



Citation: *NH v Canada Employment Insurance Commission*, 2024 SST 416

## Social Security Tribunal of Canada Appeal Division

# Decision

**Appellant:** N. H.

**Respondent:** Canada Employment Insurance Commission  
**Representative:** Julie Duggan

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**Decision under appeal:** General Division decision dated October 25, 2023  
(GE-23-1536)

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**Tribunal member:** Glenn Betteridge

**Type of hearing:** Videoconference

**Hearing date:** April 10, 2024

**Hearing participants:** Appellant  
Respondent's representative

**Decision date:** April 23, 2024

**File number:** AD-23-1091

## Decision

[1] I am dismissing N. H.'s appeal because he hasn't shown the General Division made an error.

[2] This means the General Division's decision stands.

## Overview

[3] I will call N. H. the Claimant because he made a claim for EI regular benefits.

[4] He worked in a call centre for a global retail chain. The employer's termination letter says a review of recent calls revealed highly problematic behaviours towards customers. And his refusal to align his behaviour with expectations and his blatant disrespect of customers is unacceptable and constitutes gross fault. So, it terminated the Claimant for just and sufficient cause.

[5] The Canada Employment Insurance Commission (Commission) decided he lost his job for a reason that counts as misconduct under the *Employment Insurance Act* (EI Act). So, it disqualified him from getting benefits. He asked the Commission to reconsider that decision. The Commission maintained its decision.

[6] He appealed to this Tribunal's General Division. The General Division dismissed his appeal. It decided the Commission proved the Claimant lost his job because of misconduct.

[7] He appealed to the Appeal Division. He argues the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction. He also says it made mistakes with the evidence. He says I should make the decision the General Division should have made. The Commission argues the General Division didn't make any errors. So, it says I should dismiss his appeal.

## Issues

[8] There are four issues in this appeal:

- Was the General Division **biased**, did it **prejudge the appeal**, or did it **ignore an issue** it had to decide?
- Did the General Division make **an important factual error** by ignoring or misunderstanding the Claimant's evidence, or accepting the Commission's evidence?
- Did the General Division **improperly rely on the Claimant's incompetence** when it decided his conduct was misconduct under the EI Act?
- If the General Division made an error, how should I **remedy (fix) the error**?

## Analysis

[9] I am dismissing the Claimant's appeal. He hasn't proven the General Division made an error.

### The Appeal Division's role

[10] The Appeal Division's role is different than the General Division's role. The law allows me to step in and fix a General Division decision where a claimant shows the General Division

- used an **unfair process**
- decided an issue it **should not have decided**, or **didn't decide an issue it had to decide** (in legal terms, acted beyond or refused to exercise its jurisdiction)
- based its decision on a **legal error**
- based its decision on an **important factual error**.<sup>1</sup>

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<sup>1</sup> Section 58(1) of the *Department of Employment and Social Development Act* (DESD Act) calls sets out these grounds of appeal. I will use plain language and call these errors.

[11] If the Claimant doesn't show the General Division made one of these errors, I have to dismiss his appeal.

### **The law the General Division had to apply—misconduct under the EI Act**

[12] The law disqualifies a person from getting EI benefits if they lose their job because of their misconduct.<sup>2</sup> In misconduct appeals, the General Division has to decide two things

- the reason the person lost their job
- whether the Commission has proven that reason counts as misconduct under the EI Act<sup>3</sup>

[13] To be misconduct, the person's conduct has to be **wilful** (conscious, deliberate, or intentional) or **reckless to the point of being wilful**.<sup>4</sup> This means the Commission has to prove the person **knew or should have known** their conduct breached a duty they owed to their employer. And the Commission has to show the person **knew or should have known** they could lose their job for that conduct.<sup>5</sup>

[14] A person's inability to fulfil a condition of employment isn't necessarily misconduct.<sup>6</sup> For example, poor job performance or incompetence—because a person doesn't have the skills or ability needed to do the job properly—doesn't count as misconduct.

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<sup>2</sup> See sections 29 and 30 of the *Employment Insurance Act* (EI Act).

<sup>3</sup> See paragraph 47 of the Federal Court's decision in *Cecchetto v Canada (Attorney General)*, 2023 FC 102.

<sup>4</sup> See paragraph 9 of the Federal Court of Appeal's decision in *Canada (Attorney General) v Bellavance*, 2005 FCA 87.

<sup>5</sup> See paragraph 21 of the Federal Court of Appeal's decision in *Nelson v Canada (Attorney General)*, 2019 FCA 22.

<sup>6</sup> See *Canada (Attorney General) v Granstrom*, 2003 FCA 485.

## **The General Division wasn't biased, didn't prejudge the appeal, and didn't ignore an issue it had to decide**

[15] The General Division makes a **jurisdictional error** where it doesn't decide an issue it has to decide.

