Citation: *MI v Canada Employment Insurance* Commission, 2023 SST 52

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

Applicant:	M. I.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	General Division decision dated November 24, 2022 (GE-22-2999)

Tribunal member:	Neil Nawaz
Decision date:	January 19, 2023
File number:	AD-22-931

Decision

[1] I am refusing the Claimant permission to appeal because she does not have an arguable case. This appeal will not be going forward.

Overview

[2] The Applicant (Claimant) is an Indigenous Canadian who was employed as a transitional-age youth prevention worker at a child and family services agency. On March 11, 2022, she left her job after experiencing what she describes as harassment and discrimination. She applied for Employment Insurance (EI) benefits.

[3] The Canada Employment Insurance Commission (Commission) decided that the Claimant had voluntarily left her job without just cause, so it didn't have to pay her benefits. The Claimant appealed the Commission's decision to the Social Security Tribunal's General Division.

[4] The General Division held a hearing by videoconference and agreed with the Commission. It decided that the Claimant had voluntarily left her job without just cause. It found that, while the Claimant might have had her reasons for leaving her job, they weren't enough to establish just cause under the *Employment Insurance Act*. The General Division also found that the Claimant had reasonable alternatives to leaving when she did.

[5] The Claimant is now seeking permission to appeal the General Division's decision. She alleges that she didn't get a fair hearing because the General Division member who heard her appeal didn't have an Indigenous background. She feels that her case could only have been understood by a person who was familiar with systemic racism, discrimination, and white supremacy. She says that she found it difficult to discuss the complexities of her case with a person who appeared to be of Caucasian descent.

Issue

[6] There are four grounds of appeal to the Appeal Division. A claimant must show that the General Division

- proceeded in a way that was unfair;
- acted beyond its powers or refused to use them;
- interpreted the law incorrectly; or
- based its decision on an important error of fact.[1]

An appeal can proceed only if the Appeal Division first grants leave, or permission, to appeal.[2] At this stage, the Appeal Division must be satisfied that the appeal has a reasonable chance of success.[3] This is a fairly easy test to meet, and it means that a claimant must present at least one arguable case.[4]

[7] I had to decide whether any of the Claimant's reasons for appealing fell within one or more of the above-mentioned grounds of appeal and, if so, whether they raised an arguable case.

Analysis

[8] I have reviewed the General Division's decision, as well as the law and the evidence it used to reach that decision. I have concluded that the Claimant does not have an arguable case.

There is no arguable case that the General Division was biased

[9] The Claimant alleges that the presiding General Division member dismissed her appeal because he did not have the right background to adjudicate issues unique to Indigenous people. In effect, the Claimant is accusing the member of bias.

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[1] See *Department of Employment and Social Development Act* (DESDA), section 58(1).
[2] See DESDA, sections 56(1) and 58(3).
[3] See DESDA, section 58(2).
[4] See *Fancy v Canada (Attorney General)*, 2010 FCA 63.

[10] A biased mind is a closed mind, one that is resistant to reason and evidence. The threshold for a finding of bias is high, and the onus of establishing bias lies with the party alleging its existence. The Supreme Court of Canada has stated that test for bias is: "What would an informed person, viewing the matter realistically and practically and having thought the matter through conclude?"[5]

[11] Given this test, I don't see an arguable case for the Claimant's allegation. The Supreme Court requires a real likelihood of bias to be demonstrated, with mere suspicion not being enough. An unfavourable decision by itself is not a sign of impartiality.

[12] The Claimant alleges that, because the General Division member was not Indigenous, he was not able to appreciate the intricacies of her appeal. However, she has not otherwise offered details about any specific incident indicating bias. I have listened to the recording of the General Division hearing and heard nothing to suggest that the presiding member misunderstood the Claimant's submissions or prejudged her case. In the absence of evidence that the General Division was biased against the Claimant, I don't see a reasonable chance of success for her appeal.

The Claimant implicitly waived her right to argue bias on appeal

[13] There is another reason this appeal cannot succeed: the Claimant did not raise any concerns about bias previously. Before her hearing, the Claimant never asked the General Division to assign her appeal to a member who had an Indigenous background. During the hearing, and in its immediate aftermath, she did not object to the presiding General Division's conduct or say anything to suggest that she doubted the fairness of the process.

[14] The courts have consistently held that a failure to object to perceived procedural unfairness at the earliest opportunity amounts to an implied waiver of the right to appeal such unfairness later. The Federal Court of Appeal has said, "A party who believes that the presiding judge has created a reasonable apprehension of bias must make that

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[5] See *Committee for Justice and Liberty v Canada (National Energy Board)* 1976 2 (SCC), 1978 1 SCR.

position known at the first opportunity. One cannot secretly nurse a reasonable apprehension of bias for the purpose of raising it in the event of an adverse result."[6]

[15] The Claimant was under an obligation to raise concerns about potential bias at the first reasonable opportunity, but she did not do so until her application for permission to appeal. Given my review of the record, I am not satisfied that the appeal has a reasonable chance of success.

Conclusion

[16] For the above reasons, I find that the appeal has no reasonable chance of success.

[17] Permission to appeal is refused.

Neil Nawaz
Member, Appeal Division

[6] See *Bassila v Canada (Attorney General)* 2013 FCA 276. The Federal Court has also found that Claimants implicitly waived their right to appeal faulty language interpretation because they didn't object to it during the hearing or within a reasonable time thereafter. See *Quiroa v Canada (Minister of Citizenship and Immigration)* 2005 FC 271 and *Mohammadian v Canada (Minister of Citizenship and Immigration)*, 2000 CanLII 17118 (FC), [2000] 3 FC 371.