer`s knowledge about the harassment at work. He also provided detailed reports of the persistent harassment he experienced at work from August 2020.

- The General Division failed to decide on how his judgment was affected leading to the accident.

- Also, this has caused financial hardship which has had adverse effects on him and his family. He is 61 and as a cancer patient, this makes his situation more unbearable.

– The legal test for proving misconduct

[14] The law says that a person who is dismissed from their job due to misconduct is not entitled to get EI benefits (this is called a "disqualification").[11]

[15] Misconduct is not defined in the EI Act. The Federal Court of Appeal (Court) defines "misconduct" as conduct that is wilful, which means that the conduct was conscious, deliberate, or intentional.[12]

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[10] See Claimant's arguments at AD1B-1 to AD1B-10.
[11] See section 30 of the EI Act.
[12] See *Mishibinijima v Canada (Attorney General),* 2007 FCA 36.

[16] The Court says there is misconduct if the person knew or should have known the conduct could get in the way of carrying out their duty to the employer and that dismissal was a real possibility.[13]

[17] This means that misconduct is any action that is intentional and likely to result in the loss of employment.

[18] In this case, the General Division had to decide whether the Commission had proven that the Claimant was dismissed due to misconduct according to the EI Act and applicable Court decisions.

– The General Division decided that the Claimant was dismissed because he operated the reach machine and this was misconduct leading to his dismissal

[19] The General Division decided that the Claimant's allegation he was being harassed was not supported by the facts. Namely, that his complaints about the harassment to the employer wasn't the real reason he was dismissed.[14] It decided that the real reason the Claimant was dismissed was because he operated a reach machine at work without permission, authorization or training which resulted in an accident with some damage.[15]

[20] The General Division explained that it wasn't its role or the role of the Tribunal to decide if he was being harassed.[16] It also said its role wasn't to determine if dismissal was the appropriate measure but rather that it could only consider whether his conduct amounted to misconduct based on the EI Act and related case law.[17]

[21] The General Division found that the Claimant agreed to the key facts.[18] Specifically, that he committed the conduct and also knew there was a policy about using unauthorized machines.[19] Because of that, the General Division said that the

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[13] See *Mishibinijima v Canada (Attorney General),* 2007 FCA 36.
[14] See paragraph 64 of the General Division decision.
[15] See paragraphs 20, 65 and 69 of the General Division decision.
[16] See paragraph 64 of the General Division decision.
[17] See paragraph 67 of the General Division decision.
[18] See paragraph 53 of the General Division decision.
[19] See paragraphs 54, 55 and 56 of the General Division decision.

Claimant knew what he was doing, so his choice to move the reach machine was conscious, deliberate and intentional.[20]

[22] The General Division ultimately found that the Claimant failed to comply with the employer's policy about using unauthorized machinery and that he knew, or should have known that his job could be at risk.[21] It said that he lost his job because of his own misconduct.[22]

– **There is no arguable case that the General Division made an error of jurisdiction when it focused on the Claimant's conduct**

[23] The General Division relied on the relevant section of the law in its decision.[23] It stated and applied the above legal test for misconduct based on the EI Act and the applicable Court decisions.[24]

[24] The General Division decided that it had to focus on the EI Act and what the Claimant did or didn't do.[25] It said that it could not decide whether the Claimant had other options under other laws.[26] It relied on the *McNamara* and *Paradis* decisions from the Court to support its decision.[27]

[25] The General Division's conclusion was consistent with the case law from the Court. For example, the Court in *Paradis* said that the question of whether an employer has failed to provide an accommodation under human rights legislation is not relevant to the question of misconduct under the EI Act. It is a matter for another forum.[28]

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[20] See paragraph 56 of the General Division decision.
[21] See paragraph 62 of the General Division decision.
[22] See paragraph 70 of the General Division decision.
[23] See paragraph 2 of the General Division decision.
[24] See paragraphs 38, 39 and 40 of the General Division decision.
[25] See paragraph 37 of the General Division decision.
[26] See paragraph 41 of the General Division decision.
[27] See *Paradis v Canada (Attorney General),* 2016 FC 1282 and *Canada (Attorney General) v McNamara*, 2007 FCA 107.
[28] See *Paradis v Canada (Attorney General),* 2016 FC 1282, at paragraph 34

[26] The Court confirmed in *McNamara* that the focus is not on the behaviour of the employer, but rather on the behaviour of the employee. In paragraph 23 of *McNamara,* it said:

> …there are, available to an employee wrongfully dismissed, remedies available to sanction the behaviour of an employer other than transferring the costs of that behaviour to the Canadian taxpayers by way of unemployment benefits.[29]

[27] The General Division correctly decided that it wasn't within its jurisdiction to focus on the employer's conduct and properly focused its analysis on the Claimant's conduct according to the relevant case law applicable to EI cases.

