Citation: *SR v Canada Employment Insurance Commission and X*, 2025 SST 38

# Social Security Tribunal of Canada
## Appeal Division

# Leave to Appeal Decision

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| **Applicant:** | S. R. |
| **Representative:** | B. R. |
| **Respondent:** | Canada Employment Insurance Commission |
| **Representative:** | |
| **Added Party:** | X |
| **Representative:** | |

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| **Decision under appeal:** | General Division decision dated December 27, 2024 (GE-24-3688) |

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| **Tribunal member:** | Glenn Betteridge |
| **Decision date:** | January 20, 2024 |
| **File number:** | AD-25-22 |

## Decision

[1] I am not giving S. R. permission to appeal the General Division decision.

[2] This means his appeal won't go forward and the General Division decision stands unchanged.

## Overview

[3] S. R. is the Claimant. His employer dismissed him. He applied for Employment Insurance (EI) regular benefits.

[4] The Canada Employment Insurance Commission (Commission) decided to pay him benefits. His employer asked the Commission to reconsider. His employer says it dismissed him for poor performance and insubordination.

[5] The Commission maintained its decision. So, his employer appealed.

[6] The General Division agreed with the employer and allowed the appeal. The General Division decided the Claimant lost his job for misconduct under the *Employment Insurance Act* (EI Act).[1] He was insubordinate and took the company vehicle home after being told not to. The employer warned the Claimant. But he continued this conduct, and his employer dismissed him. The General Division gave more weight to the employer's evidence. It found the Claimant's testimony wasn't credible. Because of his misconduct, he was disqualified from getting EI regular benefits.

[7] The Claimant has asked for permission to appeal. To get permission, he has to show his appeal has a reasonable chance of success. Unfortunately, he hasn't.

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[1] Section 30(1) of the *Employment Insurance Act* (EI Act) says a person who loses their job for misconduct is disqualified from getting benefits.

## Issues

[8] I have to decide two issues.

- Is there an arguable case the General Division treated the Claimant unfairly by accepting three documents from the employer at the hearing, without giving him a chance to respond?
- Is there an arguable case the General Division made an important error of fact?

## I am not giving the Claimant permission to appeal

[9] I read the Claimant's application to appeal.[2] I read the General Division decision. I reviewed the documents in the General Division file.[3] And I listened to the hearing recording.

[10] I will use "parties" to refer to the Claimant and employer, because the Commission didn't attend the hearing.

[11] For the reasons that follow, I am not giving the Claimant permission to appeal.

### The test for getting permission to appeal

[12] I can give the Claimant permission to appeal if his appeal has a reasonable chance of success.[4] This means he has to show an arguable case the General Division made an error the law lets me consider.[5]

- It used an unfair process or was biased.
- It used its decision-making power improperly.

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[2] See AD1.
[3] See GD2, GD3, GD4, GD5, and GD7, and the December 20, 2024 letter the Tribunal sent to the parties with copies of the documents the employer sent (GD7).
[4] See section 58(2) of the *Department of Employment and Social Development Act* (DESD Act).
[5] These are the grounds of appeal in section 58(1) of the DESD Act. I call them errors. The Federal Court set out the "arguable case" test in cases like *Brown v Canada (Attorney General)*, 2024 FC 1544 at paragraph 41, citing *Osaj v Canada (Attorney General)*, 2016 FC 115 at paragraph 12.

- It made an important factual error.
- It made a legal error.

[13] I have to start by considering the grounds of appeal the Claimant put in his application.[6]

## There isn't an arguable case the General Division process was unfair to the Claimant

### – The Claimant's argument

[14] The Claimant says the General Division didn't follow procedural fairness.[7]

[15] He argues the employer presented three documents at the hearing that weren't in the appeal file.[8] The documents were two written warnings and an internal email. (I am calling the third document the "internal email" because a supervisor sent it to the general manager.[9]) The internal email sets out the performance issues leading up to the Claimant's dismissal.

