Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

Citation: *L. W. v Minister of Employment and Social Development*, 2019 SST 158

Tribunal File Number: AD-18-430

BETWEEN:

L. W.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Kate Sellar

DATE OF DECISION: February 22, 2019

DECISION AND REASONS

DECISION

[1] The appeal is allowed. The matter is referred back to the General Division for reconsideration by a different member.

OVERVIEW

[2] L. W. (Claimant) began working for X in 1984 when he was 21 years old. After 28 years with the same employer, he injured his back and received long-term disability benefits. The Claimant has degenerative disc disease of the lumbar spine and osteoarthritis in his right hip. He was discharged from a rehabilitation program because he was not progressing and reported worsening pain in his right hip. He did not return to work. He says that his treatment team advises him to wait as long as possible before having hip replacement surgery because of his relatively young age.

[3] The Claimant applied for a disability pension under the *Canada Pension Plan*, and the Minister denied his application both initially and upon reconsideration. The General Division of this Tribunal dismissed his appeal on April 8, 2018. The Appeal Division granted leave to appeal, finding that there was an arguable case that the General Division failed to observe a principle of natural justice. The Appeal Division must decide whether it is more likely than not that the General Division made an error under the *Department of Employment and Social Development Act* (DESDA) and, if it did, how the Appeal Division will remedy that error.

[4] The Appeal Division finds that the General Division made an error by failing to observe a principle of natural justice. The Appeal Division will return the matter to the General Division for reconsideration by a different member.

ISSUES

[5] The issues are:

1. Should the Appeal Division consider implying waiver when an appellant does not raise a natural justice allegation at the General Division first?

2. If the Appeal Division should consider implying a waiver when the appellant does not raise a natural justice allegation at the General Division first, should the Appeal Division imply waiver in this case?

3. Did the General Division member fail to observe a principle of natural justice by making comments during the hearing that raised a reasonable apprehension of bias?

ANALYSIS

Appeal Division Review of General Division Decisions

[6] The appellant must establish on a balance of probabilities that the General Division made an error under the DESDA. The errors in the DESDA are referred to as the "grounds of appeal." One of the grounds of appeal listed in the DESDA occurs when the General Division fails to observe a principle of natural justice.[1]

Implied waiver and its purpose

[7] The Federal Court of Appeal has stated that allegations of bias and unfairness must be raised at the earliest practical opportunity: "allegations of bias and procedural unfairness in a first-instance forum cannot be raised on appeal or judicial review if they could reasonably have been the subject of timely objection in the first-instance forum."[2] The Federal Court has concluded that the earliest practical opportunity arises when a person is aware of the relevant information and it is reasonable to expect them to raise the objection.[3] If the person making the allegation of bias or unfairness does not raise an objection, then that person is assumed to have waived the right to argue that the error occurred.[4] This is referred to as "implied waiver."

[8] The justification for applying the concept of implied waiver is that it gives the first instance decision-maker a chance to address the matter before any harm is done, or to try to

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[1] DESDA, s 58(1)(a).
[2] *Hennessey v Canada*, 2016 FCA 180 at para 20.
[3] *Benitez v Canada (Minister of Citizenship and Immigration)*, 2006 FC 461 at para 220; affirmed 2007 FCA 199.
[4] *Benitez v Canada (Minister of Citizenship and Immigration)*, 2006 FC 461.

repair any harm or explain themself. The Federal Court has described this as "judicial economy":[5]

> There is a powerful argument in favour of such a requirement arising from judicial economy. If applicants are permitted to obtain judicial review of adverse decisions by remaining silent in the face of known problems of interpretation, they will remain silent. This will result in a duplication of hearings. It seems a better policy to provide an incentive to make the original hearing as fair as possible and to avoid repetitious proceedings. Applicants should be required to complain at the first opportunity when it is reasonable to expect them to do so.

[9] This is consistent with the idea that appellants should not be able to stay silent or "stay still in the weeds" and then "pounce" by raising issues of natural justice only when they lose cases.[6]

Issue 1: Should the Appeal Division consider implying waiver when an appellant does not raise a natural justice allegation at the General Division first?

