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

Citation: *A. K. v Minister of Employment and Social Development*, 2019 SST 1345

Tribunal File Number: AD-19-287

BETWEEN:

A. K.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Kate Sellar

DATE OF DECISION: November 14, 2019

Canada

DECISION AND REASONS

DECISION

[1] The appeal is allowed. The General Division made an error by failing to provide a fair process. The case is returned to the General Division for reconsideration.

OVERVIEW

[2] A. K. (Claimant) worked in the drywall business. He stopped working in 2015 due to his medical conditions. He injured his back, knees, neck, and legs.

[3] The Claimant applied for a disability pension under the *Canada Pension Plan* (CPP) on May 3, 2016. The Minister denied the application initially and on reconsideration. The Claimant appealed to this Tribunal.

[4] On January 15, 2019, the General Division dismissed the Claimant's appeal. I granted leave to appeal the General Division decision on July 8, 2019, finding that there was an arguable case that the General Division had ignored evidence from the Claimant about the nature of his pain. I also stated that I welcomed arguments from the parties about whether the General Division failed to provide a fair process. At the hearing, the General Division did not ask the Claimant's representative[1] whether she wanted to add evidence that she had from the Claimant's workers' compensation file to the General Division file.

[5] I 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). I find that the General Division failed to provide a fair process. I will return the matter to the General Division for reconsideration.

[1] The Claimant now has a different representative at the Appeal Division level. At the General Division level, the Claimant's representative was a paralegal.

PRELIMINARY MATTER

[6] In support of his appeal, the Claimant gave the Appeal Division some new evidence.[2] The new evidence was not available to the General Division member when he made his decision.

[7] With some limited exceptions, the Appeal Division does not consider new evidence when deciding whether to grant leave to appeal.[3] No exception applies in this case. I will not consider the content of the new evidence.

ISSUE

[8] Did the General Division fail to provide a fair process by not taking steps to find out whether the Claimant wanted to provide evidence after the hearing?

ANALYSIS

Appealing a General Division Decision

[9] The Appeal Division reviews the General Division's decision to decide whether it contains errors. The DESDA sets out the three categories or types of errors that can justify an appeal (also called the grounds of appeal) for cases at the Appeal Division.[4]

[10] One of the grounds of appeal is that the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction.[5]

[11] Failing to observe a principle of natural justice is basically about failing to provide a fair process. What fairness requires depends on the context of each case. The Supreme Court of Canada set out a list of factors to consider when deciding whether a process is fair.[6] At the heart of this question about fairness is whether, considering all the circumstances, the people impacted by the process had a meaningful opportunity to present their case fully and fairly.

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[2] AD3.
[3] This is explained in a case called *Parchment v Canada (Attorney General)*, 2017 FC 354.
[4] DESDA, s 58(1).
[5] DESDA, s 58(1)(a).
[6] This is explained in a case called *Baker v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC).

[12] Part of the duty to act fairly is allowing people the right to be heard. The right to be heard is also about giving people the chance to make arguments on every fact or factor likely to affect the decision.[7] The duty of fairness continues even after the hearing is over.[8]

Getting Documents to the General Division

[13] Once the claimant has filed an appeal of the Minister's decision with the Tribunal, the Minister will get a copy of the appeal. The *Social Security Tribunal Regulations* (SST Regulations) give the Minister 20 days to provide some specific documents (such as the initial application the Claimant filed). Then the parties have 365 days from the time the claimant appealed to either (a) file more documents or arguments (called submissions); or (b) explain that they have no further documents or arguments to file with the Tribunal.[9] Next, the Tribunal decides whether to hold a hearing. The SST Regulations do not describe what the Tribunal should do when a party asks to file more documents after the hearing and before the General Division makes its decision. The SST Regulations also do not explain what happens if a person files documents after the 365-day deadline, but before the hearing or at the hearing.

