Citation: *JK v Canada Employment Insurance Commission*, 2024 SST 1278

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

Applicant:	J. K.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	General Division decision dated October 2, 2024 (GE-24-1324)

Tribunal member:	Janet Lew
Decision date:	October 22, 2024
File number:	AD-24-686

Decision

[1] Leave (permission) to appeal is refused. The appeal will not be going ahead.

Overview

[2] The Applicant, J. K. (Claimant), is seeking leave to appeal the General Division decision of October 2, 2024. The General Division issued two interlocutory decisions, the first on July 3, 2024,[1] and the second on August 27, 2024.[2] This decision is largely about the October 2, 2024, decision. (There are some overlapping issues with the two earlier decisions.)

[3] In its October 2, 2024 decision, the General Division found that:

i. the Claimant's wages were earnings that had to be allocated (assigned) to four weeks of his Employment Insurance claims,

ii. the Respondent, the Canada Employment Insurance Commission (Commission), had reviewed the claims within the allowable time limit,

iii. the Commission had shown that the Claimant had knowingly provided misleading information when he did not declare his work and earnings on his biweekly reports,

iv. the Commission acted judicially when it reviewed the claims, allocated the earnings, imposed a penalty, decided the amount of the penalty, and issued a violation, and

v. the Claimant had not shown that he had enough hours as of December 17, 2023, to qualify for Employment benefits.

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[1] The General Division dismissed the Claimant's application that the General Division member recuse herself from hearing his appeal. See document GD16.

[2] The General Division decided that the Claimant's Amended Notice of Constitutional Question did not meet the requirements of the *Social Security Tribunal Regulations* to raise a constitutional issue before the Social Security Tribunal. The General Division decided that the Claimant's appeal would continue as a regular appeal, without consideration of any constitutional issues.

[4] As a result, the Claimant was left with an overpayment, penalty and violation. The General Division determined that it did not have the power to waive or reduce the amount of the overpayment, penalty, or violation.

[5] The Claimant argues that the General Division made jurisdictional, procedural, legal, and factual errors. In particular, he argues that the General Division member failed to provide him with an opportunity to present his case. He claims that the member had already decided the outcome of his appeal. He also argues that the member failed to apply the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) and indigenous law. He also argues that the member failed to address the issue of Crown reprisal.

[6] Before the Claimant can move ahead with the appeal, I have to decide whether the appeal has a reasonable chance of success.[3] In other words, there has to be an arguable case. If the appeal does not have a reasonable chance of success, this ends the matter.[4]

[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 the appeal.

Issues

[8] The issues are as follows:

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

b) Is there an arguable case that the General Division failed to give the Claimant a chance to present his case?

c) Is there an arguable case that the General Division failed to appoint an *amicus curiae*?

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[3] See *Fancy v Canada (Attorney General)*, 2010 FCA 63.
[4] Under section 58 2) of the *Department of Employment and Social Development* (DESD) *Act*, I am required to refuse permission if I am satisfied "that the appeal has no reasonable chance of success."

d) Is there an arguable case that the General Division failed to apply UNDRIP and indigenous law?

e) Is there an arguable case that the General Division failed to consider the issue of Crown reprisal?

f) Is there an arguable case that the General Division based its decision on an important factual error that it made in a perverse or capricious manner or without regard for the evidence before it?

I am not giving the Claimant permission to appeal

[9] Leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success. A reasonable chance of success exists if the General Division may have made a jurisdictional, procedural, legal, or a certain type of factual error.[5]

[10] For these types of factual errors, the General Division had to have based its decision on an error that it made in a perverse or capricious manner, or without regard for the evidence before it.[6]

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

[11] The Claimant does not have an arguable case that the General Division member was biased.

[12] The Claimant argues that the General Division member had already determined the outcome of his case without hearing the evidence and that she was therefore biased. He did not provide any evidence that the member had predetermined the outcome before the hearing took place.

[5] See section 58(1) of the DESD Act.
[6] See section 58(1)(c) of the DESD Act.