[10] There are several reasons why the Appeal Division should not consider implying waiver simply because an appellant raises that issue for the first time at the Appeal Division level. Given the nature of the Tribunal, the work that it does, and the people it serves, the Appeal Division's use of implied waiver creates an unacceptable barrier to access to justice for claimants. The DESDA does not mention the Appeal Division implying waiver of natural justice allegations. The purpose behind implied waiver as expressed by the courts—judicial economy—involves different considerations within the Tribunal system than it does in the courts.

[11] There is no binding legal authority that specifically considers any principled reasons why implied waiver may not be appropriate at the Appeal Division level. A review of the Appeal Division's cases involving implied waiver suggests that it would be better to consider whether an appellant raised a natural justice allegation at the General Division level as a factor when deciding whether a natural justice error actually occurred, rather than considering that factor as a justification for implying waiver.

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[5] *Mohammadian v Canada (Minister of Citizenship and Immigration)*, 2000 CanLII 17118 (FC) at para 25; affirmed 2001 FCA 191.
[6] *Hennessey v Canada (Attorney General)*, 2016 FCA 180.

The Appeal Division's use of implied waiver creates an unacceptable barrier to access to justice for claimants.

[12] The Tribunal (including the Appeal Division) is not a court. It is an administrative tribunal. Given the nature of the work the Tribunal does, requiring appellants to raise a natural justice issue at the General Division or risk an implied waiver of that right at the Appeal Division level can create a barrier to accessing justice that is not consistent with the Tribunal's overall project. The Tribunal provides decisions about "benefits-conferring" legislation—in this case, legislation that provides for social benefits: employment insurance, pension benefits, and old age security. This kind of legislation requires a broad and liberal approach to interpretation.[7] Implying waiver at the General Division level can end a claimant's appeal for a social benefit: the stakes, therefore, are high since the Tribunal's work involves benefits-conferring legislation.

[13] The Tribunal must put claimants seeking benefits at the heart of the appeal process.[8] Natural justice is most often going to arise for claimants and not for the Minister because the Minister does not often take part in the hearing before the General Division. In addition, claimants are not required to have legal representation at the Tribunal. Some claimants have lawyers, some have non-lawyer professionals, like paralegals, representing them, some claimants are represented by friends, and some claimants represent themselves. Many claimants who appear before the Tribunal have disabilities, and having those disabilities can mean experiencing functional limitations as well socially constructed limitations.[9]

[14] Implied waiver is a legal concept that is likely to be understood by a small group of people. It may sound like common sense that a claimant be expected to raise natural justice at the earliest opportunity, but it may be equally consistent with common sense for a claimant to believe that raising issues like bias or concerns about an interpreter is rude, obstructionist, or not sufficiently deferential to the decision-maker in any given instance. Putting claimants at the heart of an appeal process should mean considering their claims about General Division errors on their merits, rather than dismissing those claims based on legal concepts like implied waiver with which they may not be familiar.

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[7] *Rizzo & Rizzo Shoes Ltd. (Re.)*, 1998 CanLII 837 (SCC).
[8] See the Tribunal's mandate: https://www1.canada.ca/en/sst/mandate.html.
[9] *Granovsky v Canada (Minister of Employment and Immigration)*, 2000 SCC 28 (CanLII).

[15] The Tribunal must conduct proceedings as informally and quickly as the circumstances and the considerations of fairness and natural justice permit.[10] There is no legal requirement for the members of the Tribunal, including the Appeal Division, to be lawyers. The Tribunal does not strictly follow the rules of evidence. To imply waiver in this quasi-judicial context does not seem consistent with these elements of an informal process at the Tribunal.

[16] The Tribunal is also tasked with promoting and demonstrating accountability and transparency.[11] Currently, the Tribunal does not publish all decisions written by the General Division. However, the Tribunal does publish decisions from the Appeal Division on a publicly searchable website: CanLII. This website is fully searchable and free to access by the public.[12] Justice must be seen to be done. If counsel raises issues of natural justice at the General Division level, it is true that the General Division then has the opportunity to explain itself or to try to remedy the problem in some way, and it is likely that the natural justice objection will form part of the discussion in the General Division's reasons. However, most decisions from the General Division are not published on CanLII. Therefore, accountability and transparency may be better achieved, in some cases, when claimants who have a natural justice issue have the opportunity to raise that issue for the first time at the Appeal Division, and a decision on that issue is published.

