



Citation: *DW v Minister of Employment and Social Development*, 2023 SST 579

## Social Security Tribunal of Canada Appeal Division

# Decision

**Appellant:** D. W.

**Respondent:** Minister of Employment and Social Development  
**Representative:** Viola Herbert

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**Decision under appeal:** General Division decision dated October 18, 2022  
(GP-21-1292)

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**Tribunal member:** Neil Nawaz

**Type of hearing:** Teleconference

**Hearing date:** April 18, 2023

**Hearing participants:** Appellant  
Respondent's representative

**Decision date:** May 4, 2023

**File number:** AD-23-78

## Decision

[1] The appeal is dismissed. The General Division did not make any errors when it found that the Appellant was not entitled to the Guaranteed Income Supplement (GIS) in 2019–20.

## Overview

[2] The Appellant is an Old Age Security pensioner. In March 2019, he applied for the GIS for the payment period from July 1, 2019, to June 30, 2020. The Minister denied the application because the Appellant's assessed income from 2018 was too high. It was high in part because the Appellant had cashed in a locked-in retirement account (LIRA) that year, giving him an additional \$13,664 in income that he wouldn't have otherwise had.

[3] The Appellant said that his LIRA income was a one-time occurrence that should not have been used to assess his entitlement to the GIS. He appealed the Minister's denial to this Tribunal's General Division, which forwarded the appeal to the Tax Court of Canada.<sup>1</sup> On August 31, 2022, the Tax Court decided that the Minister had appropriately used the Appellant's LIRA income to estimate his 2019 income.<sup>2</sup>

[4] After receiving the Tax Court's decision, the General Division resumed its proceedings. It sent the Appellant a letter notifying him that it intended to summarily dismiss his appeal. After receiving further submissions from the parties, the General Division did just that. It found that that, after the Tax Court ruling, there were no more issues for it to decide.

[5] The Appellant appealed the General Division's summary dismissal to the Tribunal's Appeal Division. He argued that the General Division made the following errors:

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<sup>1</sup> Under section 28(2) of the *Old Age Security Act*, only the Tax Court can decide how the Minister should treat income.

<sup>2</sup> See Tax Court of Canada judgment, docket number 2021-2088 (OAS), GD3-2.

- It displayed bias by deciding his appeal without a hearing;
- It failed to recognize the extenuating circumstances that explained his high income in 2018; and
- It ignored inconsistencies in how the government treats LIRA income versus other forms of income such as the Canada Emergency Relief Benefit (CERB).

[6] Last month, I held a hearing by teleconference to discuss the Appellant's allegations in full.

## **Preliminary Matter**

[7] On December 5, 2022, the rules governing the appeals to the Social Security Tribunal were changed. Among other things, the changes eliminated the General Division's ability to summarily dismiss appeals.

[8] The law contains transitional provisions for summary dismissals made under the old rules. Under these provisions, appeals of summary dismissals must be brought within 90 days after the new rules came into force, but the Appeal Division must deal with those appeals under the old rules.<sup>3</sup> That means the Appellant doesn't need to get permission to appeal the General Division's summary dismissal.<sup>4</sup> It also means the Appellant's hearing at the Appeal Division was not about whether his GIS claim had merit but about whether the General Division made an error under specific grounds of appeal.

[9] Under the old rules, there were four grounds of appeal to the Appeal Division. An appellant had to 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

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<sup>3</sup> See section 240 of the *Department of Employment and Social Development Act* (DESDA).

<sup>4</sup> Under section 53(3) of the old DESDA, there was an appeal as of right when the matter dealt with a summary dismissal from the General Division.

- based its decision on an important error of fact.<sup>5</sup>

[10] To succeed, the Appellant had to show that the General Division made an error under one or more of the above grounds of appeal.

## Issues

[11] In this appeal, I had to answer the following questions:

- Did the General Division display bias?
- Did the General Division apply the correct test for summary dismissal?
- Did the General Division make an error that fell one or more of the grounds of appeal?

## Analysis

[12] 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 General Division did not make any errors.

### **The General Division did not display bias**

[13] The Appellant alleges that the General Division was biased. He points to the fact that the General Division disposed of his appeal without holding an oral hearing. In his view, that suggests that the General Division did not give his appeal due consideration.

[14] I don't see an arguable case here. The General Division summarily dismissed the Appellant's appeal, but that doesn't mean it was biased. It only means that his appeal was almost entirely without merit.

[15] Bias suggests a closed mind that is predisposed to a particular result. Proving bias is difficult, and the burden of proof lies with the party alleging its existence.

[16] The Supreme Court of Canada has stated the test for bias as follows: "What would an informed person, viewing the matter realistically and practically and having

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<sup>5</sup> See DESDA, section 58(1), as it read before December 5, 2022.

thought the matter through conclude?”<sup>6</sup> An allegation of bias cannot rest on mere suspicion, pure conjecture, insinuations, or mere impressions.<sup>7</sup>

[17] As we will see, the law gives the General Division the authority to summarily dismiss an appeal if it has no reasonable chance of success. In this case, General Division proceeded in the absence of an oral hearing, not because it was predisposed against the Appellant, but because the key issue had already been decided by the Tax Court. For that reason, the General Division could not be reasonably accused of bias.

