



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *S. S. v. Minister of Employment and Social Development*, 2016 SSTADIS 105

Tribunal File Number: AD-15-228

BETWEEN:

S. S.

Appellant

and

**Minister of Employment and Social Development
(formerly known as the Minister of Human Resources and Skills
Development)**

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Valerie Hazlett Parker

HEARD ON February 26, 2016 and February 29, 2016

DATE OF DECISION: March 8, 2016

REASONS AND DECISION

PERSONS IN ATTENDANCE

| | |
|----------------------------|------------------|
| Counsel for the Appellant | Ron Dumonceaux |
| Counsel for the Respondent | Hasan Junaid |
| Observer | Veronica Walters |

PRELIMINARY MATTERS

[1] This matter was originally scheduled to be heard on February 26, 2016. Approximately ten days prior to this date counsel for the Respondent filed an Addendum to its written submissions and sent a copy to the Appellant's counsel. Counsel for the Appellant did not receive this document prior to the hearing. He advised that his office had moved. Although he did not provide the Tribunal with a notice of change of address, he had done so with Canada Post. Upon learning that an Addendum had been filed, he requested a recess to try to find the materials, then an adjournment to receive and consider this before making oral argument in this matter.

[2] Counsel for the Respondent objected to any adjournment being granted. He relied on section 11 of the *Social Security Tribunal Regulations* (reproduced in the Appendix to this decision) to support his argument that the matter must proceed as the hearing had already been adjourned at the Appellant's request.

[3] It was in the interest of justice to permit a short adjournment in this matter. The Addendum was filed with the Tribunal only shortly before the scheduled hearing date. Counsel for both parties should have an opportunity to consider and respond to all legal arguments presented in this matter. In addition, the videoconference audio equipment was not working well, which caused some disruption to the hearing. The hearing was adjourned to February 29, 2016 and concluded on that date.

[4] Counsel for the Appellant also advised that the Appellant would not be attending the hearing on February 26, 2016. He had just received a medical letter from the Appellant that stated that he could not do so for medical reasons. Counsel also advised on February 29, 2016 that the Appellant would not attend the hearing on that date. Counsel had instructions from the Appellant to proceed in his absence.

INTRODUCTION

[5] The Appellant applied for a *Canada Pension Plan* disability pension. The Respondent granted this application, and began to pay the disability pension to him in October 1994. After a later investigation, the Respondent decided that the Appellant ceased to be disabled and suspended payment of the disability pension to him as of February 2000. The Appellant appealed this decision to the Office of the Commissioner of Review Tribunals. The matter was not heard prior to April 1, 2013 as the Appellant requested a number of adjournments of the hearing. On April 1, 2013 the appeal was transferred to the General Division of the Social Security Tribunal pursuant to the *Jobs, Growth and Long-term Prosperity Act*. The General Division initially scheduled a hearing in October 2014. This was adjourned to January 26, 2015 at the Appellant's request.

[6] The Appellant requested that the January 2015 hearing date also be adjourned. The General Division refused this request, and proceeded with the hearing in the Appellant's absence. The General Division dismissed the appeal.

[7] On May 11, 2015 the Appellant was granted leave to appeal the General Division decision to the Appeal Division of the Tribunal. He argued that the General Division did not observe the principles of natural justice when it refused his request for a further adjournment, as it denied him the ability to present his case to the General Division. In contrast, the Respondent argued that the General Division observed the principles of natural justice and acted in accordance with the *Social Security Tribunal Regulations* when it proceeded with the hearing in January 2015.

[8] This appeal proceeded by videoconference after considering the following:

- a) The complexity of the issues under appeal;

- b) The information in the file, including the need for additional information;
- c) The fact that the Appellant and other party was represented; and
- d) The availability of videoconferencing in the area where the Appellant resides and his representative works.

ANALYSIS

[9] The *Department of Employment and Social Development Act* governs the operation of the Tribunal. Subsection 58(1) of the Act provides that the only grounds of appeal are that:

- a) the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;
- b) the General Division erred in law in making its decision, whether or not the error appears on the face of the record; or
- c) the General Division based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

[10] I must therefore decide if the General Division erred as set out in section 58 such that its decision cannot stand.

[11] Counsel for the Appellant argued that not granting the second adjournment of the General Division hearing was a breach of fundamental justice. He relied on the decision of the Supreme Court of Canada in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817. This decision stated clearly that a decision that affects the rights, privileges or interests of an individual is sufficient to trigger the application of the duty of fairness which is part of the principles of natural justice. The concept of procedural fairness is, however, variable and its content is to be decided in the specific context of each case. This decision then lists a number of factors that may be considered to determine what the duty of fairness requires in a particular case. They include the nature of the decision being made and the process followed in making it, the nature of the statutory scheme and the terms of the statute in question, the importance of the decision to the individual affected, the legitimate expectations

of the person challenging the decision, and the choices of procedure made by the agency itself, particularly when the legislation gives the decision-maker the ability to choose its own procedure.