<u>The legislation does not mention the Appeal Division implying waiver of natural justice allegations.</u>

[17] The Tribunal is governed by its legislation, and its legislation does not restrict appellants from raising a natural justice allegation for the first time at the Appeal Division stage. At the Appeal Division, appellants must establish that the General Division made an error. The only errors the Appeal Division is allowed to consider are those listed in the DESDA at section 58(1).[13] An error under section 58(1)(a) occurs when the General Division fails to observe a principle of natural justice. There is no requirement in section 58(1)(a) for the Appeal Division to consider whether the appellant raised the issue at the General Division level and no statement

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[10] *Social Security Tribunal Regulations* (SST Regulations), s 3(1).
[11] See the Tribunal's mandate: https://www1.canada.ca/en/sst/mandate.html.
[12] Identifying information in decisions is removed.
[13] *Parchment v Canada (Attorney General)*, 2017 FC 354.

that the path to appeal set out by section 58(1)(a) may not be available if it is not raised first at the General Division level.

[18] The Appeal Division follows the wording of the errors as they are listed in the DESDA very closely to determine how much scrutiny an alleged error receives, and the Appeal Division does not apply the standards of review that the courts apply to errors raised in court on judicial review. The Federal Court of Appeal is clear that the Appeal Division's jurisdiction is limited to the grounds of appeal under section 58(1).[14]

[19] The *Social Security Tribunal Regulations* (SST Regulations) do not advise appellants that they must raise issues of natural justice as early as is practical, and that failing to raise an issue at the General Division level may mean that Appeal Division will imply that the appellant waived their right to proceed with an appeal. There is no information about this potential roadblock to accessing one of the grounds of appeal in any online sources of information available to the public on the Tribunal's website, either.

[20] Even professional representatives, paralegals, and lawyers may not be familiar with the idea that the Appeal Division could imply waiver of a natural justice issue if the appellant did not raise it at the General Division level first. The Tribunal derives all of its power from statute, and if one of the grounds of appeal at the Appeal Division cannot be accessed without raising it first at the General Division, it would stand to reason for a legal representative that the Tribunal's governing legislation, the DESDA, would make that clear.

<u>There is no binding case law that specifically considers the principled reasons why the Appeal Division should not imply waiver.</u>

[21] The notion of implied waiver is reflected in some decisions of the federal courts, but none of those decisions specifically considers the principled reasons why the Appeal Division should not imply waiver when an appellant has failed to raise a natural justice issue at the General Division first.

[14] *Jean v Canada (Attorney General)*, 2015 FCA 242.

[22] The Minister argues that the key cases cited above, *Hennessey* and *Benitez*, require the Appeal Division to consider whether to imply waiver in appeals from the General Division to the Appeal Division.

[23] The Claimant's lawyer argues that one of the key cases about waiver, *Hennessey*, is not binding on the Tribunal because it is a case in which the Federal Court of Appeal implied waiver where an appellant raised bias by the Federal Court for the first time at the Federal Court of Appeal. In other words, *Hennessey* was about implying waiver when an appellant failed to raise a natural justice issue in court, not at the General Division of this Tribunal.

[24] I agree and find that cases in which the courts have implied waiver are less helpful in determining whether it should be applied at a tribunal, which is less formal and only quasi-judicial.

[25] The Claimant's lawyer also notes that the other case on implied waiver that is often cited, *Benitez*, arises from the immigration system. Proceedings before immigration tribunals are, in his submission, more formal and more judicial in nature than those at this Tribunal. *Benitez* involved a group of appellants seeking judicial review of the fairness of their hearings at the Refugee Protection Division (RPD) of the Immigration and Refugee Board (IRB). The appellants alleged the unfairness was the result of the RPD following a guideline about conducting hearings from the Chairperson of the IRB. The Claimant's counsel argues that hearings before the RPD are more judicial and more formal in nature than those before the General Division of this Tribunal and that, as a result, the principles about implied waiver at play between the RPD and the Federal Court do not have to be applied between the General Division and the Appeal Division.

[26] It is difficult to meaningfully compare the IRB process to that of this Tribunal, and it is probably not necessary for me to decide here, although I note as above that the IRB and this Tribunal do different work and have different internal processes and procedures. I do not read *Benitez* as a definitive or binding statement about what this Tribunal must require from appellants at the General Division level before they can raise natural justice concerns at the Appeal Division.