[16] The Claimant says he didn't have a chance to comment on the three documents during the hearing. And he argues, "these documents are fraudulent in the fact they were manufactured after employment was already terminated to justify their termination of me."[10]

### – The law about procedural fairness

[17] The General Division makes an error if it uses an unfair process.[11] These are called procedural fairness or natural justice errors. The question is whether a person

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[6] See *Twardowski v Canada (Attorney General)*, 2024 FC 1326 at paragraph 26.
[7] See AD1-4.
[8] See AD1-6.
[9] See GD7-4 and GD7-5. Unfortunately, there are two GD7 documents in the General Division file. The first is a New Notice of Hearing, dated November 18, 2024. I am referring to the other one, the documents the employer emailed the Tribunal after the hearing, on December 17, 2024.
[10] See AD1-6.
[11] This is a ground of appeal under section 58(1)(a) of the DESD Act.

knew the case they had to meet, had a full and fair opportunity to present their case, and had an impartial decision-maker consider and decide their case.[12]

[18] The Supreme Court of Canada has said the duty of procedural fairness a decision-maker owes to a person is flexible and variable, and depends on the circumstances of the case.[13] In Social Security Tribunal appeals, the duty of procedural fairness focuses on the Tribunal's decision-making process.[14]

[19] The Claimant didn't argue the General Division member was biased. So, I will consider whether he knew the case he had to meet, and whether the General Division gave him a full and fair opportunity to present his case.[15] I will focus on the circumstances of the Claimant's appeal and the General Division process.

– **EI is an insurance plan**

[20] EI benefits are for people who are involuntarily unemployed.[16] The courts have said that workers who create their unemployment should not get EI benefits.[17] This is why people who lose their job for misconduct are disqualified from getting benefits.

[21] Under the EI scheme, the Commission pays partial income replacement benefits for a limited time to eligible people. The General Division decision denied the Claimant EI regular benefits. I assume he needed those benefits to replace his lost employment income. In other words, these benefits were probably important for his well-being.

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[12] See *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69; and *Kuk v Canada (Attorney General)*, 2024 FCA 74.
[13] See *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paragraphs 21 to 28. Some of the circumstances I should consider include the nature of the decision and the process; the decision-making scheme set up by the law; the impact of the decision on the lives of those affected; the legitimate expectations of the person about the procedure the decision-maker will follow; and the choice of procedures made by the Tribunal. See also regarding procedural fairness at the Social Security Tribunal, *Bosse v Canada (Attorney General)*, 2015 FC 1142.
[14] See *Davidson v Canada (Attorney General)*, 2023 FC 1555 at paragraph 40.
[15] See *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69; and *Kuk v Canada (Attorney General)*, 2024 FCA 74.
[16] See *Canada (Canada Employment and Immigration Commission) v Gagnon*, [1988] SCR 29.
[17] See *Canada (Attorney General) v Langlois*, 2008 FCA 18; and *Canada (Attorney General) v Marier*, 2013 FCA 39.

[22] Under the EI scheme, he had no right to these benefits. He had a right to apply and to have his application considered and decided by the Commission and this Tribunal. The law also gives employers a right to appeal to this Tribunal.

[23] Under the EI Act, usually the person applying for benefits has to show they are eligible. In misconduct appeals, the opposite it true. The Commission (or the employer in this case) has to prove the employee's conduct was misconduct to show the employee can't get benefits.

[24] The General Division owed the Claimant a duty to use a fair process when it decided whether the employer met its burden of proving misconduct.

## – The General Division and how it deals with evidence

[25] The General Division is an independent administrative tribunal that hears appeals of Commission reconsideration decisions. Like a court process, the General Division process is adversarial—between the parties. The General Division has the power and duty to hold hearings, consider evidence and arguments, and issue written decisions.

[26] But the General Division isn't a court. So, the formal rules and procedural protections that apply to courts don't necessarily apply to General Division proceedings. This includes the formal rules of evidence.

[27] Section 52 of the *Social Security Tribunal Rules of Procedure* (Tribunal Rules) says parties have to file evidence before the hearing ends. But Tribunal Rules also say the General Division can adapt the Tribunal Rules, or decide a rule doesn't apply, if that's in the interests of justice.[18]

[18] See section 8(3) of the *Social Security Tribunal Rules of Procedure* (Tribunal Rules).