### **The General Division applied the correct test for summary dismissal**

[18] The General Division disposed of the Appellant’s appeal in the appropriate way. In its decision, the General Division correctly stated that it could summarily dismiss an appeal if it had no reasonable chance of success.<sup>8</sup> I am satisfied that the General Division understood the legal test and properly applied it to the facts.

[19] The threshold for summary dismissal is high.<sup>9</sup> It is not enough to consider the merits of a case in the parties’ absence and then find that the appeal cannot succeed. A decision-maker must determine whether it is **plain and obvious** on the record that the appeal is bound to fail.<sup>10</sup> The question is **not** whether the decision-maker must dismiss the appeal after giving full consideration to the facts, the case law, and the parties’ arguments. Rather, the question is whether the appeal is **destined to fail**, regardless of whatever evidence or arguments might be submitted at a hearing.

[20] From the beginning of this proceeding, the only issue of substance has been the amount of income used to calculate the Appellant’s GIS for the 2019–20 payment period. The Tax Court conclusively answered this question, leaving nothing of consequence for the General Division to resolve.

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<sup>6</sup> See *Committee for Justice and Liberty v National Energy Board*, 1976 CanLII 2 (SCC), [1978] 1 SCR 369.

<sup>7</sup> See *Arthur v Canada (Attorney General)*, 2001 FCA 223.

<sup>8</sup> See General Division decision, paragraph 9, citing the former DESDA section 53(1).

<sup>9</sup> See *Lessard-Gauvin v Canada (Attorney General)*, 2013 FCA 147; *Sellathurai v Canada (Public Safety and Emergency Preparedness)*, 2011 FCA 1; *Breslaw v Canada (Attorney General)*, 2004 FCA 264.

<sup>10</sup> See *Fancy v Canada (Attorney General)*, 2010 FCA 63.

[21] In dismissing the Appellant's appeal, the General Division correctly applied a high threshold, concluding that the appeal had "no reasonable chance of success." For reasons that I will explain in more detail, it was plain and obvious on the record that the Appellant was bound to fail.

### **The General Division did not make an error in coming to its decision**

[22] The General Division's disposition of this appeal depended on whether there were any outstanding issues of merit after the Tax Court issued its ruling. In my view, there were none.

#### **– The General Division did not misinterpret the Tax Court's decision**

[23] The Claimant suggests that the General Division misinterpreted the Tax Court's judgment. I have to disagree.

[24] Under section 28(2) of the *Old Age Security Act* (OAS Act), the Tax court, and not the Tribunal, has jurisdiction over issues relating to the source and calculation of income used to determine eligibility for benefits. In this case, the Tax Court made a specific determination of the Appellant's income to assess his GIS. In doing so, it considered the same argument — that the proceeds from his LIRA should not have been included in regular income — on which the Appellant based his appeal to the General Division.

[25] Having reviewed the Appellant's submissions, the General Division determined that the Tax Court had definitively resolved the issue of what constituted his income for the 2019–20 GIS payment period. The General Division concluded — correctly, in my view — that the matter was beyond its jurisdiction.

[26] The Appellant has now presented essentially the same arguments to the Appeal Division. This is not a forum that ordinarily rehears cases on their merits. My authority as an Appeal Division member permits me to determine only whether any of an appellant's reasons for appealing fall within the specified grounds of appeal. In this case, I don't see an error that would warrant intervention.

– **The General Division could not take into account extenuating circumstances**

[27] The Appellant regards the General Division's decision as unjust. He says that he depends on the GIS for his living expenses. He claims that the proceeds from his LIRA would have been released in 2017, rather than 2018, if his bank had not taken so long to close his account. He wonders why his LIRA proceeds were included in his income for the purpose of calculating the GIS, whereas other benefits, such as the CERB, are excluded.

[28] However much I sympathize with the Appellant, I see no recourse available to him under the law. The General Division was bound to follow the OAS Act to the letter, and so is the Appeal Division. We are not permitted to consider extenuating circumstances such as the Appellant's financial need or evidence that his bank's negligence forced him to report income in the wrong year. The Tax Court ruled on the Appellant's income for 2018, and the General Division rightly determined that there were no other arguable issues left.

[29] As for the CERB, I have no evidence that it is in fact excluded from GIS calculations. Even if it is, I can't consider whether that's fair. Parliament has enacted laws to determine how the GIS is calculated, and it's not for me to second-guess the wisdom of those laws. My only job is to interpret and apply them.

[30] Under the rules governing this Tribunal, I lack the discretionary authority to simply order what, in my opinion, might be fair. This reality is reflected in cases such as *Tucker* and *Esler*, which have held that an administrative tribunal is not a court but a statutory decision-maker and therefore not empowered to provide any form of equitable relief.<sup>11</sup>

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<sup>11</sup> *Canada (Minister of Human Resources Development) v. Tucker*, 2003 FCA 278 and *Canada (Minister of Human Resources Development) v Esler*, 2004 FC 1567.

## Conclusion

[31] The General Division did not commit an error that falls within the permitted grounds of appeal. From what I can see, it proceeded fairly and applied the law correctly. Its decision stands.

[32] The appeal is therefore dismissed.



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Member, Appeal Division