[27] There are federal court cases that raise implied waiver more specifically in the context of this Tribunal. In *Sharma v Canada (Attorney General),* [15] the Federal Court of Appeal refused to review an issue of procedural fairness that the claimant alleged had occurred at the General Division, stating that the Court was the first time the claimant raised the issue, and therefore in the Court's view, it was not able to review that question. The Court implied waiver. However, in that case, the Claimant did not raise the natural justice issue at the Appeal Division either, and leave to appeal was restricted to a different issue. *Sharma* is clear that the Court of Appeal is willing to imply waiver when the claimant raises the natural justice allegation for the first time during the judicial review in court after the case is completed at the Tribunal. *Sharma* does not expressly consider whether the Appeal Division should be implying waiver when deciding whether the General Division has made an error under the DESDA.

[28] In a very recent decision, *Brochu v Canada (Attorney General),*[16] the Federal Court found that the Appeal Division did not make a reviewable error in a case involving an alleged failure by the General Division to observe natural justice. The Appeal Division refused to grant leave to appeal to a claimant who alleged for the first time at the Appeal Division that the General Division made an error when it held a hearing by teleconference instead of in person or by videoconference. The Appeal Division concluded that the Claimant had no reasonable chance of success for a series of reasons, one of which was that the Claimant had not raised any fairness issue with the form of hearing until the matter reached the Appeal Division and therefore had not raised the issue at the earliest opportunity.

[29] *Brochu*, like some of the other cases in which the Appeal Division discusses the need to raise issues of natural justice at the earliest opportunity, actually expressly addresses the substance of the natural justice claim, rather than merely implying waiver. The Appeal Division rejected the claimant's argument that the General Division needed to hold an in-person hearing because his credibility was at issue, noted concern about relying on demeanour to assess credibility, and relied on the fact that the decision on form of hearing is highly discretionary and should not be interfered with lightly.[17] The Federal Court considered all of these elements of the

[15] *Sharma v Attorney General (Minister of Employment and Social Development)*, 2018 FCA 48.
[16] *Brochu v Canada (Attorney General)*, 2019 FC 113.
[17] *M. B. v Minister of Employment and Social Development*, 2018 SST 499.

Appeal Division's decision in its decision as well; it did not simply imply waiver strictly or state in any way that waiver was the deciding factor.

[30] Strictly speaking, the federal courts have not specifically required the Tribunal to imply waiver at the Appeal Division level.

Judicial economy involves different considerations within the Tribunal system than it does in the courts.

[31] The purpose behind requiring Claimants to raise natural justice issues at the earliest opportunity, judicial economy, does not operate the same way in the Tribunal context as it does in the courts. The courts have been clear that experiencing a natural justice violation at one level of court or at a tribunal, remaining silent about it or staying "still in the weeds," and then "pouncing" at the court is not fair and is not a proper use of judicial resources.

[32] However, this concept operates differently when the appellant experiences the natural justice problem at the General Division level and wishes to raise it for the first time at the Appeal Division level. The Appeal Division is not an appellate court. The General Division and the Appeal Division are simply separate divisions of the same Tribunal. Claimants who have a decision from the General Division and then request leave to appeal to the Appeal Division based on a natural justice allegation may not have really "pounced" anywhere—they are still, arguably, in the same field of grass. They have simply moved to another decision-maker in the same Tribunal who has the express authority to review the errors of their colleagues.

[33] It may seem inefficient to allow appellants to raise natural justice issues for the first time at the Appeal Division because it may result in further proceedings (namely, an Appeal Division decision on leave to appeal and possibly on the appeal's merits, and then possibly a new General Division hearing) when the issue might have been dealt with immediately if it had been raised at the General Division level. This argument is stronger when the issue is one that involves an interpreter, for instance, than it might be for a bias issue, where it is less clear how the issue is to be resolved in the moment by the member accused of the bias.

[34] It may be, depending on the type of natural justice issue alleged, that raising the issue at the General Division hearing all but guarantees a second General Division hearing, whereas

staying “still in the weeds” will only result in a second General Division hearing if the claimant loses at the General Division and wins at the Appeal Division. Considered on the whole, it may be that allowing claimants the opportunity to decide whether to raise the natural justice issue at the Appeal Division actually saves judicial resources and avoids a second General Division hearing scheduled by the General Division in cases where the claimant would have won if they had simply waited in the weeds.

