Citation: *JM v Canada Employment Insurance Commission*, 2024 SST 325

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	J. M.
Representative:	Ashley Harvey
Respondent:	Canada Employment Insurance Commission
Representative:	Kevin Goodwin

Decision under appeal:	General Division decision dated October 13, 2023 (GE-23-2321)

Tribunal member:	Elizabeth Usprich
Type of hearing:	Videoconference
Hearing date:	January 30, 2024
Hearing participants:	Appellant Appellant's representative Respondent's representative
Decision date:	March 28, 2024
File number:	AD-23-1006

Decision

[1] The appeal is dismissed.

[2] The General Division didn't make a reviewable error.

Overview

[3] J. M. is the Claimant. He worked for a fire security company. The employer said the Claimant didn't follow policies and they let him go.

[4] The Canada Employment Insurance Commission (Commission) decided the Claimant was let go for misconduct. This means that no Employment Insurance (EI) benefits were payable.

[5] The Claimant appealed to the Social Security Tribunal. The General Division decided that the Claimant breached the employer's policies and that there was misconduct under the *Employment Insurance Act* (EI Act). The Claimant appealed this decision.

[6] I have considered all of the Claimant's arguments. I don't find the General Division made any errors that would allow me to intervene (step in). That means I must dismiss the appeal.

Preliminary matters

– **The late arguments were considered**

[7] The Claimant's Representative submitted arguments after the date for filing submissions had ended.[1] The submission was accepted, considered and discussed at the hearing. The Commission had no objections to the late submission.[2]

[1] See AD7 dated January 26, 2024. The filing date for submissions ended on January 20, 2024.
[2] Listen to the Appeal Division hearing recording at 00:14:38.

– The new evidence cannot be considered

[8] The Claimant provided a copy of the NFPA with his appeal.[3] He provided some definitions that are contained in the NFPA.[4] He also provided the contact for a fire inspector and screenshots of text messages he had with him.[5]

[9] But, as explained at the hearing, the Appeal Division can't consider new evidence unless it falls under an exception.[6] There was no argument put forward about how the new evidence falls under an exception for allowing new evidence.

[10] The Claimant argues the General Division should have considered the whole NFPA. But there are two problems here. First, the Claimant provided the full copy of the NFPA as part of his documents to the Appeal Division.[7] Yet, there was nothing preventing the Claimant from providing this document to the General Division.

[11] Second, the Claimant provided a text message between himself and a fire inspector.[8] At the Appeal Division hearing, the Claimant confirmed he had this communication with the Fire Inspector after his General Division hearing. This means it is new information. Again, my role is to look at the information the General Division had, and decide if it made an error based on **that** information. The Appeal Division hearing isn't an opportunity to try to make your case better by providing additional new information. So, the General Division can't be found to have made an error based on information it never had.

[12] So, I don't find these meet an exception for new evidence. This means that I am not considering this evidence as I find it is new evidence. I can only consider the evidence that was before the General Division.

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[3] See AD1-7.
[4] See AD1-92.
[5] See AD1-90; see AD1B-1 and see AD6.
[6] See *Sibbald v Canada (Attorney General)*, 2022 FCA 157 at paragraph 37.
[7] See AD1-7.
[8] See AD1-90 to AD1-91.

Issues

[13] The issues in this appeal are:

a) Did the General Division fail to provide the Claimant with a fair hearing?

b) Did the General Division make an error of jurisdiction by considering that the Claimant breached his employer's policies which included the National Fire Protection Association (NFPA) Code?

c) Did the General Division make an error of law by applying incorrect case law; by deciding the Claimant met the legal test for misconduct under the *Employment Insurance Act* or by not supporting its findings?

d) Did the General Division make an important error of fact by failing to consider the testimony of the Claimant and his witness?

Analysis

[14] I can only intervene (step in) if the General Division made an error. There are only certain errors I can consider. Briefly, I can intervene if the General Division made at least one of the following errors:[9]

- It acted unfairly in some way.
- It decided an issue it should not have, or didn't decide an issue it should have.
- It made an error of law.
- It based its decision on an important error about the facts of the case.

[9] See section 58(1) of the *Department of Employment and Social Development Act* (DESD Act).

[15] The Claimant's leave to appeal application had only the box of error of jurisdiction checked.[10] The Claimant's Representative filed submissions that allege an error of natural justice, an error of jurisdiction, an error of law, and an error of fact.[11]

[16] The Appeal Division process isn't a redo of the General Division hearing. Unless there is an error, I can't just reweigh the evidence that was before the General Division.[12] So, even if I would have decided the case differently, I can't make changes to the decision unless there is an error identified.

