Citation: *AP v Canada Employment Insurance Commission*, 2024 SST 517

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

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

Decision under appeal:	General Division decision dated February 26, 2024 (GE-24-104)

Tribunal member:	Janet Lew
Decision date:	May 10, 2024
File number:	AD-24-235

Decision

[1] Leave (permission) to appeal is refused. The appeal will not be going ahead.

Overview

[2] The Applicant, A. P. (Claimant), is seeking leave to appeal the General Division decision.

[3] The General Division found that the Respondent, the Canada Employment Insurance Commission (Commission), proved that the Claimant lost his job because of misconduct. It found that the Claimant had been on duty at the same time on November 23, 2022, for two different employers—competing companies.[1] Both companies had policies that forbid employees from working for competing firms.

[4] Because the General Division found that there was misconduct, this meant that the Claimant was disqualified from receiving Employment Insurance benefits.

[5] The Claimant denies that he committed any misconduct. He argues that the General Division made jurisdictional and factual errors. He says that the General Division failed in its duties to direct Service Canada in its investigations. He also says the General Division misconstrued and overlooked vital evidence.

[6] The Claimant acknowledges that he was employed by two different firms at the same time. However, he denies that he worked overlapping shifts on November 23, 2022. He says that he had stopped working for his first employer partway through his shift, before he began his shift for his second employer.

[7] The Claimant says that if the General Division had not made these errors, it would have accepted that he had not committed any misconduct.

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[1] I will refer to these companies as company “G” and company “S,” although the Claimant says it is unacceptable, unprofessional, and primitive to do so (AD 1-12). He says the General Division should have fully spelled names. However, the Social Security Tribunal routinely abbreviates or shortens proper names to protect a party’s privacy.

[8] 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.[2] If the appeal does not have a reasonable chance of success, this ends the matter.[3]

[9] I am not satisfied that the appeal has a reasonable chance of success. Therefore, I am not giving permission to the Claimant to move ahead with the appeal.

Issues

[10] The issues are as follows:

(a) Is there an arguable case that the General Division failed to exercise its jurisdiction to serve as a watchdog over Service Canada?

(b) Is there an arguable case that the General Division made a decision based on incomplete information?

(c) Is there an arguable case that the General Division mischaracterized or overlooked some of the evidence?

I am not giving the Claimant permission to appeal

[11] 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.[4]

[12] For these types of factual errors, 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.[5]

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[2] See *Fancy v Canada (Attorney General)*, 2010 FCA 63.
[3] 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."
[4] See section 58(1) of the DESD Act.
[5] See section 58(1)(c) of the DESD Act.

The Claimant does not have an arguable case that the General Division failed to exercise its jurisdiction

[13] The Claimant does not have an arguable case that the General Division failed to exercise its jurisdiction. He says the General Division should have contacted Service Canada and ensured that it conducted a thorough investigation into his claim. The Claimant wanted Service Canada to obtain phone records that showed that he had in fact contacted one of his employers.

[14] The General Division simply does not have the authority or jurisdiction to perform the type of role envisioned by the Claimant. He describes this as a "watchdog role."[6] The scope of its authority is quite limited. The General Division is limited to considering appeals of reconsideration decisions. It does not contact Service Canada to direct its investigations, nor tell it whom to contact, and what information to get.

[15] I am not satisfied that there is an arguable case that the General Division member failed to exercise its jurisdiction.

The Claimant does not have an arguable case that the General Division based its decision on incomplete information

[16] The Claimant does not have an arguable case that the General Division based its decision on incomplete information.

[17] The Claimant suggests that the General Division overlooked some of the evidence. He says that during the General Division hearing, he discovered that one of the records of employment was missing from the hearing file. So, he says that there could be other documents that were missing. And, if they were missing, then the General Division obviously would not have considered them.

[18] However, at the beginning of the hearing, the General Division member reviewed the documents in the hearing file with the Claimant. If there was anything else missing, the Claimant should have let the member know.