[35] Judicial economy is also relevant to the individual parties, not just the Tribunal’s caseload as a whole. However, as noted previously, it is most often the case that the respondent at the General Division level does not participate in the hearing in any event and the Appeal Division proceeding is attended only by the claimant. The impact of a second General Division hearing on the Minister’s resources is therefore not the same as it is in the courts.

[36] In addition, the Appeal Division has another key way of preserving judicial economy. The Appeal Division determines whether leave to appeal will be granted for a natural justice issue: there must be a reasonable chance of success. A case in which a claimant was truly just waiting in the weeds may be less likely to have a reasonable chance of success on the merits—it may be that, in some cases, waiting in the weeds is a calculated decision that indicates the actual breach was either not serious or did not occur at all.

Consider when the appellant raised natural justice when that is relevant to whether there was a breach of natural justice.

[37] The pattern in Appeal Division decisions suggests that it is important to consider whether an appellant raised a natural justice allegation at the General Division level as a factor when deciding whether a natural justice error actually occurred, rather than considering the failure to raise the issue at the General Division as a justification for implying waiver.

[38] Historically, the Appeal Division has considered whether the claimant raised the issue of natural justice at the earliest practical opportunity and therefore whether the Appeal Division should imply waiver. These cases from the Appeal Division are not binding. However, because

these cases consider implying waiver at the Appeal Division level and my position is inconsistent with that approach, I must consider those cases.[18]

[39] The Appeal Division has refused to imply waiver against appellants in two different cases in which unrepresented appellants failed to clearly raise bias issues at the General Division level.[19]

[40] By contrast, in two different cases about language interpretation, the Appeal Division implied waiver. In both of those cases, it is not clear whether the Appeal Division would have found that the alleged language interpretation problems at the General Division actually gave rise to a natural justice breach if waiver had not been implied. In the one case, the Tribunal noted that the Appellant was able to communicate effectively with the Tribunal in English.[20] In the other case, the Appeal Division member stated that the appellant's failure to raise the breach sooner caused the member to doubt whether there was a significant breach of natural justice at the hearing.[21]

[41] A similar situation played out in another case at the Appeal Division in which the natural justice question was a bit different. The Appeal Division considered whether it was fair for the General Division to have required an appellant's counsel to provide an argument on the spot at the General Division hearing about the impact of some case law.[22] The Appeal Division member agreed that allegations of fairness must be raised at the earliest opportunity, but he also noted that the appellant's counsel did ultimately manage to provide an argument about the case law as the General Division requested. This suggests that the Appeal Division member considered not just implied waiver, but also whether there was any breach at all, given the fact that the appellant's counsel ultimately made the argument he needed to make.

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[18] *Canada (Attorney General) v Bri-Chem Supply Ltd.*, 2016 FCA 257 (CanLII).
[19] *R. M. v Minister of Employment and Social Development*, 2018 SST 285 (The appellant did her best to raise it at the General Division.), and *S. B. v Minister of Employment and Social Development*, 2018 SST 405 (It was not reasonable to require the unrepresented appellant to raise bias at the General Division level because of "frequent and intense intervention" by the General Division member during the hearing.).
[20] *E. K. v Minister of Employment and Social Development*, 2015 SSTAD 360.
[21] *S. N. v Minister of Employment and Social Development*, 2018 SST 155.
[22] *D. B. v Minister of Employment and Social Development*, 2016 CanLII 99555.

[42] In another case, an Appeal Division member implied waiver but chose to discuss the alleged natural justice breach anyway and concluded that there was no breach.[23]

[43] These cases show that Appeal Division has sometimes refused to find it reasonable to imply waiver based on the individual circumstances of the case. However, the cases also show that the Appeal Division has implied waiver in some situations but then either engaged in an analysis of the merits of the natural justice claim or implied that the failure to raise the issue at the General Division was a factor in deciding whether there was truly a natural justice breach at all. These cases do not show a clear or consistent pattern on the part of the Appeal Division to imply waiver and simply dismiss an issue of natural justice based purely on the threshold question of whether the appellant raised the issue at the General Division first. The analysis provided by more than one member of the Appeal Division supports the idea that there are limited circumstances in which Appeal Division members are willing to imply waiver, and that those cases where the members are willing may be ones where the Appeal Division does not find the merits of the breach compelling.