[12] Counsel contended that the nature of the decision and the process for this at issue in the matter at hand was such that by not granting the adjournment, the hearing was converted from an oral hearing to a “paper hearing”, which resulted in the Appellant not being able to respond to the case against him. He argued that it was clear that the Appellant intended to respond to the Respondent’s case but was prevented from doing so when the adjournment was not granted to him.

[13] In addition, counsel argued that although the Tribunal is to decide matters in a fast and cost-effective manner, and that this matter had been prolonged by a number of adjournments requested by the Appellant, the nature of the claims before the Tribunal are such that delays are to be expected, and there was no prejudice to either party in delaying this matter as the Appellant had not been receiving any disability pension income from the Respondent for a number of years. If he did not succeed on the appeal therefore no repayment would be necessary; if he did not succeed the Respondent would not owe him any money.

[14] Counsel further submitted that the importance of this matter is self-evident, and that the Appellant’s legitimate expectations to answer the case against him were breached as he did not receive an oral hearing. He contended that this breach of natural justice was an exceptional circumstance such that not granting an adjournment was a reviewable error.

[15] Finally, counsel for the Appellant argued that the General Division did not turn its mind to whether not granting an adjournment was a breach of natural justice and this in itself was also a reviewable error.

[16] I agree that in this case the Appellant was owed a duty of procedural fairness by the Tribunal. The *Baker* factors were also relevant to decide what that duty included in this case. For the reasons set out below I am not persuaded that the General Division breached any such duty to the Appellant. His claim for a disability pension was accepted by the Respondent, and paid to him for a period of time. When the Respondent subsequently investigated the matter,

the Appellant was notified. He was also notified of the Respondent's decision to terminate his disability pension, and exercised his right to appeal this decision.

[17] During the appeal process, the Appellant was granted a number of adjournments by the Office of the Commissioner of Review Tribunals for medical and other reasons. The appeal was then transferred to the Social Security Tribunal. The General Division of the Tribunal again granted the Appellant an adjournment of the hearing so that he could retain another representative. The adjournment was a lengthy one, to accommodate the Appellant's request for a period of ten weeks to retain a representative.

[18] The Social Security Tribunal is constrained by the *Department of Employment and Social Development Act* which governs its operation, and by the *Social Security Tribunal Regulations*. These Regulations are clear that only one adjournment of a hearing is to be granted, unless exceptional circumstances are found. In this case, the General Division did not find that there were exceptional circumstances, and the reasons for reaching this decision are set out clearly in the decision. Counsel for the Respondent was correct that without such circumstances being found, the General Division was mandated to conduct the hearing in January 2015 as clearly the Appellant had received notice of it.

[19] The Appellant was not prevented from presenting his case or meeting the case against him. The General Division notified him that the January 2015 hearing date would not be adjourned when he first requested the adjournment to continue to try to retain a representative. Despite this, the Appellant again asked for an adjournment, this time for medical reasons. The Appellant had communicated with the Tribunal in writing. He could have continued to do so. The Respondent's legal position had been presented to him long before the hearing date set by the Tribunal, originally for October 2014 and adjourned to January 2015. He therefore knew the case against him and had been afforded plenty of time to respond to it.

[20] I also note that the Tribunal is not required to afford each claimant an oral hearing of their matter, but may also decide cases based on the written record, or by written questions and answers. This weakens the Appellant's assertion that the principles of natural justice were not observed because his matter was decided based on the written materials.

[21] Further, while delays in disability pension claims may be expected due to the nature of the claims, this must have been in the mind of Parliament when it enacted the Act and the Regulations that govern the Tribunal, and contain the specific wording that precludes numerous adjournments of cases.

[22] Counsel for the Appellant also argued that the fact that the General Division decision did not refer to the principles of natural justice or procedural fairness in refusing to grant the adjournment demonstrated that it had not turned its mind to this, which was a breach of these principles. I disagree. It is not necessary for the General Division to refer specifically to each and every argument that could be raised in a proceeding before it (*Simpson v. Canada (Attorney General)*, 2012 FCA 82). In addition, the Appellant did not raise this as an issue before the General Division. The General Division cannot be expected to anticipate what arguments might be raised on an appeal from its decision, and to consider and decide all such issues prior to them being raised.

CONCLUSION

[23] The appeal is dismissed. I am not satisfied, for the reasons set out above, that the General Division failed to observe the principles of natural justice in this case.

Valerie Hazlett Parker
Member, Appeal Division

APPENDIX

Social Security Tribunal Regulations

11 (1) A party may request that a hearing be adjourned or postponed by filing a request, with supporting reasons, with the Tribunal.

(2) If the Tribunal grants an adjournment or postponement at the request of a party, the Tribunal must not grant the party a subsequent adjournment or postponement unless the party establishes that it is justified by exceptional circumstances.

12 (1) If a party fails to appear at a hearing, the Tribunal may proceed in the party's absence if the Tribunal is satisfied that the party received notice of the hearing.

(2) The Tribunal must proceed in a party's absence if the Tribunal previously granted an adjournment or postponement at the request of the party and the Tribunal is satisfied that the party received notice of the hearing.