Citation: *LM v Canada Employment Insurance Commission*, 2023 SST 305

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

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

Decision under appeal:	General Division decision dated January 27, 2023 (GE-22-3968)

Tribunal member:	Janet Lew
Decision date:	March 16, 2023
File number:	AD-23-204

Decision

[1] Leave (permission) to appeal is refused. The appeal of the General Division's decision of January 27, 2023 will not be going ahead. The Claimant's appeal of the General Division's decision of October 7, 2022, will be going ahead.

Overview

[2] The Applicant, L. M. (Claimant), is appealing the General Division decision of January 27, 2023. The General Division determined that the Claimant had not met the legal test to enable it to rescind or amend its decision of October 7, 2022.[1]

[3] In its initial decision of October 7, 2022, the General Division determined that the Claimant had been suspended and then dismissed from her employment because of misconduct. She had not complied with her employer's COVID-19 vaccination policy. This meant that she was initially disentitled and then later disqualified from receiving Employment Insurance benefits.[2]

[4] In its decision of January 27, 2023, the General Division found that the Claimant had not shown that there were new facts about a legal issue in her appeal. The General Division also found that the Claimant had not shown that it had made its initial decision without knowing a material fact or that it made a mistake about a material fact in the initial decision.

[5] The Claimant argues that the General Division made jurisdictional, procedural, legal, and factual errors:

a) She questions the member's authority.

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[1] In its earlier decision of October 7, 2022, the General Division determined that the Claimant
[2] The Claimant is also appealing the General Division decision of October 7, 2022, but that decision is not the subject of this application. The hearing of that appeal will be going ahead.

b) She also argues that the General Division member was biased and says that there should have been another member who decided her rescind or amend application.

c) She also argues that the General Division failed to explain why the new evidence she presented with her application did not qualify as "new facts."

d) She argues that the General Division should have accepted the facts and case law that she produced with her rescind or amend application. She says that, while these facts or evidence may have existed at the time of her hearing before the General Division, they remain "new facts" in relation to her appeal.

e) The Claimant also argues that the General Division made errors when it concluded that there was misconduct. She says the General Division should have produced evidence of misconduct.

[6] Before the Claimant can move ahead with her appeal, I have to decide whether the appeal has a reasonable chance of success.[3] Having a reasonable chance of success is the same thing as having an arguable case.[4] If the appeal does not have a reasonable chance of success, this ends the matter.

[7] 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 her appeal of the General Division decision dismissing her rescind or amend application.

Issues

[8] The issues are as follows:

a) Is there an arguable case that the General Division exceeded its authority?

b) Is there an arguable case that the General Division member was biased?

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[3] Under section 58(1) of the *Department of Employment and Social Development Act* (DESD Act), I am required to refuse permission if am satisfied, "that the appeal has no reasonable chance of success."
[4] See *Fancy v Canada (Attorney General)*, 2010 FCA 63.

c) Is there an arguable case that the General Division failed to explain its decision?

d) Is there an arguable case that the General Division misinterpreted what "new facts" means?

e) Is there an arguable case that, in its decision of January 27, 2023, the General Division failed to examine what misconduct means?

I am not giving the Claimant permission to appeal

[9] The Appeal Division must grant permission to appeal unless the appeal has no reasonable chance of success. A reasonable chance of success exists if there is a possible jurisdictional, procedural, legal, or certain type of factual error.[5]

[10] For factual errors, the General Division had to have based its decision on an error that was made in a perverse or capricious manner, or without regard for the evidence before it.

[11] Once an applicant gets permission from the Appeal Division, they move to the actual appeal. There, the Appeal Division decides whether the General Division made an error. If it decides that the General Division made an error, then it decides how to fix that error.

The Claimant does not have an arguable case that the General Division acted without any authority

[12] The Claimant argues that the General Division acted without any authority and says it acted arbitrarily when it decided against rescinding or amending its decision. She cites paragraph 33. There, the General wrote that it could rescind or amend its initial decision if it made a decision without knowledge of a material fact or made a mistake in

[5] See section 58(1) of the DESD Act. For factual errors, the General Division had to have based its decision on an error that was made in a perverse or capricious manner, or without regard for the evidence before it.

the decision in relation to a material fact.[6] She questions where the General Division got its authority to decide when it could rescind or amend its initial decision.

[13] At paragraph 19, the General Division also set out the requirements that have to exist before it can consider whether to rescind or amend its initial decision. The General Division referred to section 66 of the *Department of Employment and Social Development Act* (DESD Act).