[44] In light of all of the above, the Appeal Division should not imply waiver in cases where the appellant raises the breach of natural justice for the first time on appeal. Given the nature of the Tribunal's work and its structure, the client-centric approach it is expected to take, the case law from the courts and even its own cases, the Appeal Division should consider whether an appellant raised a natural justice allegation at the General Division level as a factor when deciding whether a natural justice error actually occurred, rather than considering that factor a justification for implying waiver.

Issue 2: If the Appeal Division should consider implying a waiver when the appellant does not raise a natural justice allegation at the General Division first, should the Appeal Division apply waiver in this case?

[45] If I am wrong and the Appeal Division must consider implied waiver, it is not reasonable for the Claimant's paralegal in this case to have raised the issue of bias during the General Division hearing, and so I will not imply waiver. The General Division member's comments

[23]It seems the Appeal Division reasoned that *Benitez v Canada (Minister of Citizenship and Immigration)*, 2006 FC 461 carves out an exception to implied waiver where the issue is badgering during cross-examination.

suggested she already knew her comments were inappropriate but she went on to make them anyway, which arguably makes raising the issue with her more difficult, not less.

[46] In this case, the General Division member asked the Claimant about why he had not yet had surgery on his hip. The member gave the Claimant direct advice about hip surgery, stating, "Don't let them tell you to wait for hip replacement" and "You might have to be the squeaky wheel." The member stated, "I'm not supposed to tell you this," and then shared her age and her very positive experience with a hip replacement, particularly in terms of her ability to ski. She also stated, "I hope they don't listen to this recording. I am a real big fan of [having hip replacement surgery] as soon as you can."

[47] In response, the Claimant asked a follow-up question about the General Division member's experience with her hip replacement—whether she was warned about certain kinds of physical activity following her surgery. The member responded to the question in some detail. The Claimant's paralegal responded only to the extent that she attempted to contrast her client's situation with that of the member's, stating, "but you're in good shape, Madam Chair, I mean you're in good physical shape."

[48] The General Division member acknowledged the impropriety of sharing her own medical experience and giving medical advice in this case by saying, "I'm not supposed to tell you this" and then stating, "I hope they don't listen to this recording." The member even went as far as to say that if the recording was heard, she "might get a little talking to." Based on the recording, it sounds like the paralegal actually stated, "Never mind" in response, but I find that this was not an express waiver but rather the paralegal's attempt in an awkward situation to get the General Division member back on track.

[49] It is reasonable for the Claimant to assume from these comments that he is being indirectly asked to keep a secret for the member—she knew that she was making statements that were not appropriate and clearly hoped that they would not be caught on review, which would only occur if one of the parties filed an appeal.

[50] The Minister's counsel raised the argument that the Claimant's paralegal is experienced and should have raised the issue during the General Division hearing. Counsel for the Claimant on appeal took the position that the paralegal did not raise an objection.

[51] From a practical perspective, there are inherent problems with requiring a paralegal (or even a lawyer) to raise bias at the General Division level. Arguably, taking such a step is significant enough in the context of the case that it would require specific instruction from the claimant. The mere requesting of a recess to seek instruction may in itself raise the issue with the General Division member, particularly in this case in which the member had already acknowledged that she should not have said what she said. Some claimants may not wish to raise the issue directly with the member for fear of prejudicing their case, but the mere request for the adjournment might signal to the member that a claimant is already considering their options. These challenges may not be unique to this tribunal, but, as a quasi-judicial body that is meant to proceed informally, requiring a formal objection raises these kinds of problems.

[52] In any event, in this particular circumstance it was not reasonable to expect a person who was not represented by a lawyer to raise reasonable apprehension of bias to the General Division member at the same time as the General Division member was explicitly acknowledging she was saying things she should not say. The paralegal attempted to address the issue by contrasting her client's situation with that of the member's situation and by awkwardly stating, "Never mind" when the member continued to muse aloud about the impropriety of her statements and the possible consequences that could flow from them.

[53] I find that the Claimant's paralegal did not really raise an objection to the General Division member's conduct at the hearing and that, even if implied waiver must be considered, it is not reasonable to expect the paralegal to have raised the issue at the General Division hearing. In *Sharma*, the Federal Court of Appeal found that a paralegal should have raised an objection about the lack of language interpretation at the General Division level. However, *Sharma* was different because that claimant never raised the natural justice issue until the matter was before the courts. In addition, the issue in *Sharma* was language interpretation, so the dynamic was very different. Here, immediately raising bias with a General Division member when she herself

already seems aware of the fact that her behaviour may not be appropriate is probably no easier for a paralegal than for a layperson.