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[6] See Claimant's submissions, at AD 1 C-2.

[19] It became apparent to the member during the hearing that the Claimant wanted to file additional records. The member asked the Claimant what document he wanted to send to her after the hearing.[7] The member was open to allowing the Claimant file additional documents and submissions. As the member noted, the Claimant filed six additional sets of records.[8] The member accepted these documents.

[20] Other than the Claimant's Notice of Appeal, I see that the Social Security Tribunal always acknowledged that it had received documents from the parties, including the post-hearing documents. According to the letters from the Tribunal, it provided copies of any documents that it received from either party to both the Claimant and to the Commission.

[21] The Claimant has not indicated that there were other records that did not form part of the record. He does not pinpoint what these records might have been, or how they could have changed the outcome. I cannot speculate that there had to have been missing records. I am not satisfied that there is an arguable case that there were missing records, or that the General Division overlooked these records.

The Claimant does not have an arguable case that the General Division mischaracterized or overlooked some of the evidence

[22] The Claimant argues that the General Division mischaracterized or overlooked all of his supporting evidence. He writes, "Everything [the member] wrote in her decision letter is nothing else than her fantasy that does not have any link with facts and reality."[9] He says what really happened is as follows:

- The Claimant had been scheduled to work overlapping shifts on November 23, 2022, for companies "G" and "S." The shift for company "S" started two hours after the shift for company "G" started.

[7] At approximately 26:40 of the audio recording of the General Division hearing.
[8] See documents GD7 to GD12.
[9] See Claimant's Application to the Appeal Division – Employment Insurance, at AD 1-3.

- Initially the Claimant was going to quit working for company “S” because of harassment. So, this would have eliminated the issue of working overlapping shifts. But the Claimant changed his mind after receiving a text from his manager at company “S.” He continued working for company “S” while continuing to work for company “G.”[10]

- The Claimant says that he contacted company “G,” on November 23, 2022, so he could ask to be removed from the work schedule that day. He says company “G” has a record of the phone calls he made that day. The Claimant says the General Division should have considered the fact that he called company “G” to be removed from the work schedule. He says he took steps to avoid being booked for overlapping shifts with two different employers.

- The Claimant says that he was blameless that company “G” did not immediately relieve him from working on November 23, 2022.

- Even so, the Claimant denies that he worked overlapping shifts.[11] He says that he had changed uniforms for his shift starting at 4:00 p.m. and therefore would not have attended a work site wearing the competitor’s uniform.[12] He also says that he did not intend to work overlapping shifts for two different companies.

- The Claimant says that company “G” never paid him for any work on November 23, 2022. He says that this proves that he could not have worked overlapping shifts for both companies, if one of those companies did not pay him at all for any work that day.

- The Claimant says that if the manager for company “S” had properly investigated the client’s complaint that he had worked overlapping shifts, it would have

[10] See Request for Reconsideration, at GD 3-46 to 3-47.
[11] See Request for Reconsideration, at GD 3-46 to 3-47, Supplementary Record of Claim, dated September 22, 2023, at GD 3-92, and undated letter, at GD 3-95.
[12] See Claimant’s undated letter, at GD 3-95.

discovered that he had not worked overlapping shifts. He says the client's complaint was unfounded.[13]

- The Claimant had been harassed by an employee for ten months at company "S." He reported this guard. He wrote a letter to his manager, "K." He says that the General Division distorted his evidence or failed to mention it. The General Division wrote, "The Appellant says that he reported misconduct by his manager to the human resources department." The Claimant denies that he wrote or said that the manager committed any misconduct.

- The Claimant says the General Division was wrong also that his manager K. had not retaliated against him before he was dismissed. The Claimant says that K. had in fact tried to retaliate against him many times in the months leading up to his dismissal.

- The Claimant says the General Division overlooked the fact that his manager K. fabricated the case against him for dismissal. He says there was no basis to dismiss him as he was an excellent employee. He says K. was highly motivated to dismiss him because he had gone to the Human Resources Department to make a complaint against another employee. He says that, once he did this, it did not reflect well on K. that he had not managed the complaint himself.