[16] The Claimant writes it's a "joke" that **the Commission says** the "Tribunal does not have the expertise or jurisdiction to decide whether the claimant was unjustly terminated, this is well beyond the scope of the Tribunal's expertise in EI matters and lies outside its jurisdiction."<sup>7</sup>

[17] Here is what I understand the Claimant is arguing. His employer unjustly dismissed him. The General Division should have decided his EI appeal in his favour because his employer unjustly dismissed him.

[18] The General Division didn't make a jurisdictional error. It could not decide whether his employer wrongfully dismissed him or base its decision on this issue.<sup>8</sup>

[19] The General Division fails to observe a **principle of natural justice** where it **doesn't use a fair process** to reach its decision. This includes where the Tribunal member is **biased or has prejudged** the case.

[20] At the hearing the Claimant argued the General Division member, "was maybe a little bit biased." He says the member raised his voice to the Claimant during the hearing. He says some of the evidence the member referred to was not true. And he says the member made his decision without deeply going into the facts.

[21] The legal test to show a tribunal member was biased is difficult to meet. The member is presumed to be impartial. The Claimant has to show that a reasonably

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<sup>7</sup> See the Claimant's written argument at pages AD04-1 where he refers to the Commission's written arguments at page AD03-6. See also his argument at page AD04-8 where he has cut and pasted the text of section 58(1)(a) of the DESD Act, and page AD04-14 where he again refers to the Commission's written argument at page AD03-6.

<sup>8</sup> The Federal Courts have decided that arguments about whether an employee has been wrongfully or otherwise illegally dismissed by an employer are best addressed in another type of legal proceeding, not under the EI Act test for misconduct. See for example *Abdo v Canada (Attorney General)*, 2023 FC 1764 at paragraph 32; *Paradis v Canada (Attorney General)*, 2016 FC 1282 at paragraph 30; and *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36 at paragraphs 22 and 39.

informed person would think, in the circumstances, the decision-maker would not decide fairly.<sup>9</sup>

[22] The Claimant hasn't proven the General Division was biased or otherwise failed to observe a principle of natural justice. I listened to the General Division hearing and I reviewed the documents the parties sent to the General Division and the General Division decision.

[23] There is nothing to show the General Division member was biased or prejudged the case. It gave both parties a full and fair opportunity to present their evidence and arguments.

[24] The General Division had to weigh the evidence then decide which facts were more likely than not true. Where the Commission's evidence went against the Claimant's evidence, it had to decide what evidence it preferred and give reasons why. This is what it did at paragraphs 35, 44, 45, 46 and 47. So the way the General Division handled the evidence doesn't show it was biased or prejudged the appeal.

[25] To summarize this section, the **Claimant hasn't proven** the General Division made a jurisdictional error or otherwise failed to observe a principle of natural justice.

### **The General Division didn't make an important factual error**

[26] The General Division makes an **important factual error** if it bases its decision on a factual finding it made by ignoring, misunderstanding, or mistaking the evidence.<sup>10</sup>

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<sup>9</sup> This is a plain language statement of the legal test the Supreme Court of Canada set out in *Committee for Justice and Liberty v National Energy Board*, [1978] 1 SCR 369 at page 394. The court said the test is, "what would an informed person, viewing the matter realistically and practically - and having thought the matter through - conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly."

<sup>10</sup> Section 58(1)(c) of the DESD Act says it's a ground of appeal where the General Division based its decision on an erroneous finding of fact it made in a perverse or capricious manner or without regard for the material before it. I have described this ground of appeal using plain language, based on the words in the Act and the cases that have interpreted the Act.

In other words, the Claimant has to show the evidence goes squarely against or doesn't support a factual finding the General Division made.<sup>11</sup>

[27] I can presume the General Division reviewed all the evidence—in its decision it doesn't have to refer to every piece of evidence.<sup>12</sup> I can't reweigh the evidence.<sup>13</sup> And I can't find an error only because I would have weighed the evidence differently or come to a different decision based on the evidence.

[28] The Claimant focused his written and oral arguments on the evidence and facts as he sees them. He challenged his employer's evidence, conduct, and competence. He repeatedly challenged the Commission's evidence, characterization of the facts, and arguments. He says they are "blatant lies", "offensive and hurtful", and "very unfair and hurtful and not justified". And he was "very hurt" the General Division decision went against him.

[29] At the Appeal Division hearing the Claimant argued the General Division

- came to its decision without deeply going into the facts
- should have looked at his situation in a different light
- didn't have all the evidence on file, specifically, a recording of the November 28, 2023 customer call
- didn't pay attention to the fact an email about that customer call was written by a new employee who didn't have analytical skills, and the email said the call was 45 minutes long and he says it was only five minutes long<sup>14</sup>
- ignored his argument he should be entitled to benefits because of the economy and prices being almost three times as expensive

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<sup>11</sup> See *Garvey v Canada (Attorney General)*, 2018 FCA 118; and *Walls v Canada (Attorney General)*, 2022 FCA 47.

<sup>12</sup> See *Sibbald v Canada (Attorney General)*, 2022 FCA 157 at paragraph 46.