[14] There are two parts of the SST Regulations that the General Division relies on to allow it to consider evidence after the hearing is over. First, the SST Regulations state that they should be understood to ensure the "just, most expeditious and least expensive determination of appeals and applications."[10] This is sometimes referred to much more simply as the "good, fast, and cheap rule" in administrative justice.[11] Second, the SST Regulations state that proceedings at the General Division should be as informal and fast as they can be, given the circumstances and the need to be fair.[12]

[15] The Tribunal has a Practice Direction that sets out the procedure for dealing with post-hearing documents.[13] The procedure explains how to make a request to file documents after the

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[7] This idea is explained in a case called *Kouama v Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 9008 (FC).
[8] This idea is explained in a case called *Murray v Canada (Attorney General)*, 2011 FC 542.
[9] SST Regulations, s 27(1).
[10] SST Regulations, s 2.
[11] At least at my law school it was.
[12] SST Regulations, s 3(1).
[13] That direction is available online at https://www1.canada.ca/en/sst/rdl/gdpd2016isposthearing.html

hearing, what the Tribunal members does once the request comes in, and what steps the member should take if they accept the documents.

Did the General Division fail to provide a fair process by not taking steps to find out whether the Claimant wanted to provide evidence after the hearing?

[16] The General Division failed to provide a fair process. The General Division was aware that the Claimant's representative had evidence that seemed to be relevant to the proceedings. The General Division member took no steps to understand whether the Claimant wanted the General Division to accept that evidence after the hearing was over. The Claimant did not have a meaningful opportunity to present his case fully and fairly. There were documents that his representative had (and that she referred to at the hearing) that the General Division did not have. The General Division should have taken steps to determine whether the Claimant wanted that evidence to be included in the record for the General Division to consider before making the decision. The General Division member did not point out that the Tribunal had a Practice Direction that covers the process for providing documents after the hearing.

[17] The Canadian Judicial Council has a *Statement of Principles on Self-represented Litigants and Accused Persons* (Statement).[14] The Statement includes a set of guidelines for judges and others in the justice system to promote opportunities for everyone to understand and meaningfully present their case, regardless of whether they have representation. According to the Statement, when people do not have representation, the decision-maker needs to take steps to protect the right to be heard. The Statement explains that the decision-maker might need to explain the process, ask whether the parties understand the process, and provide information about the law and the evidence needed to meet legal tests. The Supreme Court of Canada has specifically endorsed the Statement.[15]

[18] The Appeal Division has referred to the need for the General Division to take the approach set out in the Statement.[16] In one case,[17] the Appeal Division also pointed out that there

[14] The Statement is available online at https://www.cjc-ccm.gc.ca/cmslib/general/news_pub_other_PrinciplesStatement_2006_en.pdf
[15] The decision that approves the Statement is *Pintea v Johns*, 2017 SCC 23.
[16] These cases are good examples: *VF v Minister of Employment and Social Development*, 2018 SST 1275, and *SJ v Minister of Employment and Social Development*, 2018 SST 1251.
[17] *The Estate of JP v Minister of Employment and Social Development*, 2019 SST 653.

is case law from the Federal Court suggesting that tribunal members should be alert and remain prepared to provide information about procedure when fairness requires it. The Appeal Division explained that, more specifically, in the case of people who are unrepresented, the courts have described the need to:

> (a) direct those parties to important points of law and procedure;[18] and
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> (b) give whatever leeway is reasonably possible to allow those parties to present their case in its entirety, even if it means relaxing strict and technical rules.[19]

[19] At the hearing, the General Division member asked if there was a report from the time the Claimant was injured. The Claimant's representative said that there was a report, that she had it, but that it was not in the General Division file. The General Division member said it was not in "this" (meaning the General Division's) file. The General Division member stated, "I'm only going to refer to this file."[20]

[20] Later on in the Claimant's testimony, there was some discussion about other medical reports that seemed to be missing from the General Division's file.[21] The Claimant's representative explained that she believed, for example, that Dr. Mati's reports may have been going to the Claimant's workers' compensation file, but that they were not in the file that went to the General Division. The Claimant's representative explained that, when she got the Claimant's case just before the hearing, she believed reports were missing from the General Division file, so she brought the workers' compensation file with her to the hearing. When the General Division member heard that the Claimant's representative had received the case late and that the General Division record was missing relevant documents, he said quietly to her, "I feel for you," but then ultimately concluded, "Well, if we don't have it, we don't have it."