- The Claimant says the General Division made a mistake about one of the managers. "M." was the Human Resources Manager of the Calgary office, not a Burnaby, B.C. local branch specialist.

- The Claimant also says that the General Division overlooked the fact that he was an excellent employee. He was highly qualified and very conscientious.

[13] See Claimant's undated letter, at GD 3-91.

- **The General Division accepted some of the Claimant's evidence**

[23] In fact, the General Division accepted some of the Claimant's evidence. The General Division accepted the Claimant's evidence that initially he was going to quit working for company "S" and that he had tried to contact company "G" to cancel his November 23, 2022, shift. The General Division also accepted that company "G" did not pay the Claimant for any work on November 23, 2022.

[24] However, the General Division found that this evidence did not conclusively prove that the Claimant could not have worked overlapping shifts. It determined that it had to consider all of the evidence.

- **The General Division did not have to address all of the evidence**

[25] The General Division did not mention or address all of the evidence. However, the General Division was not required to address all of the evidence. It is presumed that a decision-maker considers all of the evidence before it.[14] A decision-maker is required to address evidence only if that evidence could be used to prove something.

[26] So, for instance, the fact that the Claimant was an excellent employee was irrelevant to the misconduct question. So too was the fact that the General Division inaccurately described "M.'s" position with company "S," that the Claimant had been harassed by another employee, and that the Claimant's manager did not investigate his harassment complaints. None of this evidence spoke to whether the Claimant had or had not committed any misconduct.

[27] Apart from the fact that some of this evidence was irrelevant, the General Division also had to have based its decision on an erroneous finding of fact. So, even if the General Division made a factual error that alone does not enable the Appeal Division to grant leave. The General Division simply did not base its decision on the evidence that the Claimant says that it mischaracterized.

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

- **The General Division could not consider whether company "S" had wrongfully dismissed the Claimant**

[28] The Claimant argues that company "S" had wrongfully dismissed him. The Claimant says that if his employer had properly investigated what had happened, it would have learned that there was no basis to the client's complaint against him and decided that there was no basis to dismiss him. But the General Division appropriately did not address issues about whether company "S" had wrongfully dismissed the Claimant.

[29] As the Federal Court of Appeal held in a case called *Sullivan*, "Under any plausible reading of the legislation that governs the [Social Security] Tribunal, it is a forum to determine entitlement to Social Security benefits, not a forum to adjudicate allegations of wrongful dismissal."[15]

- **The General Division's role was to look at the misconduct issue**

[30] Fundamentally, the question that the General Division had to answer was whether the Claimant had gone against the policies of Employer "S" and whether he had been dismissed from his employment for that reason.

[31] The Claimant argued that the real reason he was dismissed had nothing to do with whether he had overlapping shifts with two different companies. The Claimant says those allegations were fabricated.

[32] But the General Division rejected the Claimant's arguments that he had been dismissed for reasons unrelated to whether he had worked overlapping shifts for two different employers. The General Division simply was not persuaded by these arguments. It was entitled to and explained why it rejected these arguments. There was an evidentiary basis to support the General Division's findings on this point.

[15] See *Sullivan v Canada (Attorney General)*, 2024 FCA 7 at para 6.

- **The General Division looked at the Employer's policies**

[33] The Employer "S" provided extracts from its employee handbook, which reads, in part, as follows:

> **Conflict of Interest**
>
> **Outside Employment or Other Activities**
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> While working, employees are required to devote their full effort, energy and loyalty to [the employer]. [The employer] allows outside employment and activities if they do not create an actual, perceived a potential conflict of interest, disruptions or distractions that interfere with workplace productivity, or may be in competition with [the employer], pursuant to applicable law.
>
> Activities related to outside employment cannot be conducted in the [employer] workplace. You must advise and consult with your Branch Manager regarding this policy before becoming involved in outside employment, activities or relationships that could violate this policy.[16]