[28] The Tribunal Rules say the General Division has to make the appeal process as simple and quick as fairness allows.[19] And the process should be flexible and appropriate for what the General Division has to decide in each appeal.[20]

## – The two written warnings

[29] The Tribunal sent the Claimant copies of the two written warnings at least one month before the hearing.

[30] On November 12, 2024, the Tribunal mailed the Claimant a letter adding him as a party. It included GD2 and the Commission's documents (GD3 and GD4).[21] The written warnings are at pages GD2-13 and GD2-14.

[31] The Tribunal mailed the letter and documents to the Claimant at the same address as the three notices of hearing.[22] The Claimant attended the hearing and confirmed he had received the Commission's documents. The General Division Member didn't ask about GD2 and the Claimant didn't say anything about GD2.

[32] I find it's more likely than not the Claimant received—and had a chance to review—the two written warnings before the hearing. The fact the Claimant acknowledged he got GD3 and GD4 tells me he also got GD2. It was up to him whether he reviewed those documents before the hearing.

[33] At the video conference hearing on December 13, 2024:

- The General Division Member and the parties spent about 5 minutes on the two warnings.[23]
- The General Division and the parties could not find the written warnings in the documents.

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[19] See section 6(a) and 8(1) of the Tribunal Rules.
[20] See sections 6(d) and 17(2)(b) of the Tribunal Rules.
[21] See GD5.
[22] See GD1, GD7, and GD8.
[23] Listen to the General Division hearing recording at 50:35 to 57:00.

- The employer shared its screen with the Claimant and the General Division Member, then scrolled through the two written warnings.[24]
- The General Division Member asked questions about the written warnings and gave the Claimant a chance to ask questions of the employer.
- The Claimant argued the February 1, 2024 written warning was "made up and false" and he said he didn't remember ever seeing it.
- Near the end of the hearing, the General Division Member asked the Claimant
    - if he had anything else he wanted to say,[25]
    - if he had any other questions for the employer,[26]
    - if he wanted to respond to the Commission's written arguments.[27]
- The Claimant answered "no" to each question.
- The General Division gave the employer the opportunity to send in the two written warnings and the internal email after the hearing. It said the Tribunal would send a copy to the Claimant and the Commission—which is that it did.

[34] The Claimant didn't ask for an opportunity to send post-hearing written arguments about the warnings. And the General Division didn't say it would give the parties that opportunity.

[35] The circumstances show me the procedure the General Division used to deal with the two written warnings was fair to the Claimant. It didn't have to give him an opportunity to send in written arguments after the hearing. He had copies of the two warnings before the hearing, saw those documents during the hearing, and had a full

[24] Listen to the General Division hearing recording at 51:25.
[25] Listen to the General Division hearing recording at 1:08:09.
[26] Listen to the General Division hearing recording at 1:08:58.
[27] Listen to the General Division hearing recording at 1:09:10.

and fair opportunity to challenge the employer's evidence and make arguments about the written warnings.

– **The employer's internal email**

[36] The Claimant didn't get the chance to review the internal email before the hearing. It wasn't in the Commission's reconsideration file (GD3). And the employer didn't send it to the Tribunal in its appeal documents (GD2).

[37] But the employer did introduce the internal email at the hearing. In other words, before the hearing ended. And the General Division gave the employer permission to send it in after the hearing. The General Division said the Tribunal would put the documents in the file and send copies to everyone.[28]

[38] At the video conference hearing:

- The General Division Member and the parties spent between 7 and 8 minutes on the internal email.[29]
- The employer shared its screen, which the Claimant could see, and scrolled through the internal email.[30]
- The General Division member gave the employer the chance to give more context, then gave the Claimant an opportunity to give his side of the story.
- The Claimant said he never saw the email and never heard of it. He argued the employer "must have added it afterwards trying to save their bums."[31]
- The General Division Member asked the employer and the Claimant questions based on the incidents of insubordination in the email.

[28] Listen to the General Division hearing recording at 41:19 and 56:40.
[29] Listen to the General Division hearing recording at 33:36 to 41:04.
[30] Listen to the General Division hearing recording at 37:00.
[31] Listen to the General Division hearing recording at 34:30.

- Near the end of the hearing, the General Division Member gave the Claimant a chance to ask questions to the employer and to say anything else he wanted to. He chose not to.