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[18] My co-worker who wrote the *JP* decision relied on *Wagg v Canada*, 2003 FCA 303 at paras 32–33.
[19] My co-worker who wrote the *JP* decision looked specifically at *Law v Canada (Citizenship and Immigration)*, 2007 FC 1006 at paras 17–18 and *Kohazi v Canada (Citizenship and Immigration*), 2015 FC 705 at para 12.
[20] In the audio recording of the General Division hearing, Part I, starting at about 10:00.
[21] In the audio recording of the General Division hearing, Part I, starting at about 21:00.

[21] At one more point during the hearing, the Claimant's representative was flipping through and reading from the workers' compensation file and explaining that she had not seen any of what she was reading in the General Division's file.[22]

[22] The Claimant's representative at the time did not ask the General Division member for permission to send the documents to the General Division after the hearing. She did not ask for an adjournment to allow extra time to provide the new medical documents.[23] The General Division member did not ask the Claimant's representative whether she wanted to rely on any documents that he did not yet have. He did not tell her what the process would be for requesting that the General Division consider the documents as set out in the Practice Direction, and he did not explain what the test was for admitting documents after the hearing.

[23] I am not aware of any case from the Appeal Division that deals with the General Division failing to ask a represented claimant whether they wanted the opportunity to provide evidence[24] after the hearing. However, the Appeal Division has considered whether it is an error to refuse a request to accept a late-filed medical report.[25]

[24] The Claimant argues that his representative at the General Division had relevant evidence in this case that the General Division also needed to receive and consider. The Claimant argues that, as a result, the General Division failed to consider relevant evidence, and that therefore the Claimant did not receive a fair process.

[25] The Minister's representative did not have instructions to make arguments about whether the General Division failed to provide a fair process.

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[22] In the audio recording of the General Division hearing, Part I, starting at about 34:00.
[23] Sometimes parties argue that the Appeal Division cannot find an error relating to fair process if the person saying the process was unfair did not raise their issue in a timely way. This concept is called "implied waiver". Implied waiver, basically, is the assumption that someone waived (or gave up) their right to raise a fair process issue because they did not speak up about the alleged unfairness when it was happening. There were no arguments before me about implied waiver here, and in any event, I would not imply a waiver here, for largely the same reasons I explained in *L.W. v Minister of Employment and Social Development*, 2019 SST 158, paras 10-44.
[24] That they were referencing during the hearing
[25] For example, the Claimant pointed me to *NG v Minister of Employment and Social Developmen*t. In that case, the Appeal Division found that the General Division made an error by refusing to accept a post-hearing document submitted by the claimant.

[26] The General Division made an error by failing to provide a fair process. In my view, when a claimant or their representative has documents during the hearing that the General Division member does not have, the General Division member needs to take an active role. The General Division member needs to understand what the document is and how it might be relevant. The General Division member needs to explain to the claimant (and/or the claimant's representative) that the SST Regulations and the Practice Direction allow for them to ask the General Division member to receive and consider documents after the hearing. This is especially important when the Claimant or their representative is discussing the documents that the General Division member does not have during the hearing.

[27] The General Division member should have confirmed whether the Claimant wanted to provide the documents after the hearing. The General Division member should have informed the Claimant of the Tribunal's Practice Direction, which describes the procedure for filing post-hearing documents.

[28] Providing that kind of information about the Practice Direction is consistent with the Federal Court's finding in an immigration case called *Clarke*.[26] In that case, the applicant stated that she realized that she should have brought forward more evidence. The tribunal member in *Clarke* did not tell the applicant that she could file more documents after the end of the hearing in accordance with the *Immigration and Refugee Board Rules*. The Federal Court decided that failing to give that information contributed to a lack of fair process for the applicant. The tribunal in that case never told the applicant that she could supplement her evidence with more material, and she was obviously not aware of the process.