[13] During the General Division hearing, the Claimant also alleged that the General Division member was an agent of the Crown, but there is no evidence that the member was an agent, or that she was anything but an independent decision-maker.

[14] The Supreme Court of Canada set out the test for a reasonable apprehension of bias. It referred to Grandpré J.'s dissenting opinion in the case of *Committee for Justice and Liberty v National Energy Board*:

> [T]hat test is "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."[7]

[15] Merely alleging that the General Division had already decided the outcome does not meet the test set out by the Supreme Court of Canada. Without anything more, it is unlikely that an informed person would think that the General Division member would not decide fairly.

[16] And, as it is, the Claimant did not testify nor make any oral submissions, as he viewed the member as an agent of the Crown. So, it cannot be said that the member failed to take into account the oral evidence before she decided the appeal.

[17] Other than saying the General Division had already determined the outcome, the Claimant does not have anything else to support his claim that the General Division member was biased.

[18] I am not satisfied that there is an arguable case that the General Division member was biased or that there was a reasonable apprehension of bias.

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[7] See *Committee for Justice and Liberty et al., National Energy Board et al*., 1976 CanLII 2 (SCC), [1978] 1 SCR 369.

The Claimant does not have an arguable case that the General Division failed to give him a chance to present his case

[19] The Claimant does not have an arguable case that the General Division failed to give him a chance to present his case.

- **The Claimant says the General Division member would not allow him to speak**

[20] The Claimant argues that the General Division member would not allow him to speak and present his case.

[21] The hearing lasted less than 10 minutes. None of the substantive issues, such as the allocation or the matter of the sufficiency of earnings, were addressed.

[22] The General Division member gave the Claimant several opportunities to give evidence and address these issues. But the Claimant did not respect the member's July 3, 2024 decision that she recuse herself from hearing the appeal. He remained of the view that the member should not hear the appeal. He determined that she was an agent of the Crown and was biased. So, he was unprepared to give evidence.

[23] The Claimant also challenged the General Division decision of August 27, 2024. He maintained that he wanted to proceed with a constitutional challenge. He stated that the Crown had committed retaliation. He was of the position that the General Division member should recuse herself from hearing any of this information. The member reminded the Claimant that she had already issued a decision on his request that he recuse herself and that she remained seized of the matter.

[24] The General Division member asked the Claimant how he wished to proceed. She advised the Claimant that she would be making a decision on the two reconsideration decisions that the Commission had made, regarding allocation and whether he had sufficient hours to qualify for Employment Insurance benefits.[8]

[8] At approximately 4:00 of the audio recording of General Division hearing on October 1, 2024.

[25] The Claimant advised that he wanted an *amicus curiae* (friend of the court) appointed to represent him. The General Division member responded to him that the Social Security Tribunal (Tribunal) does not appoint *amicus curiae* or representatives for parties, but that he was free to arrange to have his own representative. His response on the audio recording is illegible.

[26] The member again asked the Claimant how he wished to proceed. The Claimant responded to the member that she was mistaken, and that the Tribunal does indeed appoint *amici curiae*. The member again informed the Claimant that the Tribunal does not appoint *amici curiae* or representatives for parties and asked him how he wished to proceed and whether he wanted to address any of the issues.

[27] The Claimant responded:

> It doesn't matter how we proceed. I've already given the facts. The fact is that the Crown has conducted highly discriminatory behaviour ... has refused to communicate and it wouldn't matter what I would provide. I don't think the Crown … we're going to end up here in Federal Court. Your people when we raise constitutional question, laughed [illegible] … and she basically discriminated against your own tribunal basically. I feel discriminated against this issue. So I can't come into a hearing presenting information to a Tribunal that I've asked to recuse themselves. You wouldn't recuse yourself and then you guys are basically the Crown's agents here. How can we trust that you would do a right decision? We can't. So something has to be put in place that by your tribunal. So you're going to have to go back to your tribunal and figure out a way to resolve this because at no point in time should you be on this hearing.
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> …
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> At this point in time, you should not be overhearing this hearing. You should have been recused.
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> …
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> And that request should have been brought to another member and not yourself.
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> How can you deny your request to have your own self recused?
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> …

> You are completely wasting my time and you are all doing it purposely for the benefit of the Crown who's already acted in a discriminatory behaviour, so how we can trust any word that you're doing? We can't.[9]

[28] At that point, the General Division member determined that there was no further need to continue the hearing. She announced that she would be issuing a decision on the appeal. The Claimant suggested that she had already predetermined the outcome. The member assured the Claimant that she had yet to make a decision. The Claimant was unpersuaded by the member's assurances and suggested that the Crown had already given her directions as to how to decide.

