Citation: *AS v Canada Employment Insurance Commission*, 2025 SST 1373

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

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

Decision under appeal:	General Division decision dated December 12, 2025 (GE-25-3225)

Tribunal member:	Solange Losier
Decision date:	December 22, 2025
File number:	AD-25-801

Decision

[1] Leave (permission) to appeal is refused. A. S.'s appeal will not proceed.

Overview

[2] A. S. is the Claimant. He stopped going to work and lost his job. When he was released from jail, he applied for Employment Insurance regular benefits.

[3] The Canada Employment Insurance Commission (Commission) decided that the Claimant voluntarily left his job without just cause. The Commission found there were reasonable alternatives.[1] This resulted in a disqualification to benefits.[2]

[4] The General Division decided that the legal issue was misconduct and not voluntary leave. It found that the Claimant lost his job because he was absent from work. It concluded that his conduct amounted to wilful misconduct and maintained the disqualification to benefits.[3]

[5] The Claimant is now asking for permission to appeal. He argues that the General Division made legal errors and didn't follow a fair process.[4]

[6] I am denying permission to appeal because the Claimant's arguments don't show that he has an arguable case upon which the appeal might succeed. So, I can't give him permission to appeal.[5]

Issues

[7] Is there an arguable case that the General Division made any legal errors, or any important factual errors or didn't follow a fair process when it decided the misconduct issue?

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[1] See Commission's initial and reconsideration decision at pages GD3-23 to GD3-24 and GD3-35.
[2] See section 30(1) of the *Employment Insurance Act* (EI Act).
[3] See General Division decision at pages AD1A-1 to AD1A-8.
[4] See Application to the Appeal Division at pages AD1-1 to AD1-28.
[5] See section 58(2) of the *Department of Employment and Social Development Act* (DESD Act).

Analysis

[8] The law says that I can consider four types of errors, and they include, a failure to follow a fair process, jurisdictional errors, legal errors, and important factual errors.[6] These errors are also known as "reviewable errors."

[9] I can only give the Claimant permission to appeal if there's an "arguable case" that the General Division made a reviewable error that gives his appeal a reasonable chance of success.[7]

[10] The Claimant set out his reasons for appealing, and I have considered them.[8] I've also reviewed the General Division decision and the file record. He argues that the General Division made legal errors and didn't follow a fair process.[9] Some of his arguments overlap with factual errors, so I will also consider that ground of appeal.[10]

I am not giving the Claimant permission to appeal

[11] The General Division makes a legal error when it misinterprets a law, doesn't follow a court decision it has to follow, or doesn't give adequate reasons for its decision.[11] Reasons are inadequate when they don't add up, don't make sense, or don't show how the decision-maker reached its decision.[12]

[12] A factual error happens when the General Division has "based its decision on an erroneous finding of fact made in a perverse or capricious manner or without regard for the material before it."[13]

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[6] See section 58(1) of the DESD Act.
[7] See *Osaj v Canada (Attorney General),* 2016 FC 11 at paragraph 12 and sections 56(1) and 58(2) of the DESD Act.
[8] See pages AD1-8 to AD1-9.
[9] See page AD1-6.
[10] See section 58(1)(c) of the DESD Act.
[11] See section 58(1)(b) of the DESD Act and
[12] See *Sennikova v Canada (Attorney General)*, 2021 FC 982 at paragraph 63.
[13] See section 58(1)(c) of the DESD Act.

[13] This involves considering some of the following questions:[14]

- Does the evidence squarely contradict one of the General Division's key findings?
- Is there no evidence that could rationally support one of the General Division's key findings?
- Did the General Division overlook critical evidence that contradicts one of its key findings?