[14] Section 66(1)(a) of the DESD Act[7] reads:

> **66.** (1) The Tribunal may rescind or amend a decision given by it in respect of any particular application if
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> (*a*) in the case of a decision relating to the *Employment Insurance Act*, new facts are presented to the Tribunal or the Tribunal is satisfied that the decision was made without knowledge of, or was based on a mistake as to, some material fact.

[15] Clearly, the General Division did not design its own test as to when and under what circumstances it could rescind or amend its initial decision. The General Division cited and applied the test set out in the DESD Act.

[16] I am not satisfied that there is an arguable case that the General Division acted without any authority when it decided what circumstances had to exist for it to rescind or amend its initial decision.

The Claimant does not have an arguable case that the General Division member was biased

[17] The Claimant argues that the General Division member was biased. She claims that the member was necessarily partial as he would naturally want to stand by his

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[6] The General Division also set out these same requirements at paragraph 19.
[7] The section has since been repealed.

original decision. She says that "there is always an element of ego when a human being is involved."[8]

[18] The Federal Court reviewed the case law on the issue of bias in a case called *Murphy v Canada (Attorney General)*.[9] The Court noted that bias is a very serious allegation and that there is a strong presumption of impartiality that cannot be easily rebutted. The Court noted the test set out in *Committee for Justice and Liberty et al v National Energy Board et al*., in determining whether there is actual bias or a reasonable apprehension of bias. There, the Supreme Court of Canada determined that:

> [T]he apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude"[10]

[19] The Federal Court then reviewed the test set out by the Federal Court of Appeal in *Firsov v Canada (Attorney General)*. The test is whether:

> an informed person, viewing the matter realistically and practically—and having thought the matter through--… [would] think that it is more likely than not that the [decision-maker], whether consciously or unconsciously, would not decide fairly: *Yukon Francophone School Board, Education Area #23 v Yukon (Attorney General)*, 2015 SCC 25 at paras 20 to 21, 26.[11]

[20] The Federal Court found that Ms. Murphy had failed to produce any evidence that could meet the high threshold necessary to rebut the presumption of judicial integrity and impartiality. The Court held that the grounds for an apprehension of bias must be substantial and not related to a sensitive conscience.

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[8] See Claimant's Application to the Appeal Division -- Employment Insurance, filed February 13, 2023, at. AD 1-2.
[9] See *Murphy Canada (Attorney General)*, 2023 FC 57.
[10] See *Committee for Justice and Liberty et al v National Energy Board et al,* 1976 CanLII 2 (SCC), [1978] 1 SCR 369 at pages 394 and 395.
[11] See *Firsov v Canada (Attorney General)*, 2022 FCA 191.

[21] The Court acknowledged that Ms. Murphy disagreed with the findings of the Associate Justice in that case. But the Court found that that did not justify an allegation of bias. The Court wrote, "the fact that a [decision-maker] clearly disagrees with and rejects the arguments of an applicant is not, in and of itself, bias."[12]

[22] The Claimant argues that bias arose because it was the same General Division member who decided her initial appeal and he would be naturally inclined to maintain his decision. Otherwise, she says that he would essentially be admitting that he was wrong in the first place.

[23] The Claimant's argument overlooks the fact that the General Division member could change his decision, if the Claimant produced new facts, or if the member became aware of a material fact, or if its earlier decision was based on a mistake as to some material fact.

[24] Apart from this consideration, merely alleging that there had to have been bias because the same member decided her application falls far short of meeting the requirements to show bias or an apprehension of bias. There is nothing in the member's language in his decision that meets the high threshold necessary to meet the test for bias or a reasonable apprehension of bias.

[25] I am not satisfied that the Claimant has an arguable case that the General Division member was biased or that there was a reasonable apprehension of bias. The evidence falls far short of meeting the test.

The Claimant does not have an arguable case that the General Division failed to explain its decision

[26] The Claimant argues that the General Division failed to explain its decision. She writes that she "sent several facts including legal decisions made by the SST … [The General Division] has not given my evidence any merit or consideration. Please show

[12] See *Murphy*, at para 25.

me how you came to this conclusion."[13] She claims that the General Division failed to present any facts or evidence to support its decision.

[27] The General Division listed the documents that the Claimant filed on in support of her application to rescind or amend the initial decision.

[28] The General Division made it clear that an application to rescind or amend was not an opportunity for a claimant to argue or re-argue the issues from the initial decision.

[29] The General Division explained that, if it was going to consider whether to rescind or amend its initial decision, the Claimant had to meet the requirements set out in section 66 of the DESD Act. The General Division set out the requirements. The General Division said the Claimant had to show either:

- New facts that would lead it to decide a legal issue differently, or that
- It had made its decision without knowledge of a material fact, or that it made a mistake about a material fact.