[29] The member invited the Claimant to provide anything further and to give evidence, but the Claimant responded that the member was wasting his time and that he wished to speak to someone "that is above [her] because at this point in time, [she was] completely wasting [his] time."[10] He advised the member that he would be contacting the Commissioner and seeking to have her removed. He told the member that she had no right to judge on the issue or to be on the issue.

[30] The member persisted in asking the Claimant whether he had any evidence that he wished to give.[11] The Claimant stated that he had oral evidence to give, "none of which will make a difference in what [she was to] decide because what you decided was decided from day one because the Crown is instructing you. And there is nothing at this point that I will be able to say or do to say otherwise."[12]

[31] The member asked the Claimant whether he wished to present that evidence specific to the issues.[13] He responded that he wanted to present his evidence to the Tribunal as a whole, as she was "Obviously not the person … the problem was that [you] refused to recuse [herself], under the instruction of the Crown, and [she was] their handler."[14]

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[9] At approximately 5:33 to 8:00 of the audio recording of General Division hearing on October 1, 2024.
[10] At approximately 8:42 of the audio recording of General Division hearing on October 1, 2024.
[11] At approximately 9:40 of the audio recording of General Division hearing on October 1, 2024
[12] At approximately 9:45 to 10:03 of the audio recording of General Division hearing on October 1, 2024
[13] At approximately 10:04 to 10:28 of the audio recording of General Division hearing on October 1, 2024
[14] At approximately 10:15 of the audio recording of General Division hearing on October 1, 2024

[32] Contrary to what the Claimant says, I do not see anything from the General Division hearing that suggests the member would not allow the Claimant to speak. The member asked the Claimant a few times how he wished to proceed, and whether he had any evidence to give. But the Claimant found the process a waste of time and was unprepared to testify before that particular member.

[33] The General Division member ensured that the Claimant knew that she would be making a decision on his appeal, and again invited the Claimant to give evidence.

[34] The Claimant chose not to give evidence or to present his case at the General Division hearing, despite the numerous opportunities that the General Division member gave him. He cannot now claim that the member did not allow him to speak on his appeal.

[35] Further, although the Claimant decided against testifying at the General Division hearing, he also had the chance to file any supporting records and to make written submissions.

[36] The Claimant asked for an indigenous tribunal (member) but appeals of reconsideration decisions under the *Employment Insurance Act* are made to the Social Security Tribunal.[15] So, a member of the General Division necessarily had to hear his appeal.

[37] I am not satisfied that there is an arguable case that the General Division member did not allow the Claimant to speak at the hearing.

[15] See section 113 of the *Employment Insurance Act*.

- **The Claimant asked for the appointment of an *amicus curiae***

[38] In terms of being able to present his case, there is some suggestion that the Claimant wanted a representative, which I understand to mean that without one, he was unable to present his case. But this seems to be limited to asking the Tribunal to appoint an *amicus curiae*. When the General Division member informed the Claimant that the Tribunal does not appoint *amici curiae* or representatives for parties, the Claimant did not seek an adjournment of the hearing or suggest that he would take any steps to secure a representative.

[39] Even if the Claimant had sought an adjournment, there is no absolute right to an adjournment to retain legal counsel.[16] Granting an adjournment is a discretionary matter. Even if there had been an adjournment, there is no indication that the Claimant would have sought a representative. Indeed, the Claimant does not suggest that he has attempted to find a representative or that he intends to find one, short of asking the Tribunal to appoint an *amicus curiae*.