Issue 3: Did the General Division member fail to observe a principle of natural justice by making comments during the hearing that raised a reasonable apprehension of bias?

[54] The General Division member made comments during the hearing that raised a reasonable apprehension of bias and therefore failed to observe a principle of natural justice.

[55] Proceedings before the General Division are conducted as informally as the considerations of natural justice permit.[24] To determine whether there is a reasonable apprehension of bias, the correct legal question to ask is what would a reasonable, right-minded, informed person—viewing the matter realistically and practically and having thought the matter through—conclude?[25] The person considering the bias must be reasonable, and the apprehension of bias must be reasonable in the circumstances of the case.[26]

[56] The Claimant argues that the General Division member made inappropriate comments during the hearing that raise a reasonable apprehension of bias. The Claimant argues that, in response to his evidence about why he has not yet had hip surgery, the General Division member directly referenced her own personal medical history and gave him medical advice. The Claimant argues that the General Division member suggested that he should pursue the same hip surgery that the member had undergone.

[57] The Claimant argues that these comments raise a reasonable apprehension that the member was biased against the Claimant for not yet choosing to have the same surgery she had. The Claimant argues that the member made an inference about whether hip surgery was advisable based not on evidence that was properly before her, but rather on her own personal experience with that surgery. The Claimant argues that the General Division member made a serious error of natural justice because her comments cast "doubt upon the impartiality of the

[24] SST Regulations, s 3(1)(a).
[25] *Hennessey v Canada*, 2016 FCA 180 at para 15.
[26] *R. v S. (R.D.)*, 1997 CanLII 324 (SCC).

Social Security Tribunal and the ability of the [T]ribunal to adjudicate *Canada Pension Plan* disability cases in accordance with the rules of evidence and impartiality."[27]

[58] The Minister argues that the General Division did not fail to observe a principle of natural justice. First, the Minister argues that the General Division member did not make any statement at the hearing that could lead to a reasonable apprehension of bias. The Minister argues that, when the member's comments are understood in their proper context, it was appropriate for the member to ask why the Claimant had not considered the surgery since she had had the surgery.

[59] The Minister also argues that the member's general comments about the surgery did not mean that she lost her impartiality, that she demonstrated no actual bias, and that a reasonably informed person apprehends none. The Minister argues that the member expressing her view should not disqualify her as a decision-maker and that having had the same surgery could be a valuable asset in her work. The Minister cited the Supreme Court of Canada, which found in a case about the reasonable apprehension of bias that the requirement that decision-makers be neutral does not require them to "discount the very life experiences that may so well qualify them to preside over disputes." Judges bring their own existing sympathies to the bench, but the Supreme Court of Canada noted that:

> […] the wisdom required of a judge is to recognize, consciously allow for, and perhaps to question, all the baggage of past attitudes and sympathies that fellow citizens are free to carry, untested, to the grave.
>
> True impartiality does not require that the judge have no sympathies or opinions; it requires that the judge nevertheless be free to entertain and act upon different points of view with an open mind.[28]

[60] The Minister argues that the General Division did not consider medical evidence that was not properly before it, namely medical inferences the member drew based on the advisability of her hip replacement surgery. The Minister takes the position that the General Division was

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[27] AD1-7.
[28] *R. v S. (R.D.)*, *supra* note 26, at para 119.

required to and did analyze the medical evidence to determine whether the Claimant qualified for a disability pension.

[61] I have reviewed the portion of the oral hearing the Claimant references. I find that the General Division made an error and failed to observe a principle of natural justice.

[62] The issue is not just whether the General Division member was entitled to ask the Claimant about why he did not have hip surgery. There is no doubt she was entitled to ask the Claimant that question.

[63] The issue is not whether there is a reasonable apprehension of bias merely because the member has had hip surgery and there were references to the question of hip surgery in the record. The Minister is correct to note that the neutrality we expect of decision-makers is not violated simply because they have had certain life experiences that result in attitudes or sympathies that they might bring to their work. However, as the Supreme Court of Canada noted, the expectation is that a decision-maker will have the wisdom to consciously allow for, and perhaps to question, that "baggage" and then freely entertain and act on different points of view with an open mind.