[29] Providing this kind of information about filing documents after the hearing does not mean the tribunal is overstepping its role, or taking the burden away from claimants to provide all the evidence they intend to rely on. When a claimant argued that the General Division did not give him the chance to address gaps in his medical evidence before making its decision, the Federal Court found that fair process does not put an obligation on a tribunal to seek evidence from an applicant.[27] However, in that case, it does not appear that claimant actually had the

[26] *Clarke v Canada (Citizenship and Immigration)*, 2018 FC 267.
[27] *Grosvenor v Canada (Attorney General)*, 2018 FC 36.

evidence or referenced the evidence in the hearing. It appears the claimant in that case was advocating for a blanket invitation from the tribunal to close gaps in the evidence after the hearing was over, which is different from the situation of the Claimant here. The General Division does not have the obligation to seek out evidence that the Claimant has not discussed or referenced in order to close gaps in the evidence. The Federal Court of Appeal is clear that the burden is always on claimants to make out their case, and to put forward all the evidence they intend to rely on.[28] Giving procedural information about how to put forward evidence (when it is clear the claimant has the evidence and the General Division member does not) does not shift the burden in any real way from the claimant to the Tribunal.

[30] Providing this kind of routine information to parties is in line with the Statement. Although the Statement references judges, in my view it is probably even more applicable at tribunals like this one. Our process is not as formal as a court, and tribunal practices and procedures vary from one tribunal to another. As a result, it is extra important for parties to know what their options are in terms of process.

[31] Although the Guidelines state that providing information about process may be required when a party is unrepresented, in my view, at our tribunal, there is no reason to limit this requirement to unrepresented claimants; "underrepresented" and even well-represented parties may still legitimately need this information. The reality is that a representative (whether they are a lawyer, paralegal, or layperson) may make an incorrect assumption about the Tribunal's rules, even if they are experienced in tribunal settings.

[32] Providing information about process does not mean that the decision-maker has become an advocate or is providing legal advice. Providing basic information about process-related options when they arise like this at a hearing is something that is better understood as our own responsibility. We are active decision-makers at a Tribunal providing a service to people who are seeking benefits. The service needs to be fair to all the parties. If either party is speaking about or

[28] *Wilson v Canada (Attorney General)*, 2019 FCA 49.

reading from a document that the decision-maker does not have, it makes sense to explain what the options are at that point for getting the document to the decision-maker.[29]

[33] All parties have an interest in the member making an informed decision based on all of the evidence. Not describing options to a claimant in the interest of being fast is not consistent with providing a good, fair service.[30]

[34] Finding that the General Division failed to provide a fair process involves assessing the actions of the General Division to make its process more fair for everyone. Deciding that taking these kinds of steps is necessary only when a claimant is unrepresented, or looking hard at the paralegal's actions to figure out whether the Claimant was underrepresented, is not a good approach. If the parties are all on a journey, the Tribunal is providing the road. When we provide good signage before a fork in the road, all parties benefit. There is no sense in focussing on the drivers and assessing their navigation skills or their level of preparation when we could simply tip them all off to the fork in the road as it approaches—whether they have an expert driver, or a friend in the car helping them out, or are alone in the vehicle. The parties are still driving their own cars, and we are not telling them which route to take, but signalling these kinds of procedural options, the glaring forks in the road, should be our standard approach.

REMEDY

[35] Once the Appeal Division has found an error by the General Division, the Appeal Division has two options. The Appeal Division can give the decision that the General Division should have given. Alternatively, the Appeal Division can return the case to the General Division for reconsideration.

[36] At the Appeal Division hearing, the parties agreed that if the Appeal Division returned the case to the General Division, the Claimant would need to have a brand new hearing because

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[29] Rather than trying to decide whether the claimant is being "underrepresented" badly enough that the member should step in and explain what the options are.
[30] The idea in administrative tribunals is to achieve all three—good, fast, and cheap. Based on the way the SST Regulations are written, you can only be as fast and cheap as being fair and providing good service will allow.

there might be more or different issues, based on the new documents, which the Claimant will need the chance to testify about.

[37] The issue here is about fair process, and therefore the remedy (the fix) is to return the matter to the General Division for reconsideration. I do not have a complete record, and therefore giving the decision that the General Division should have given is not the appropriate remedy. The Claimant should have an opportunity to present all of the evidence he has about his conditions to the General Division. The Tribunal will take steps to make sure that the documents the Claimant's current representative attached to the arguments[31] are in the new General Division file.

CONCLUSION

[38] The appeal is allowed. The case is returned to the General Division for reconsideration.

Kate Sellar
Member, Appeal Division

HEARD ON:	September 10, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	Michael Farago, Representative for the Appellant Sandra Doucette, Representative for the Respondent

[31] AD3.