The Claimant's arguments to the Appeal Division

[14] The Claimant argues that the General Division misapplied the legal test and case law when it declared that "foreseeability" was not relevant in its decision.[15] He says that according to the case law, *Mishibinijima v Canada (Attorney General*), *Minister of Employment and Immigration v Bartone*, A-369-88 and *McKay-Eden v Her Majesty the Queen,* A-402-96, foreseeability is a relevant factor and part of the legal test.[16]

[15] He also says that the General Division relied heavily on decisions such as *Canada (Attorney General) v Borden* and *Canada (Attorney General) v Lavallee*, 2003 FCA 255, which he says are distinguishable from his own case.[17] Specifically, he submits that the General Division erred by treating his criminal conviction and incarceration as automatically establishing misconduct.

[16] The Claimant also argues that the General Division failed to meaningfully consider his post-hearing evidence and submissions.[18] He says that the General Division didn't mention or analyze his spouse's evidence, it didn't engage with his explanations or clarifications in his post-hearing written arguments, and it didn't identify the specific clause in his employment contract that he breached.

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[14] This is a summary of the Federal Court of Appeal's decision in *Walls v Canada (Attorney General)*, 2022 FCA 47 at paragraph 41.
[15] See paragraph 26 of the General Division decision.
[16] See *Mishibinijima v Canada (Attorney General*),), 2007 FCA 36, *Minister of Employment and Immigration v Bartone*, A-369-88 and *McKay-Eden v Her Majesty the Queen*, A-402-96.
[17] See *Canada (Attorney General) v Lavallee*, 2003 FCA 255 and *Canada (Attorney General) v Borden*, 2004 FCA 17.
[18] The Claimant's post-hearing arguments and evidence are marked from pages GD9 to GD12.

The General Division decided that the legal issue was misconduct and not voluntary leave

[17] The General Division had to first decide whether the legal issue was voluntary leave or misconduct.[19] Both result in a disqualification to benefits.[20]

[18] The employer issued a Record of Employment (ROE) indicating that the Claimant quit his job and his last day paid was June 11, 2024.[21] And recently, in November 2024, in an email to the Claimant, the employer wrote that they would change the reason on the ROE to "other". The employer noted that they would explain that he didn't voluntarily quit but was unable to attend work because he was incarcerated.[22]

[19] The General Division concluded that the legal issue was misconduct and not voluntary leave because the Claimant didn't have a choice to stay or leave.[23] It found the evidence supported that the Claimant was actually dismissed from his job.[24]

Misconduct according to the Employment Insurance Act (EI Act) and case law

[20] The EI Act says that a person who loses their job due to misconduct is disqualified from getting benefits.[25]

[21] "Misconduct" is not defined in the EI Act, but the Federal Court of Appeal (FCA) in *Mishibinijima* defines "misconduct" as conduct that is wilful, which means that the conduct was conscious, deliberate, or intentional.[26] This includes conduct that is reckless to the point of being wilful.[27]

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[19] See *Canada (Attorney General)* v *Easson*, A-1598-92 and C*anada (Attorney General)* v *Desson*, 2004 FCA 303.
[20] See section 30(1) of the EI Act.
[21] See ROE at pages GD3-18.
[22] See page G8-4.
[23] See paragraph 18 of the General Division decision and *Canada (Attorney General) v Peace*, 2004 FCA 56 at paragraphs 11 and 15.
[24] See paragraph 17 of the General Division decision.
[25] See section 30(1) of the EI Act.
[26] See *Mishibinijima v Canada (Attorney General),* 2007 FCA 36.
[27] See *McKay-Eden v Canada*, A-402-96.

[22] There is misconduct if the Claimant knew or should have known his conduct could get in the way of carrying out his duty to the employer and that dismissal was a real possibility.[28]

[23] A person doesn't have to have wrongful intent for their behaviour to be considered misconduct based on the EI Act.[29] It is the Commission that has to establish that the loss of employment was by reason of their own misconduct.[30]

The General Division found that the Claimant lost his job because he stopped showing up for work

[24] The General Division decided that the Claimant stopped showing up to work and lost his job due to his own misconduct. The reason he didn't show up to work was because he was taken into custody on June 12, 2024, and incarcerated until February 25, 2025. It explained that a person doesn't have to have wrongful intent for their behaviour to be misconduct under the law.[31]

[25] The General Division noted that there was no dispute that the Claimant was convicted of sexual assault and sentenced to one year in jail and because of that, he stopped going to work.[32]

There is no arguable case that the General Division misunderstood or misapplied the case law

[26] I see no arguable case that the General Division made any legal errors when it applied the case law involving misconduct in the context of the EI Act and benefits.