[30] To be "new facts," the General Division found that those facts had to have happened after the General Division made its decision. Or, if the facts had happened before the General Division made its decision, the Claimant had to have been unable to discover them by acting diligently before it made its decision. And finally, the General Division found that the "new facts" had to be decisive of an issue on appeal. This meant those facts had to be so important that they would have changed the decision.

[31] This was the test that the Federal Court of Appeal set out in in a case called *Canada (Attorney General) v Chan*.[14] The General Division cited this test.

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[13] See Claimant's Application to the Appeal Division -- Employment Insurance, filed February 13, 2023, at. AD 1-2.
[14] See *Canada [Attorney General] v Chan*, [1994] F.C.J. No. 1916 at para 10.

[32] The General Division examined whether the Claimant had produced new facts under the first part of this test. It explained why it did not consider the Claimant's documents to be new facts.

- The General Division did not consider documents (a) to (g) to be new facts because they already existed before the General Division made its decision.
- The General Division did not consider documents (h) and (i) to (l) to be "new facts" because they were either case law or commentary on legal developments. Besides, the General Division did not find the documents to be decisive of the outcome in the Claimant's case.
- Finally, the General Division explained why it did not consider the fact that the Claimant worked from home to represent a "new fact." The General Division explained that it had been aware of this when it made its initial decision.

[33] The General Division then turned its focus to the second part of the test that would have allowed it to rescind or amend its initial decision. The General Division was aware of the material fact, and it explained why it did not make a mistake about a material fact either.

[34] The General Division provided a detailed explanation for its decision. For that reason, I am not satisfied that the Claimant has an arguable that the General Division failed to explain its decision.

The Claimant does not have an arguable case that the General Division misinterpreted what "new facts" means

[35] The Claimant argues that the General Division misinterpreted what "new facts" means. She says that her documents still qualify as "new facts" even if they had been in existence before the General Division made its decision. For one thing, she says that even with due diligence, searches on the internet are random and inconsistent. She

says that internet searches can have different results making it challenging to find all the facts even if they exist. She says that "new facts" should mean facts that are new in relation to her hearing.

[36] The courts have defined what "new facts" means. In a case called *Canada (Attorney General) v Hines*,[15] the Federal Court of Appeal adopted the test set out in *Chan*, upon which the General Division relied. The Court of Appeal wrote:

> [14] The test for determining whether "new facts" exist within the meaning of this provision has long been established. It was reiterated in *Canada (Attorney General) v Chan*, [1994] F.C.J. No. 1916, where Décary J.A., referring to the statutory predecessor to section 120 which bears essentially the same language, said (para 10):
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> > … "New facts", for the purpose of the reconsideration of a decision of an umpire sought pursuant to section 86 of the Act, are facts that either happened after the decision was rendered or had happened prior to the decision but could not have been discovered by a claimant acting diligently and in both cases the facts alleged must have been decisive of the issue put to the umpire.
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> > [Court's emphasis]

[37] There Is no support in any of the court cases for the Claimant's definition of "new facts."

[38] As the General Division properly identified and applied the established test for "new facts," I am not satisfied that the Claimant has an arguable case that the General Division misinterpreted what "new facts" means.

The Claimant does not have an arguable case that the General Division failed to examine what misconduct means

[39] The Claimant argues that there was no misconduct in her case. She argues that the General Division misinterpreted what misconduct means in her appeal. So, she says

[15] See *Canada (Attorney General) v Hines*, 2011 FCA 252.

that the General Division should have re-examined whether there was misconduct, even if she did not produce any “new facts.”

[40] The Claimant also says that the General Division should have produced its own evidence and facts to prove that there was misconduct.

[41] The General Division is an independent and impartial decision-maker. It would be highly inappropriate for the General Division to collect its own evidence. It is up to each of the respective parties to collect their own evidence in support of their case.

[42] Besides, as the General Division pointed out, it did not have any authority to re-examine the misconduct issue. It was not relevant to the Claimant’s application to rescind or amend its initial decision.

[43] The General Division’s focus had to be on the nature of the documents that the Claimant produced and whether they fell within the definition of “new facts,” and on whether the General Division did not have knowledge of or had made a mistake about a material fact.

Conclusion

[44] The Claimant does not have an arguable case. Permission to appeal is refused. This means that the appeal of the General Division’s decision of January 27, 2023 will not be going ahead. The Claimant’s appeal of the General Division’s decision of October 7, 2022, will be going ahead.

Janet Lew
Member, Appeal Division