[28] The Claimant arguments that the General Division erred because it should have focused on the employer's workplace obligations, the employer's negligence in handling his harassment claim and dismissal have no reasonable chance of success. The Claimant is asking to shift the focus to employer's conduct, but the case law clearly says it is the employee's conduct that matters.

– **There is no arguable case that the General Division made an error of jurisdiction on the basis that the Claimant settled a legal action against his employer**

[29] The General Division considered and was aware that the Claimant brought a wrongful dismissal action against his employer and had a copy of the minutes of settlement.[30] However, it said that there was no acknowledgement of wrongdoing by the employer and it maintained that he was dismissed for cause.[31] Also, it noted that the minutes of settlement were not signed by the employer.

[30] The General Division relied on a decision from the Court called *Morris* to support its position.[32] The *Morris* decision says that the existence of the minutes of settlement is

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[29] See *Canada (Attorney General) v McNamara*, 2007 FCA 107, at paragraph 23.
[30] See paragraph 33 of the General Division decision.
[31] See paragraph 34 of the General Division decision and minutes of settlement at GD6-68 to GD6-70.
[32] See minutes of settlement at GD6-68 to GD6-70; *Canada (Attorney General)* v *Morris*, A-291-98 and *Canada (Attorney General) v Perusse*, A-309-81.

not determinative of the issue of misconduct, but rather it has to look at the facts of the case and make a determination.[33]

[31] Even though the employer and Claimant may have settled some of the issues they had, that doesn't mean that the General Division was bound by their settlement terms. The General Division properly stated that it still had to look at the facts of the case and make a determination about why he was dismissed and whether was that misconduct.[34]

– **There is no arguable case that the General Division made an error of jurisdiction when it decided that it couldn't determine whether his dismissal was justified or the appropriate sanction**

[32] The General Division also referred to the Court decision called *Caul* to support its position.[35] The *Caul* decision says that it isn't the role of the Tribunal to determine whether a dismissal by the employer was justified or was the appropriate sanction.[36]

[33] The Claimant's argument that the General Division erred because his employer breached his rights by dismissing him have no reasonable chance of success. The Court says there are other avenues that the Claimant can take to sanction the behaviour of an employer.[37]

[34] Also, the Claimant's argument that the General Division based its ruling on what the employer told the Commission has no reasonable chance of success. The General Division is the trier of fact. It was free to make findings and weigh the evidence. As noted above, the key facts were not in dispute.[38] Further, General Division does not have any investigatory powers, so it was not its role to question the employer about the alleged harassment.

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[33] See paragraph 35 of the General Division decision.
[34] See paragraph 35 of the General Division decision.
[35] See paragraph 67 of the General Division decision.
[36] See *Canada (Attorney General) v Caul*, 2006 FCA 251.
[37] See *Canada (Attorney General) v McNamara*, 2007 FCA 107.
[38] See paragraphs 53-56 of the General Division decision.

– **The General Division has no discretion to grant EI benefits for compassionate reasons**

[35] The Claimant offered some compassionate reasons to support his position. However, the General Division and Appeal Division have no discretion to grant the Claimant EI benefits because of financial and personal hardship. The Appeal Division's mandate is limited to determining if the General Division made a specific type of error.[39] Also, the Appeal Division cannot conduct a rehearing in order to come to a more favourable outcome for the Claimant.[40] So, there is no reasonable chance of success on this argument.

[36] In conclusion, it is not arguable that the General Division made a jurisdictional error when it decided the issue of misconduct and solely focused on the Claimant's conduct. Most of the Claimant's argument are focused on the employer's conduct and penalty imposed by employer, but those were not issues that the General Division could decide. As noted above, there are other avenues for the Claimant to get the remedy he is seeking from his employer.

Conclusion

[37] I reviewed the file, listened to the audio recording of the General Division hearing, and examined the General Division decision. It only decided the issues that it had the power to decide. It applied the relevant section in law and legal test for misconduct based on binding case law from the Court for EI misconduct cases.

[38] Permission to appeal is refused. This means that the appeal will not proceed.

Solange Losier
Member, Appeal Division

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[39] See section 58(1) of the DESD Act.
[40] See *Parchment v Canada (Attorney General),* 2017 FC 354, at paragraph 23.