The Claimant was provided with a fair hearing

[17] The Claimant argues there was an error of natural justice because the General Division disregarded or ignored evidence submitted by his witness, former supervisor, D.L. Although the Claimant raised this as an error of natural justice, I believe it actually raises a question of fact. As well, the General Division's decision references the testimony by D.L.[13]

[18] The Claimant also argues that the failure to accept a Senior Fire Inspector's information was a denial of natural justice.[14] This information was never provided to the General Division. The Claimant agreed he got this additional information after he received the General Division decision.[15] I can't find the General Division made an error based on information that wasn't before it.

[19] I don't find there is anything on the hearing recording that suggests the Claimant wasn't given a fair hearing. So, the General Division provided the Claimant with a fair process.

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[10] See AD1-3.
[11] See AD7-2
[12] See *Uvaliyev v Canada (Attorney General)*, 2021 FCA 222 at paragraph 7; and *Sibbald v Canada (Attorney General)* 2022 FCA 157 at paragraph 27.
[13] See the General Division decision at paragraph 36.
[14] See AD1-90.
[15] Listen to the Appeal Division hearing recording at 00:25:37.

The General Division didn't make an error of jurisdiction by deciding that the Claimant breached his employer's policies

[20] The Claimant argues the General Division doesn't have the authority to make a decision under the NFPA Code. The Claimant argues the General Division didn't consider the entire NFPA. The Claimant agreed he didn't give a copy of the whole NFPA to the General Division.

[21] I don't find the General Division exceeded its jurisdiction. The General Division focussed on whether the conduct of the Claimant met the test for misconduct under the EI Act.[16] This included whether the Claimant breached any of his employer's policies.[17]

[22] There is nothing in the General Division's decision that says they made a finding about a breach of the NFPA.

[23] The Claimant argues that the General Division can't independently determine if the Claimant breached the fire code.[18] But that isn't what the General Division was deciding. The General Division was deciding whether the Claimant had committed misconduct as defined under the EI Act and related case law.[19] The General Division looked at whether the Claimant breached his employer's policies.

[24] This appeal also isn't about whether the Claimant was wrongfully dismissed, or if the employer's decision to let him go was right. The General Division wasn't making a decision about whether the Claimant was wrong under other laws.[20]

[25] I find the General Division focussed on the test for misconduct under the EI Act. So, the General Division didn't exceed its jurisdiction.

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[16] See the General Division decision at paragraphs 23 to 27.
[17] See the General Division decision at paragraphs 8 and 44. See also GD3-24, GD3-25 and GD3-70 which outline the employer's liability if the codes are not followed.
[18] See AD7-2.
[19] See the General Division decision at paragraphs 23 to 30.
[20] See the General Division decision at paragraph 24.

The General Division didn't make an error of law; it applied the correct legal test for misconduct under the EI Act and gave reasons for its decision

[26] The Claimant argues the General Division made an error of law because it said that the Claimant knew, or should have known, that his conduct could have led to his termination. So, the Claimant is arguing the General Division reached an incorrect conclusion.

[27] The Appeal Division can't consider whether there is an error with how the General Division applied the law to the specific facts of this case.[21] That is considered to be an error of mixed fact and law.

[28] The Claimant doesn't agree with the conclusion the General Division reached. He says because his actions were common in the industry, that he could not have known he could have been fired for those actions. But the General Division considered this.[22] The General Division explained why it focussed on **this** Claimant's situation and considered the case that was before it.

[29] The General Division decided that the Claimant was aware of the NFPA code requirements.[23] The General Division also found the Claimant was aware that he had received previous warnings and suspensions from his employer.[24] The General Division considered that the Claimant had been previously warned, and suspended, for NFPA infractions.[25] These employer reports also said a further incident could result in immediate termination.[26]

[30] The General Division applied the correct legal test.[27] Considering whether the Claimant knew or should have known there was a real possibility that he could be let go

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[21] See *Garvey v Attorney General of Canada*, 2018 FCA 118; *Cameron v Canada (Attorney General)*, 2018 FCA 100; and *Quadir* v *Attorney General of Canada*, 2018 FCA 21.
[22] See the General Division decision at paragraphs 34, 36, 43 and 44.
[23] See the General Division decision at paragraph 38 and 40.
[24] See the General Division decision at paragraphs 16 and 41.
[25] See the General Division decision at paragraph 41.
[26] See GD3-69; GD3-71; GD3-75; GD3-78; and GD3-81.
[27] See the General Division decision at paragraphs 23 to 27.

is part of that legal test. So, that means the error the Claimant is complaining about is one of mixed fact and law and I can't consider this.