[27] The General Division didn't treat his criminal conviction and incarceration as automatically establishing misconduct but rather, it found that he was absent from work (without authorization) which led to the loss of his employment.

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[28] See *Mishibinijima,* at paragraph 14.
[29] See *Canada (Attorney General) v Secours*, A-352-94.
[30] See *Minister of Employment and Immigration v Bartone*, A-369-88.
[31] See paragraphs 11–15 of the General Division decision.
[32] See paragraph 23 of the General Division decision.

[28] The *Mishibinijima* decision stands for the proposition that there is misconduct if the person knew or should have known the conduct could get in the way of carrying out their duty to the employer and that dismissal was a real possibility.

[29] So, the question isn't whether the Claimant could foresee the consequences of his criminal actions (i.e., house arrest, jail, or something else), but it's whether he *knew* or *ought* to have known that being absent from work without authorization could get in the way of carrying out his duty to the employer and that dismissal was a real possibility.

[30] The General Division correctly stated in its decision that whether the Claimant foresaw incarceration was likely or not, wasn't relevant anyway.[33] According to the *Borden* decision, it isn't relevant.

[31] The Federal Court of Appeal (FCA) in *Borden* found that a defendant's belief that his sentence would not be imprisonment or that it would be for a shorter term was an **irrelevant consideration** in determining whether the employment was lost by reason of misconduct or whether he left it voluntarily without just cause.[34] Similarly, Mr. Borden didn't think he was going to be incarcerated and argued that he shouldn't be disqualified to benefits upon release.

[32] The FCA in *Borden* also said, "that the employment relationship was terminated by the defendant's imprisonment because he was no longer in a position to fulfill an essential condition of his employment contract."[35]

[33] The General Division also correctly cited and relied on the FCA's decision in *Lavallee*.[36] The *Lavallee* decision may have had different facts, but the proposition it stands for still applies. It says that where an employee, through his own actions, can no longer perform the services required from him under the employment contract and as a

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[33] See paragraph 26 of the General Division decision.
[34] See *Canada (Attorney General) v Borden*, 2004 FCA 176 at paragraph 7.
[35] See *Borden* at paragraph 4.
[36] See *Canada (Attorney General) v Lavallee*, 2003 FCA 255 and paragraphs 21, 25–26 of the General Division decision.

result loses his employment, that employee "cannot force others to bear the burden of his unemployment, no more than someone who leaves the employment voluntarily."[37]

[34] The Claimant in this case wasn't able to fulfill an essential condition of his employment contract. The evidence before the General Division shows that he was hired to work as a full-time driver and was expected to work approximately 40 hours a week. That was an express condition of his employment outlined in his employment letter.[38] So, the General Division's finding that the performance of services was an essential condition of his employment contract was consistent with the evidence.[39]

[35] The General Division has to follow binding decisions from the FCA. It simply wasn't relevant that the Claimant didn't foresee he would be incarcerated. There is no arguable case that the General Division made any legal errors when it applied the case law.

There is no arguable case that the General Division made any other legal errors or important factual errors

[36] I see no arguable case that the General Division made a legal error because its reasons look adequate. It explained why it made the decision it did, with reference to the evidence and by applying relevant case law.

[37] Case law holds that an administrative tribunal charged with fact-finding is presumed to have considered all the evidence before it and is not required to mention every piece of evidence in its reasons.[40]

[38] The General Division doesn't have to refer to every piece of evidence in the file. I can presume that it considered all of the evidence before it. There is no reason to set aside that presumption in this case.