[34] The Employer "S" also provided a copy of its policy. It listed actions that would lead to immediate termination of employment. This included false reporting or lying and working for a competing security company or investigation service while working for the Employer.[17]

- **The Employer "S" explained that it dismissed the Claimant because it found that he worked overlapping shifts for two different companies**

[35] The Employer "S" confirmed that it had dismissed the Claimant on November 29, 2022. The termination letter reads:

> ... We were notified from our Client at […] that on November 23, 2022, you worked for [S] and a Competitor for […]. This […] was in the same building from 14:00 to 22:00 so in fact you were employed by two […] companies and working for them both at the same time as the shifts overlapped from 16:00 to 22:00 for 6 hours. In our meeting you admitted this fact. Your actions have caused damage to our brand and client relationship.[18]

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[16] See extract from Employee Handbook, at GD 3-73 to 3-74.
[17] See Employer's policies, at GD 3-75 to GD 3-76.
[18] See termination letter dated November 29, 2022, from company "S," at GD 3-64 (GD 3-72 and 3-97).

[36] The Employer "S" also spoke with the Commission on March 21, 2023. It confirmed that it had dismissed the Claimant from his employment because he had been working overlapping shifts with their competitor, in violation of one of their policies.[19] The Employer verified this information again on September 20, 2023.[20]

[37] The General Division clearly preferred the Employer's evidence. It accepted that the Claimant had worked overlapping shifts.

- **The Claimant says the evidence shows that he did not work overlapping shifts**

[38] The Claimant denies that the overall evidence showed that he could have worked overlapping shifts. But this contradicts his own evidence and even his submissions at the Appeal Division.

[39] The Claimant stated that he worked for company "G" on November 23, 2022. He says that he arrived at the work site at 1:45 p.m. and worked for the company until 3:51 p.m. He says that he relieved another guard at 3:52 p.m. and then started his shift for company "S" at 3:54 p.m.[21] He stopped working at 12:05 a.m.

    - **The Record of Employment from company "G" was not conclusive**

[40] The Claimant says that the Record of Employment from company "G" shows that he could not possibly have worked overlapping shifts on November 23, 2022, because company "G" did not pay him that day.[22] However, he confirms that he worked for the company before his shift with company "S" began.[23]

[41] The Claimant readily says that he worked for 84 minutes for company "G" on November 23, 2022.[24] He states that the shift for company "G" started at 2:00 p.m. and

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[19] See Supplementary Record of Claim, dated March 21, 2023, at GD 3-36.
[20] See Supplementary Record of Claim, dated September 20, 2023, at GD 3-68.
[21] See Claimant's undated letter addressed to "K.," at GD 3-78.
[22] See Application to the Appeal Division-Employment Insurance, at AD 1-12.
[23] See Claimant's updated reasons, at AD 1 C-7 and AD 1 C-8.
[24] See Claimant's Notice of Appeal, at GD 2-11, and Claimant's undated letter, at GD 2 A-58.

that he started at 2:30 p.m.[25] He also says that there are "unpaid 2 hours of work" with company "G."[26]

[42] So, the fact that the Record of Employment showed that company "G" last paid him on November 23, 2022, does not prove that he did not work overlapping shifts, or that he did not work at all that day for the company. The balance of the evidence clearly showed that the Claimant worked for company "G" that day.

- **The evidence showed that the Claimant remained on shift for company "G" after he had started working for company "S"**

[43] The General Division noted the Claimant's evidence that he had not planned to work overlapping shifts. The General Division also noted the Claimant's evidence that he tried contacting company "G." It noted that he had called the company twice on November 23, 2022, about getting removed from the schedule that day. The General Division noted that the Claimant was unable to speak with anyone when he first called company "G" on November 23, 2022.

