Citation: *Canada Employment Insurance Commission v AL*, 2023 SST 1423

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	Canada Employment Insurance Commission
Representative:	Dani Grandmaître
Respondent:	A. L.
Representative:	Philip Cornish

Decision under appeal:	General Division decision dated December 14, 2022 (GE-22-1889)

Tribunal member:	Pierre Lafontaine
Decision date:	May 17, 2023
File number:	AD-23-13

Decision

[1] The Claimant is asking that I remove myself from hearing the subject appeal.

[2] I am refusing the Claimant's request. She has not proven that there is a reasonable apprehension of bias.

Overview

[3] The Claimant was suspended and dismissed from her job because she did not comply with the employer's COVID-19 vaccination policy. The employer did not grant her an exemption. The Claimant then applied for Employment Insurance (EI) regular benefits.

[4] The Commission determined that the Claimant was suspended and dismissed from her job because of misconduct, so it was not able to pay her benefits. After an unsuccessful reconsideration, the Claimant appealed to the General Division.

[5] On December 14, 2022, the General Division concluded that the Claimant did not lose her job because of misconduct under the *Employment Insurance Act* (EI Act).

[6] On February 2, 2023, I granted the Commission leave to appeal without reasons. On February 7, 2023, the Claimant requested within 10 days that I give written reasons in support of my decision to grant leave to appeal. On February 9, 2023, I gave the reasons in support of my decision.

[7] The Claimant also requested that I recuse myself from hearing the subject appeal. On February 10, 2023, I requested that the parties provide written submissions on this issue before rendering my decision. The parties filed their submissions on time.

[8] On March 13, 2023, I rendered a decision refusing the Claimant's initial request to remove myself from hearing the appeal.

[9] On April 3, 2023, the Claimant verbally reiterated her request, during the case conference that I presided, that I recuse myself from hearing the subject appeal. I declined her request and referred to my decision rendered on March 13, 2023.

[10] On April 12, 2023, the Claimant presented another request that I recuse myself from hearing the appeal. I am refusing the Claimant's request that I recuse myself from hearing the appeal. She has not proven that there is a reasonable apprehension of bias.

Issue

[11] Has the Claimant proven that there is a reasonable apprehension of bias?

Analysis

What is a "reasonable apprehension of bias"?

[12] Tribunal members are presumed to be impartial. There is a high threshold for proving that a tribunal member would not be impartial when deciding an appeal.[1] But, if someone can prove that there is a reasonable apprehension of bias, then a tribunal member should remove themselves from hearing an appeal.

[13] I am going to use the test described by the Supreme Court of Canada as I make my decision. The legal test is this:

"… what would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly."[2]

[14] The Claimant submits that there is a need to revisit my previous recusal decisions based on fresh information deriving from leave to appeal decisions that I have rendered.

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1 *Committee for Justice and Liberty v Canada (National Energy Board)* 1976 2 (SCC), 1978 1 SCR.
2 *Yukon Francophone School Board, Education Area #23 v Yukon (Attorney General)*, [2015] 2 SCR 282 [Yukon Francophone School Board], at para 20.

Leave to appeal decisions that I have rendered.

[15] The Claimant submits that two leave to appeal decisions that I have rendered raise my partiality and/or prejudgment of her case.[3]

[16] In one decision, I denied the applicant leave to appeal because the Claimant's case did not apply to her case considering that she clearly knew that she would be terminated if she was not fully vaccinated or refused to follow the testing rules. I also mentioned in a footnote that the General Division decision rendered in the Claimant's case is contrary to the Appeal Division case law and that the Commission has filed an application for leave to appeal to the Appeal Division.

[17] In the other decision, I denied leave to appeal and mentioned that the Claimant's case was no help to the applicant because the facts were different. Even though the applicant was ruled by a collective agreement, it did not contain a clause that allowed her to refuse any vaccination.

[18] As stated in my first recusal decision, the Appeal Division is dealing with a high volume of files related to the issue of misconduct and vaccination policies. To date, it has issued very few decisions in favor of claimants on this issue. Contrary to the Claimant's representations, many decisions on this issue were also rendered by other Appeal Division members.

[19] I still approach each case with an open mind, free from inappropriate and undue assumptions.

[20] As stated in my first recusal decision, I have in fact granted leave to appeal to claimants that raise the same arguments that the Claimant has successfully raised before the General Division (A collective agreement clause that allows to refuse any vaccination). I have not yet decided those appeals.

[3] *KW v Canada Employment Insurance Commission*, 2023 SST 61 and *ER v Canada Employment Insurance Commission*, 2023 SST 112.

[21] The Federal Court of Appeal as stated that the assertion that judges or tribunals would declare themselves biased simply because they are being asked to reconsider or re-determine a matter on which they have previously expressed a view is difficult to advance.[4] Something much more fundamental must be present to justify a recusal.[5]

[22] In other words, the mere fact that a judge (or member) was involved in an earlier decision on a similar issue, does not, in and of itself, give rise to a reasonable apprehension of bias. To proceed from the assumption that a prior decision on the same issue constitutes a foundation for bias would have serious implications for the administration of justice.

[23] If I were to follow the Claimant's arguments, any judge (or member) that has rendered a prior decision on an issue contrary to the position of a party would be considered partial and having prejudged a case. Administrative tribunal members who hear similar cases each day would need to recuse themselves after expressing a view on other cases. It would also be impossible for the appellate courts to return a case to a judge who had rendered an earlier decision and made adverse findings against a party.

[24] It appears clearly from the Claimant's submissions that she disagrees with my previous decisions related to vaccination policies and my interpretation of the Appeal Division and Federal Court case law related to the issue of misconduct. This does not, in and of itself, constitute grounds for disqualification. The Claimant has not proven that I cannot fairly consider new facts and arguments of law.

[25] I cannot find that this proves that there is a reasonable apprehension of bias.

The Claimant's arguments, considered as a whole

[26] What would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude. Would they think that it is more likely than not that I, whether consciously or unconsciously, would not decide fairly?

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[4] *Oberlander v. Canada (Attorney General)*, 2019 FCA 64.
[5] *Janssen-Ortho Inc. v Apotex Inc.* 2011 FCA 58.

[27] I must reiterate that an allegation of bias is a serious allegation. It challenges the integrity of the Tribunal and of its members. It cannot be done lightly. It cannot rest on mere suspicion, pure conjecture, insinuations or mere impressions of a claimant or their counsel.

[28] I am not convinced that the Claimant has shown that there is a reasonable apprehension of bias.

[29] The Claimant has not demonstrated that my words or actions would lead a reasonable person, informed of the circumstances in this appeal, to agree that I would consciously or unconsciously not decide fairly.

[30] I am therefore refusing the Claimant's request that I remove myself from hearing the appeal.

Conclusion

[31] I am refusing the Claimant's request that I remove myself from hearing the appeal. She has not proven that there is a reasonable apprehension of bias.

Pierre Lafontaine
Member, Appeal Division