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[37] See *Lavallee* at paragraph 10.
[38] See page GD12-4.
[39] See paragraph 25 of the General Division decision.
[40] See *Simpson v Canada (Attorney General)*, 2012 FCA 82 at paragraph 10; *Lee Villeneuve v Canada (Attorney General)*, 2013 FC 498 at paragraph 51.

[39] The Claimant's post-hearing submissions to the General Division simply restate the same thing he argued before the General Division—that he didn't know he was going to go to jail, that he wasn't planning on being absent from work, that he didn't quit his job, that he had medical issues, that he tried going back to work once he was released from jail, his overall state of mind, that his spouse called his employer a few weeks later and that he didn't abandon his job, etc.

[40] The General Division didn't need to deal with evidence and arguments that weren't relevant.[41] For example, the fact that his wife called his employer a few weeks after he was incarcerated, that he had medical issues and tried getting his job after he was released wasn't relevant to the misconduct issue.[42]

[41] The General Division grappled with the relevant issues and explained with reasons why it found the Claimant lost his job due to his own misconduct. Its key findings are consistent with the evidence, and it didn't overlook any important evidence that was relevant. There is no arguable case that it made any legal errors or important factual errors.

There is no arguable case that the General Division didn't follow a fair process

[42] Procedural fairness is about the fairness of the process. The Claimant has a right to be heard and to know the case against him. He also has a right to be given an opportunity to respond and have his case considered fully and fairly by an impartial decision-maker.

[43] The file record and decision shows that the Claimant asked to provide post-hearing submissions, specifically his employment contract and ROE.[43] And he submitted that information to the General Division after the hearing.[44] He also submitted

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[41] See *Faullem v Canada (Attorney General),* 2022 FCA 29 at paragraph 23. This decision says that the principle of transparency and justification don't require the decision-maker to state its position regarding each issue raised by a party and address each and every argument that a party has advanced to support a position.
[42] These arguments may have been relevant if the General Division had decided that the Claimant had voluntarily left his employment without just cause under section 29(c) of the EI Act.
[43] See paragraphs 9–11 of the General Division decision.
[44] See pages GD12-5 to GD12-12.

additional written arguments.[45] Even though these documents weren't solicited, the General Division explained that it accepted them, noting that the Claimant had only understood the nature of the Commission's arguments during the hearing and the legal issues (misconduct vs. voluntary leave) were complex.[46]

[44] I see no arguable case that the General Division didn't follow a fair process.[47] The Claimant wrote to the General Division after the hearing thanking him for the respectful and fair manner in which the hearing was conducted.[48] The Claimant was permitted to submit post-hearing documents after the hearing, which the General Division accepted, considered and addressed the arguments that were relevant.

[45] The Claimant's arguments to the Appeal Division amount to a disagreement with the law and outcome. The Appeal Division's mandate is limited to deciding whether the General Division might have made a reviewable error and not whether the result was unfair.[49] As well, the Appeal Division does not provide an opportunity for the parties to re-argue their case in order to get a different outcome.

Conclusion

[46] I reviewed the documents in the file, examined the decision under appeal, and I am satisfied that the General Division didn't misinterpret or fail to consider any relevant evidence.[50]

[47] Permission to appeal is refused. This means that the Claimant's appeal will not proceed. It has no reasonable chance of success.

Solange Losier
Member, Appeal Division

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[45] See Claimant's post-hearing arguments and evidence at pages GD9-1, GD10-1 to GD10-4, GD11-1 to GD11-7 and GD12-1 to GD12-12.
[46] See paragraphs 9–11 of the General Division decision.
[47] See section 58(1)(c) of the DESD Act.
[48] See page GD11-2.
[49] See *Marcia v Canada (Attorney General),* 2016 FC 1367 at paragraph 34.
[50] See *Karadeolian v Canada (Attorney General)*, 2016 FC 165 at paragraph 10, which recommends doing such a review.