<sup>13</sup> See for example *Paraparan v Canada (Attorney General)*, 2020 FC 363 at paragraph 21.

<sup>14</sup> See that email at pages GD03-18 to GD03-20.

[30] The Commission argues the General decision is based on the evidence, and is intelligible, transparent and falls within the realm of reasonableness.

[31] At paragraphs 30 and 31, the General Division addresses the email about the November 28 customer call and reviews the Claimant's evidence about this. The General Division preferred the Commission's (and his employer's) evidence, and explains why, at paragraph 35. So, it didn't ignore the email or the Claimant's evidence about it, or the November 28 customer call.

[32] The General Division didn't have to consider what the Claimant said about the economy and prices. That argument wasn't relevant to the legal issue it had to decide—whether he was dismissed for a reason that counts as misconduct under the EI Act.

[33] I don't accept the rest of the Claimant's arguments that the General Division made an error in how it handled the evidence. He hasn't pointed to any specific factual errors the General Division made. He is arguing—in general terms—that he disagrees with the General Division's weighing of the evidence and the outcome in his case. But the law (summarized above) says I can't reweigh the evidence or allow his appeal because I might have decided the case differently based on the evidence.

[34] So, the Claimant hasn't shown the General Division ignored, mistook, or misunderstood the evidence. This means it didn't make an important factual error.

### **The General Division didn't rely on the Claimant's incompetence when it decided his conduct was misconduct**

[35] The Leave to Appeal decision says the General Division relied on the employer's Global Competency Profile and the employer's Performance Improvement Action Plan for the Claimant (the performance documents).<sup>15</sup> So the Appeal Division decided there was **an arguable case** the General Division

- made an **error of fact** by improperly relying on evidence of **incompetence**

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<sup>15</sup> See the Leave to Appeal Decision at paragraphs 11 and 12.



- made an **error of law** if it interpreted misconduct under the EI Act to include actions that are only **incompetence**

[36] The Appeal Division uses the “arguable case” test when it decides whether to give permission to appeal. This is an easy test to meet. To be successful now, the Claimant has to prove the **General Division made an error**. This is a much more difficult test to meet.

[37] The Claimant didn’t make any arguments about errors based on the Leave to Appeal decision. He said his employer lied on the performance documents. And he refused to sign the documents because of that.

[38] The Commission agreed the General Division relied on the Performance Improvement Action Plan when it decided the misconduct issue.<sup>16</sup> But it argues the performance documents show the employer **was critical of the Claimant’s attitude and behaviour and disciplined him for these**. It argues the General Division found the Claimant lost his job because over the course of nearly three years he was repeatedly rude, aggressive, and disrespectful with customers. Finally, the Commission says this came to a head in the November 28 customer call where he behaved egregiously when he told a customer to “shut up.”

[39] I agree with the Commission. The General Division didn’t base its decision on the Claimant’s poor job performance—in other words, his incompetence. It is important to look beyond the documents’ titles and focus on the words the employer used in the documents to describe the Claimant’s conduct and its responses. This is what the General Division did.

[40] The General Division weighed the evidence and then gave its reasons for preferring the Commission’s evidence (paragraph 44). Then in paragraph 47, the General Division

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<sup>16</sup> See page AD03-5.

- refers to the employer's policy of **respectfully dealing with customers, which the Claimant knew or ought to have known about**
- includes and highlights in bold two parts of the Claimant's Performance Improvement Action Plan that say **may result in further disciplinary action**
- finds that the **Claimant knew what could happen** if he went against the policy
- ends the paragraph by referring to the November 28 call—and the Claimant's testimony that he **admitted saying shut up to a customer**

[41] So, the General Division **didn't make an important factual error**. It didn't find the Claimant's employer dismissed him for incompetence—in whole or in part. So, it didn't base its decision on a finding of incompetence.

[42] The Commission also argued the General Division correctly applied the legal test for misconduct.<sup>17</sup> In other words, it didn't misinterpret the legal test to mean a finding of misconduct can be based on incompetence.

[43] I agree with the Commission. The General Division correctly set out the legal test it had to apply (paragraphs 37 to 40). And after it weighed the evidence, it applied that test to its findings of fact (paragraph 47).

[44] The General Division's findings of fact and its decision are **supported by the evidence of misconduct**. The preponderance of the evidence the General Division accepted showed the Claimant's behaviour and conduct over a prolonged period of time breached a duty he owed his employer. It found he was **disciplined for that conduct**. And it relied on the last, egregious example of that conduct—the November 28 customer call the employer acted on to dismiss the Claimant.

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<sup>17</sup> See page AD03-5.

[45] To summarize this section, the General Division **didn't consider incompetence when it applied the legal test for misconduct**. And it **didn't base its decision on a factual finding of conduct that included incompetence**.

## **Conclusion**

[46] The Claimant hasn't proven the General Division made an error. So, I have to dismiss his appeal. And the General Division stands unchanged.

Glenn Betteridge  
Member, Appeal Division