[44] As the General Division noted, the Claimant did not manage to reach anyone at company "G" until 6:00 p.m., which was two hours after he had already started working for company "S."[27]

[45] Indeed, in his application to the Appeal Division, the Claimant confirmed that he had yet to be relived from his shift for company "G." He wrote:

> Of course, working simultaneously for two security companies does not make common sense, that is why I had no choice but to drop the [first] shift because [company "G"] did not take my initial call at around 1600 hrs. and did not dispatch a guard to relieve me for some reason. And the next day I quit [company "G"] in favour of [company "S"].[28]

[25] See Application to the Appeal Division-Employment Insurance, at AD-11.
[26] See Application to the Appeal Division-Employment Insurance, at AD 1-12.
[27] See General Division decision at paras 47 and 59.
[28] See Application to the Appeal Division-Employment Insurance, at AD 1-12.

[46] In his updated submissions, he wrote:

> I actually called [company "G"] to be removed from my shift and schedule. The first time, at around 16:00 hours I could not reach the busy 24/7 western Canada Operation Center (WCC) and the voicemail box was full, and then I was deep into my [company "S"] duty … I did not have a second opportunity to call [company "G"] Western Canada Control Centre until 18:24 hours …[29]

[47] So, until he was relieved, the General Division concluded that the Claimant remained working for company "G," while his shift had already started at company "S." This was a logical conclusion.

[48] It seems that the Claimant is relying on the fact that he could not maintain a physical presence in two separate locations simultaneously. He could not be working on site for company "G" if he was working elsewhere for company "S." On that basis, he says he could not have been working overlapping shifts.

[49] But it did not matter that the Claimant was not physically present at two separate locations after 4:00 p.m., or that he tried (though unsuccessfully) to cancel one of his shifts. It did not matter also that he had changed uniforms and was no longer wearing his uniform for company "G."

[50] The undisputed evidence showed that the Claimant had started working for company "G" and had yet to be relieved of his duties. So, he could be seen as having continued to work for company "G" even after he had changed uniforms and physically left the work site to start working for company "S."

[51] The Claimant was, so to speak, on the time clock for company "G" while on duty for company "S," which made him notionally working for both companies simultaneously.

[52] The Claimant may not have intended to work overlapping shifts, but the General Division found that he acted too late to avoid this situation. It found that he only came to

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[29] See Claimant's updated reasons, at AD 1 C-8.

this decision "at the last minute."[30] The General Division found that it was too late by then to notify company "G" that he did not wish to work that day. As the Claimant stated, "[he] did not have enough time to figure out what to do in that challenging situation until the last minute."[31]

[53] There was some evidence that could have supported the Claimant. The Claimant argues that the General Division should have preferred this evidence, over the evidence of his employer. But the General Division was entitled to prefer the employer's evidence and to draw the conclusions it did, after assessing and weighing the evidence.

[54] The Claimant is also seeking a reassessment and asking me to come to a different conclusion from the one that the General Division made. But, as the Federal Court said in a case called *Tracey*,[32] the Appeal Division has a limited role in an application for leave to appeal in Employment Insurance matters. It has to determine whether the appeal has a reasonable chance of success. It does not reassess evidence or reweigh the factors considered by the General Division in order to reach a different conclusion.

[55] The possibility that the evidence might be reassessed in the Claimant's favour does not give rise to an arguable case sufficient to grant leave to appeal.[33]

[56] I am not satisfied that there is an arguable case that the General Division based its decision on a factual error that it made in a perverse or capricious manner or without regard for the evidence before it.

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[30] The Claimant noted that he changed his mind at the last minute about quitting company "S" because he received a text from K. See Request for Reconsideration, at GD 3-46.
[31] See Claimant's letter to the General Division, at GD 10-6.
[32] See *Tracey v Canada (Attorney General)*, 2015 FC 1300 at para 46.
[33] See *Canada (Attorney General) v Tsagbey*, 2017 FC 356 at para 77.

Conclusion

[57] The appeal does not have a reasonable chance of success. Permission to appeal is refused. This means that the appeal will not be going ahead.

Janet Lew
Member, Appeal Division