Citation: *MO v Canada Employment Insurance Commission*, 2024 SST 225

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

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

Decision under appeal:	General Division decision dated December 29, 2023 (GE-23-3088)

Tribunal member:	Janet Lew
Decision date:	March 6, 2024
File number:	AD-24-23

Decision

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

Overview

[2] The Applicant, M. O. (Claimant), is seeking leave to appeal the General Division decision. The General Division found that the Respondent, the Canada Employment Insurance Commission (Commission), had proven that the Claimant lost his job because of misconduct. In other words, he did something that caused him to lose his job. The General Division found that the Claimant had damaged his employer's property (parts) and failed to report it to his employer. As a result of the misconduct, the Claimant was disqualified from receiving Employment Insurance benefits.

[3] The Claimant argues that the General Division made legal and factual errors. He denies that he committed any misconduct. He had been employed for nine years without any major incidents. He also says that he has new evidence that shows he was injured at the time.

[4] Before the Claimant can move ahead with the appeal, I have to decide whether the appeal has a reasonable chance of success. In other words, there has to be an arguable case.[1] If the appeal does not have a reasonable chance of success, this ends the matter.[2]

Issues

[5] The issues are as follows:

a) Is there an arguable case that the General Division misinterpreted what misconduct means?

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[1] See *Fancy v Canada (Attorney General)*, 2010 FCA 63.
[2] Under section 58(2) of the *Department of Employment and Social Development* (DESD) *Act,* I am required to refuse permission if I am satisfied "that the appeal has no reasonable chance of success."

b) Is there an arguable case that the General Division overlooked the Claimant's work history?

c) Can the Claimant rely on new evidence for his appeal?

I am not giving the Claimant permission to appeal

[6] Leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success. A reasonable chance of success exists if the General Division may have made a jurisdictional, procedural, legal, or a certain type of factual error.[3]

[7] For these types of factual error, the General Division had to have based its decision on an error that it made in a perverse or capricious manner, or without regard for the evidence before it.[4]

The Claimant does not have an arguable case that the General Division misinterpreted what misconduct means

[8] The Claimant does not have an arguable case that the General Division misinterpreted what misconduct means. The General Division cited the definition for misconduct set out by the Federal Court of Appeal.[5] The General Division then applied that definition to the facts of the case.

[9] The Claimant argues that he did not commit any misconduct because he had been employed for nine years without any major incidents or infractions. He did not provide any legal authorities that supported his arguments.

[10] As the General Division noted, a claimant's work history is irrelevant to whether a claimant committed misconduct. Misconduct involves wilful conduct or conduct of such a careless or negligent nature that one could say the employee wilfully disregarded the

[3] See section 58(1) of the DESD Act.
[4] See section 58(1)(c) of the DESD Act.
[5] See General Division decision, at paras 28 to 29.

effects their actions would have on job performance.[6] It does not matter that the Claimant did not damage his employer's property on purpose. So, the General Division had to examine whether there was any wilful conduct on the Claimant's part. The fact that he had been employed for nine years was an irrelevant consideration.

[11] I am not satisfied that the Claimant has an arguable case that the General Division misinterpreted what misconduct means.

The Claimant does not have an arguable case that the General Division overlooked the Claimant's work history

[12] As the Claimant's work history was irrelevant to whether he had committed any misconduct, the General Division did not overlook this consideration. I am not satisfied that there is an arguable case that the General Division overlooked the Claimant's work history.

The Claimant cannot rely on new evidence for his appeal

[13] The Claimant says he has new evidence that proves that he was injured at the time of his dismissal. (He had been injured in a work accident in September 2022, almost a year before his employer dismissed him.) He says that his injuries affected his performance and ability to carry out his duties.

[14] Generally, the Appeal Division does not accept new evidence.[7] In this case, however, the General Division was aware that the Claimant had been injured. The General Division addressed the Claimant's assertions that his injuries affected his work performance. The Claimant had provided records to the General Division. He said these records supported his claim that his injuries affected his ability to carry out his duties.

[15] The General Division explained why it did not accept the Claimant's arguments that his injuries affected his job performance.[8] For one, the Claimant had not provided any medical evidence of the potential impact of the injuries on his work performance,

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[6] See General Division decision, at para 28, citing *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[7] See *Marcia v Canada (Attorney General)*, 2016 FC 1367.
[8] See General Division decision, at paras 21 to 26.

other than an October 2022 prescription for pain relief. Also, the Claimant had not told his employer about any inability to perform his duties because of his injuries. Also, when the Claimant spoke with the Commission and when he filled out a "Fired (Dismissal)"[9] form, he did not mention that his injuries impaired his ability to carry out his work duties. Finally, the Claimant did not mention the impact of his injuries on his work capability until he was dismissed.[10] By then, almost a year had passed.

[16] So, the General Division was aware of the Claimant's arguments that his injuries affected his work performance. Based on the evidence before it, the General Division could conclude that the Claimant's injuries had no impact on his ability to perform his duties.

[17] Even if there is now evidence that shows the Claimant's injuries did impact his work performance, I am unable to accept it at this stage. It is now well established that new evidence is not permitted at the Appeal Division (Employment Insurance section). The Appeal Division is limited to considering the grounds of appeal in section 58(1) of the *Department of Employment and Social Development Act* and the appeal is not a hearing *de novo* (not a new hearing).[11] The Claimant cannot rely on new evidence.

[18] There was also the issue that the Claimant had failed to report deficiencies to his employer. His employer required him to report deficiencies, but the Claimant had not done so, expecting that any deficiencies would be identified at the next step, by others. Even if the Claimant had not readily identified the deficiencies, he had failed to inspect the product before moving them to the next step. This too represented wilful behaviour or conduct of such a careless or negligent nature that one could say the employee wilfully disregarded the effects their actions would have on job performance.

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[9] See Employment and Social Development Canada Fired (Dismissed) Form, at GD 3-39.
[10] The Claimant completed a Worker's Continuity Report saying that his injury left him incapable of producing quality work product. However, the Claimant prepared the report about two months after his dismissal. See GD 3-40.
[11] See *Marcia*.

Conclusion

[19] The appeal does not have a reasonable chance of success. Permission to appeal is refused. This means that the appeal will not proceed.

Janet Lew
Member, Appeal Division