[40] There is no suggestion from the Claimant either that he would have accepted the jurisdiction and authority of the General Division member to hear the Claimant's appeal even if he had a representative.

[41] I am not satisfied that there is an arguable case that the General Division member did not give the Claimant a fair chance to present his case because he did not have a representative.

The Claimant does not have an arguable case that the General Division member failed to appoint an *amicus curiae*

[42] The Claimant does not have an arguable case that the General Division made a jurisdictional error by failing to appoint an *amicus curiae* to represent him.

[16] See *Grier v Canada (Attorney General)*, 2017 FCA 129.

[43] Courts may appoint an *amicus curiae* to assist them in exceptional circumstances, but this power to appoint arises from the court's inherent jurisdiction. The Tribunal does not have an inherent jurisdiction to make such appointments.

[44] The Claimant argued at the General Division hearing that the Tribunal has such a power, but he has not pointed to any authorities to support his arguments.

[45] The Claimant continues to ask the Tribunal to appoint an *amicus curiae*, but the Appeal Division also does not have such an authority to do so.

[46] I am not satisfied that there is an arguable case that the General Division made a jurisdictional error regarding its powers to appoint an *amicus curiae*.

The Claimant does not have an arguable case that the General Division failed to apply UNDRIP and indigenous law

[47] The Claimant does not have an arguable case that the General Division failed to apply UNDRIP and indigenous law.

[48] The General Division addressed the Claimant's arguments on this issue at paragraphs 70, 80, and 82. The General Division noted that the Claimant argued that the Commission had discriminated against him because it failed to uphold UNDRIP. He argued that the government should compensate him over stolen territory. He also argued that UNDRIP prevented the Crown from refusing to pay him Employment Insurance benefits.

[49] The General Division found that the Tribunal's interpretation of the law should be consistent with UNDRIP. However, it found that UNDRIP did not confer additional powers on the Tribunal to address the Claimant's arguments. The General Division also found that UNDRIP was not a relevant factor when considering a penalty amount for any misrepresentations knowingly made on Employment Insurance claims.

[50] The Claimant argues that UNDRIP and indigenous law applied in his case. He argues that the General Division failed to apply them. However, he did not set out how UNDRIP or indigenous law applies or is relevant in cases involving allocation of

earnings or when calculating whether a claimant has sufficient earnings to qualify for Employment Insurance benefits. He did not refer to any authorities to support his claims that the General Division made an error when it determined that UNDRIP did not confer any additional powers on the Tribunal or that it was relevant to the allocation, misrepresentation, or earnings issues.

[51] It is insufficient to simply argue that the General Division failed to apply UNDRIP or indigenous law or failed to interpret the *Employment Insurance Act* in a manner consistent with UNDRIP without providing any supporting submissions as to how they applied. I am not satisfied that there is an arguable case that the General Division failed to apply UNDRIP and indigenous law.

The Claimant does not have an arguable case that the General Division failed to consider Crown reprisal

[52] The Claimant does not have an arguable case that the General Division failed to consider Crown reprisal. It is unclear how the issue of any Crown reprisals is relevant to the issues of allocation of earnings and sufficiency of earnings. The Claimant has not provided any supporting arguments on this point. I am not satisfied that the appeal has a reasonable chance of success on this issue.

The Claimant does not have an arguable case that the General Division made a factual error

[53] The Claimant does not have an arguable case that the General Division based its decision on a factual error that it made in a perverse or capricious manner or without regard for the material before it.

[54] In completing the application form requesting leave to appeal, the Claimant checked off the box, “The General Division made an important error of fact,” to explain why he was seeking permission to appeal. However, he did not identify any specific factual error that the General Division might have made.

[55] As the Federal Court recently said, "Absent any particulars, these bald assertions [have] no reasonable chance of success."[17]

Conclusion

[56] The appeal does not have a reasonable chance of success. Permission to appeal is refused. This means that the appeal will not be going ahead.

Janet Lew
Member, Appeal Division

[17] See *Twardowski v Canada (Attorney General)*, 2024 FC 1326 at para 28.