[39] When I read its decision and listen to the hearing, I see the General Division adapted the Tribunal Rules to the Claimant's appeal. It adapted section 52 by allowing the employer to file the internal email during the hearing. The employer did that using screen sharing. This was the simplest and quickest way for the parties and General Division to review and test that evidence.

[40] The circumstances also show me the way the General Division handled the internal email was fair to the Claimant. He saw the email. And the General Division gave him a full and fair opportunity to challenge the internal email by asking questions, and by presenting his evidence and arguments about the internal email and incidents described in it.

[41] Finally, at the end of the hearing the Claimant didn't have anything else to say, and had no more questions for the employer. He didn't ask the General Division for a further opportunity to review the internal email or send written arguments after the hearing.

### – Summary of this section

[42] The Claimant hasn't shown an arguable case the General Division used an unfair process to deal with the employer's evidence (two written warnings and the internal email). The General Division process allowed him to know the case he had to meet. And the General Division gave him a full and fair opportunity to challenge the employer's evidence and make arguments.

## There isn't an arguable case the General Division made an important factual error

[43] The Claimant says the General Division made an important error of fact.[32]

[44] He argues the General Division ignored the fact the employer didn't return the Commission's emails or calls when it investigated his claim.[33] He argues the General Division didn't ask for date-stamped or software processed information to prove the employer's written evidence was "not manufactured." He says the employer lied when it said he was told to return the company vehicle but refused.

[45] In his argument about factual errors, the Claimant included information about workplace incidents.[34] These incidents weren't in the documents or testimony at the General Division. Unfortunately for him, the law says I can't consider new evidence that wasn't before the General Division—unless it meets an exception.[35] His new evidence doesn't meet an exception. So, I won't consider it.

[46] The General Division isn't an investigator. It didn't have to get evidence to prove the employer's documents weren't falsified. It was up to the Claimant to test the employer's evidence by providing his evidence and asking the employer questions about its documents.

[47] The Claimant disagrees with the General Division's credibility findings and how it weighed the evidence. But I can't interfere with its decision unless he shows the General Division made an important factual error.

[48] The General Division makes an important factual error if it bases its decision on a factual finding it made by ignoring or misunderstanding relevant evidence.[36] In other

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[32] See AD1-4.
[33] See AD1-6.
[34] See AD1-6 and AD1-7.
[35] See Sibbald v Canada (Attorney General), 2022 FCA 157 at paragraphs 37 to 40.
[36] Section 58(1)(c) of the DESD Act says it is 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.

words, there is some evidence that goes squarely against or doesn't support a factual finding the General Division made to reach its decision.

[49] The Claimant hasn't shown the General Division ignored or misunderstood the relevant evidence that was before it. And my review of the General Division file shows me the relevant evidence supports the General Division decision.

[50] The General Division reviewed the Commission's evidence, the employer's evidence, and the Claimant's evidence (paragraphs 13 to 22, 29, 30, and 33). It recognized there was conflicting evidence (paragraphs 13 and 30). Then it considered how to assess credibility and weighed the parties' and Commission's evidence to reach its findings of fact (paragraphs 31 to 33).

[51] The General Division gave more weight to the employer's evidence than the Claimant's evidence because it decided his evidence wasn't credible (paragraphs 33 and 34). It found the Claimant didn't tell the truth during the hearing and explained how it reached that finding.

[52] So, the Claimant hasn't shown an arguable case the General Division made an important factual error. And my review of the documents, hearing testimony, and decision shows me the General Division decision is supported by the relevant evidence.

## Conclusion

[53] The Claimant hasn't shown an arguable case the General Division made an error the law lets me consider. And I didn't find an arguable case when I reviewed the General Division decision, hearing recording, and file.[37]

[37] The Federal Court has said the Appeal Division should not apply the permission to appeal test in a mechanistic manner. See for example *Griffin v Canada (Attorney General)*, 2016 FC 874; *Karadeolian v Canada (Attorney General)*, 2016 FC 615; and J*oseph v Canada (Attorney General)*, 2017 FC 391.

[54] This means his appeal doesn't have a reasonable chance of success. So, I can't give him permission to appeal the General Division decision.

Glenn Betteridge
Member, Appeal Division