– **The General Division gave sufficient reasons**

[31] The Claimant was granted permission to appeal to have a merits hearing. At the permission to appeal stage, the only consideration is whether there is an arguable case. That is a low threshold. That means someone only has to have a potential argument that there was an error in the General Division decision.

[32] Yet, it is different at the merits hearing for the appeal. At this stage, it must be shown that there actually **is** an error. This is a higher threshold than just being able to show you might have an argument.

[33] The permission to appeal decision said the General Division decision raised the question of whether there was an error of law because the employer's evidence was preferred. The Claimant didn't make an argument about this at the hearing.

[34] The General Division considered the evidence of the Claimant and his witness, as noted above.[28] The General Division also explained why it found the evidence of the employer credible. When the decision paragraphs are read together, it is clear the documents the General Division was referring to were the incident reports the employer gave the Commission.[29] The Claimant didn't dispute that he was given these warnings.[30]

[35] It is possible the General Division could have been more detailed about preferring the employer's evidence. But the information wasn't disputed. Also, the General Division isn't held to a standard of perfection.[31] The General Division went through all of the evidence it had.[32] The Claimant didn't dispute any of the warnings and

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[28] See paragraph 19.
[29] See the General Division decision at paragraphs 20 and 21.
[30] For example, listen to the General Division hearing recording at 00:21:02; 00:21:31; 00:24:15; 00:25:23; and 00:27:34.
[31] See *Szabo v Canada (Attorney General)*, 2020 FCA 33 at paragraph 12.
[32] See the General Division decision at paragraphs 19 to 22.

suspensions he had. The General Division gave enough of an explanation about how and why it made the decision it did. That means the decision had sufficient reasons.

– **The Claimant didn't explain what case law the General Division applied incorrectly**

[36] The Claimant also argued that the General Division applied incorrect case law.[33] At the hearing, the Claimant's Representative referred to the General Division's decision and argued that the Claimant couldn't have known he could be let go.[34] There was nothing put forward as to why that case law isn't correct. The argument is just based on the outcome, not the General Division's application of case law.

[37] In this case, the Claimant hasn't shown that there is an error of law in the General Division decision.

The General Division didn't make an important error of fact by ignoring the testimony of the Claimant and his witness

[38] The Claimant argues the General Division didn't consider the testimony of his witness D.L., but the General Division did consider this.[35]

[39] The Claimant also argues the General Division misunderstood his testimony. The Claimant says the General Division didn't understand that the Fire Inspector/Marshall is the only person that can find the Claimant was in breach of the NFPA. But the General Division based its decision on the fact that the Claimant knew the employer expected him to follow the NFPA and the NFPA required "like for like" exchange of extinguishers.[36]

[40] It also based its decision on the fact that the employer had previously warned the Claimant about following the NFPA and that he could be let go if he didn't.[37] The case

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[33] See AD7-2.
[34] See the General Division decision at paragraph 20 which is a general statement about the part of the misconduct test that says a claimant knew, or should have known, that his conduct could get in the way of the duties owed to the employer.
[35] See the General Division decision at paragraph 36.
[36] See the General Division decision at paragraphs 40 and 44. Also, listen to the General Division hearing recording at 00:07:05; 00:12:10; 00:17:32; 00:20:10; 00:28:59; and 00:37:39.
[37] See the General Division decision at paragraph 44.

isn't about whether or not the fire extinguishers the Claimant left would have met building code. So, the General Division didn't ignore the testimony.

– The General Division considered the testimony of the Claimant and his witness that replacing extinguishers that weren't like for like was commonplace

[41] The Claimant argues the General Division ignored his evidence about the common practice of not replacing extinguishers in a like for like manner. He argues this was an error.

[42] But the General Division did consider the testimony of the Claimant and his witness.[38] In its decision, the General Division noted the Claimant provided the Commission with a memo from his employer about loaner fire extinguishers.[39] This memo specifically details that employees must ensure that they have enough loaners for their day-to-day jobs.

[43] The General Division concluded the Claimant knew his employer's position about fire extinguishers.[40] This included that the Claimant had previously been warned and suspended by his employer for breaching the NFPA.[41] The General Division also noted that the employer saying a failure to follow a code could be a liability issue.[42] This means the General Division gave an explanation about its findings and there were sufficient reasons for its findings.[43] The General Division didn't ignore this testimony.

– The General Division found that the Claimant breached his employer's policies

[44] The Claimant argues the General Division made a finding of fact under the NFPA. But what the General Division found was the Claimant breached his employer's policies and that this was misconduct.[44]

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[38] See the General Division decision at paragraphs 34 and 36.
[39] See the General Division decision at paragraph 37 and GD3-35.
[40] See the General Division decision at paragraphs 38, 40, 41 and 44.
[41] See GD3-71.
[42] See the General Division decision at paragraphs 12 and 44.
[43] See paragraphs 33 to 35.
[44] See the General Division decision at paragraphs 12, 44 and see paragraph 29 where the General Division specifically says it can't decide other laws.