[64] The member gave the Claimant direct advice about hip surgery, stating, "Don't let them tell you to wait for hip replacement" and "You might have to be the squeaky wheel." The member stated, "I'm not supposed to tell you this," and then shared her age and her experience with a hip replacement. She also stated, "I hope they don't listen to this recording. I am a real big fan of [having hip replacement surgery] as soon as you can."

[65] The Claimant's decision about whether to pursue surgery was relevant to the General Division's determination about the severity of his disability. The Claimant's evidence was that he was advised to wait as long as he could for hip surgery, given his age. The evidence was that he was not on the wait list for hip surgery. The General Division member provided her own opinion about the advisability of waiting for hip replacement surgery and said that she was "a fan" of doing it early. She shared her own personal experience with the surgery and her participation in physical recreation after the surgery was complete.

[66] A reasonable, right-minded, informed person—viewing the matter realistically and practically and having thought the matter through—would conclude that the General Division member's comments raise a reasonable apprehension of bias. The Claimant had not yet pursued a treatment that the member suggests he should not be made to wait for, that she is a fan of, and that she explained has worked well for her. The member's comments raise a reasonable apprehension of bias.

[67] Although Tribunal hearings are less formal and some of the procedural requirements from court settings do not apply, the work the members do must reflect the highest standards of fairness and impartiality. This is consistent with the dignity interests of people with disabilities, and with the Tribunal's mandate more generally.

[68] As a final note, people who make decisions at tribunals today should reflect the diversity of the communities they serve. Members of the Tribunal will have what is sometimes referred to as "lived experience" in addition to professional experience relating to disability and medical models of health care. That lived experience may mean that members have experienced similar physical or mental health differences or have been diagnosed with the same conditions as the claimants that appear before them seeking a disability pension.

[69] There may be limited instances in which members can share information about their lived experience of disability with parties during a hearing without creating a reasonable apprehension of bias.[29] Members with disabilities bring value to the table; the Supreme Court of Canada has recognized that decision-makers are expected to bring their humanity to the job.[30] The legal tests require them to focus on the claimant's capacity to work and not their diagnoses,[31] and to check their assumptions. Sharing information in some limited contexts in an informal hearing may not always give rise to a reasonable apprehension of bias, but giving advice certainly crosses that

[29] Some members may have visible or invisible disabilities that they may wish to acknowledge in the context of the hearing, for example because they need to modify some aspect of procedure to self-accommodate, or at the beginning of the hearing to put a claimant at ease, for example where is it visible or evident that the member has a similar limitation to that of the claimant.
[30] *R. v S. (R.D.)*, 1997 CanLII 324.
[31] *Klabouch v Canada (Minister of Social Development)*, 2008 FCA 33.

line. Members divulging personal medical information should do so only where there is a purpose that is consistent with the task at hand.

REMEDY

[70] If the Appeal Division finds an error in the General Division decision, the Appeal Division has the authority to return the matter to the General Division for reconsideration or to give the decision that the General Division should have given.[32]

[71] In many cases, giving the decision the General Division should have given is the most efficient way to proceed. In some cases, the Appeal Division may find it appropriate to refer a matter back to the General Division, for example, where the record contains gaps because there was a breach of natural justice, such as a reasonable apprehension of bias on the part of the General Division member, or where there was no full hearing before the General Division.

[72] The Minister took the position that if the Appeal Division found an error, it should give the decision that the General Division should have given. The Claimant's counsel stated a preference for the matter being returned to the General Division for reconsideration because the record may not actually be complete.

[73] The Appeal Division refers the matter back to the General Division for reconsideration. It seems that, at the very least, on the question of the Claimant's treatment (and more specifically, his hip surgery), the Claimant should have an opportunity to provide his evidence on that question again and in full. It is possible that his evidence on that question was not complete because it was interrupted by the General Division member speaking about her experience and advising the Claimant about how he should proceed in terms of treatment. Natural justice in this case would grant the Claimant the opportunity to give the evidence again if it is necessary, which is not the Appeal Division's role.

[32] DESDA, s 59.

CONCLUSION

[74] The appeal is allowed. The matter is returned to the General Division for reconsideration by a different member.

Kate Sellar
Member, Appeal Division

HEARD ON:	November 27, 2018
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	Daniel Griffith, Representative for the Appellant Viola Herbert, Representative for the Respondent