[45] The Claimant says his employer was going after him and not others.[45] The General Division considered what the Claimant said but found the focus had to be on the Claimant's actions and not the employer's.[46]

[46] The Claimant raised the issue with the General Division that the loaner extinguishers were still suitable.[47] The Claimant argues that because the loaner extinguishers were still suitable it means that there was no misconduct. This was considered by the General Division. That means the question here is, again, a question of mixed fact and law.[48] That means I can't intervene on this issue.

[47] I can't just change the decision because the Claimant isn't happy with the outcome. There must be an important error of fact identified.[49]

[48] The General Division is given some freedom when it makes findings of fact. When I look at whether I can intervene, there has to be an important error that the General Division **based** its decision on. So, if the finding is "willfully going contrary to the evidence," or if crucial evidence was ignored, then I could intervene.[50]

[49] The General Division doesn't have to mention every piece of evidence.[51] The law is clear that I can intervene only if the General Division "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."[52]

[50] In this case, the Claimant argues that the General Division misunderstood relevant facts. Specifically, that the full NFPA wasn't taken into account.[53] The Claimant

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[45] See the General Division decision at paragraph 15 and listen to the General Division hearing recording at 00:21:31.
[46] See the General Division decision at paragraph 42.
[47] See the General Division decision at paragraphs 34, 36 and 38.
[48] See *Garvey v Attorney General of Canada*, 2018 FCA 118; *Cameron v Canada (Attorney General)*, 2018 FCA 100; and *Quadir* v *Attorney General of Canada*, 2018 FCA 21.
[49] The finding of fact must be made in a perverse or capricious manner or without regard to the material. See *Canada (Attorney General) v Bernier*, 2017 FC 120 at paragraph 34.
[50] See *Walls v Canada (Attorney General)*, 2022 FCA 47 at paragraph 41.
[51] See *Rahal v Canada (Minister of Citizenship & Immigration)*, 2012 FC 319 at paragraph 39.
[52] See section 58(1)(c) of the DESD Act.
[53] See AD1-84.

says there are definitions about the designated authority and that the Fire Marshall is the one that makes the decision about whether something goes against the NFPA.

[51] The Claimant and his witness both testified that there are two different codes. First, there is what is required for the size and type of building. Second, there is the NFPA.[54]

[52] Both the Claimant and his witness testified that the loaner extinguishers the Claimant left in the building would have met the building code.[55] They both say a fire inspector wouldn't have an issue with the size loaner the Claimant left.

[53] The issue in this case though isn't about whether or not an inspector would have had a problem. The issue is whether the Claimant was following his employer's policies. The employer gave the Claimant a binder full of codes that were to be followed when he started working for them.[56] That means the employer had policies in place that the Claimant was expected to follow.

[54] The Claimant had many incidents where he was written up for various issues the employer had with the Claimant's conduct. But importantly, the Claimant was specifically written up for failing to follow the NFPA. The employer put the Claimant on notice that he was to follow the NFPA or he could be let go.[57]

[55] This means the employer made it clear to the Claimant that they expected him to follow the NFPA. It isn't disputed the NFPA says loaner extinguishers should be the same type as those taken out ("like for like").[58]

[56] I don't find there is an error with an important fact that the General Division based its decision on.

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[54] Listen to the General Division hearing recording at 00:18:24, 00:51:56 and 01:01:00.
[55] Listen to the General Division hearing recording at 00:51:56 and 00:59:10.
[56] See GD3-70.
[57] See GD3-71.
[58] See GD3-47.

[57] So, even if the Claimant disagrees with how the General Division considered the evidence, the General Division didn't ignore or misinterpret the evidence. The General Division's findings weren't made in a perverse and capricious manner. There weren't any important errors of fact. This means there isn't an error that allows me to intervene.[59]

[58] I understand, and empathize, with the Claimant. He feels his reputation has been damaged. He feels that he was wrongfully dismissed. I understand the Claimant doesn't agree with what his employer did, but that isn't the focus here. There are other forums for the Claimant to address these issues.[60]

Conclusion

[59] The General Division didn't make a reviewable error.

[60] The appeal is dismissed.

Elizabeth Usprich
Member, Appeal Division

[59] See *Page v Canada (Attorney General)*, 2023 FCA 169 at paragraph 77.
[60] See *Cecchetto v Canada (Attorney General)*, 2023 FC 102 at paragraphs 46 and 47.