



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *V. K. v Minister of Employment and Social Development*, 2020 SST 336

Tribunal File Number: AD-19-601

BETWEEN:

V. K.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Kate Sellar

DATE OF DECISION: April 17, 2020

DECISION AND REASONS

DECISION

[1] I allow the appeal. The General Division made an error. The General Division failed to provide a fair process. I return the case to the General Division for reconsideration.

[2] V. K. (Claimant) was in a car accident in October 2014. He applied for a disability pension under the *Canada Pension Plan* (CPP) on January 24, 2017. The earliest month he could be considered disabled was October 2015 (15 months before the Minister received his application). The Minister decided that the Claimant had a severe and prolonged disability within the meaning of the CPP in October 2015.

[3] The Claimant appealed to this Tribunal. The Claimant argued that his disability pension should have started sooner. He says that he was incapable of forming or expressing an intention to make an application on his own behalf until he made the application in January 2017.

[4] On May 28, 2019, the General Division dismissed the Claimant's appeal. The General Division found that the Claimant's post-concussion syndrome and sleep deprivation significantly diminished his cognitive abilities. However, the General Division concluded that those limitations fell short of leaving him incapable of forming or expressing an intention to apply for a disability pension earlier.

[5] The Claimant argues that the General Division made errors of fact and errors of law. However, I granted leave (permission) to appeal finding that there was an arguable case that the General Division failed to provide a fair process.

[6] I must decide whether the General Division made an error under the *Department of Employment and Social Development Act* (DESDA).

[7] I allow the appeal. The General Division failed to provide a fair process. I return the case to the General Division for reconsideration.

PRELIMINARY MATTERS

[8] The Claimant provided some new evidence (online articles) in his submission at the Appeal Division level.¹

[9] Generally speaking, the Appeal Division does not hear new evidence.² There are some exceptions to that rule. For example, new evidence might be allowed in some cases to establish that the General Division made an error relating to fair process.

[10] There is no reason here to consider the new evidence in relation to the error I am dealing with. I will not consider the new evidence here.

ISSUE

[11] Did the General Division fail to provide a fair process by allowing the Claimant's lawyer to give evidence and act as counsel to the Claimant in the same matter?

ANALYSIS

Reviewing General Division Decisions

[12] The Appeal Division does not give people a chance to re-argue their case in full at a new hearing. Instead, the Appeal Division reviews the General Division's decision to decide whether there is an error. That review is based on the wording of the DESDA, which sets out the reasons for appeal (called the grounds of appeal).³

Fair Process Errors

[13] The DESDA says that it is an error when the General Division fails to observe the principles of natural justice.⁴ The principles of natural justice focus on the fairness of the process. What fairness requires in each case will depend on a variety of factors.⁵

¹ AD4-9 and 10.

² *Parchment v Canada (Attorney General)*, 2017 FC 354.

³ DESDA, s 58(1).

⁴ DESDA, s 58(1)(a).

⁵ *Baker v Canada (Minister of Citizenship and Immigration)*, 2 SCR 817 (SCC).

[14] Part of the duty to act fairly is to allow for 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.⁶

Did the General Division fail to provide a fair process?

[15] The General Division failed to provide a fair process by allowing the Claimant's lawyer to both give evidence and to act as counsel to the Claimant in the same matter.

[16] At the start of the hearing,⁷ the General Division member asked the Claimant's representative (a lawyer) whether she would be a legal representative for the Claimant during the hearing, or whether she would be giving evidence. The representative explained that the situation was "blurry." The representative was in the car with the Claimant during the accident that caused the Claimant's disability. As such, the representative had first-hand information about how the Claimant managed his affairs in the months and years after the accident. The General Division member confirmed that it was inappropriate in the context of this case for the roles to remain blurry.

[17] The Claimant's representative ultimately confirmed that she would not be giving evidence at the hearing, that she was the "counsel of record" because her law office prepared the CPP disability pension application for the Claimant. She confirmed that she would be making submissions and asking questions of her client (the Claimant). The Claimant affirmed that his evidence would be the truth, and the hearing went ahead.⁸

[18] However, during the course of the hearing, the Claimant's lawyer gave evidence on a variety of topics. The Claimant's representative interjected to fill in gaps in the Claimant's evidence about a period of time when he was planning to commit suicide.⁹ The General Division member referenced a list of symptoms that the Claimant seemed to have prepared. The Claimant's lawyer then gave evidence about how the list was prepared.¹⁰ The Claimant's lawyer

⁶ The Federal Court explained this idea in a case called *Kouama v Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 9008 (FC).

⁷ Audio recording of the General Division hearing, starting at about 9:30.

⁸ Audio recording of the General Division hearing, the exchange ends at about 12:04.

⁹ Audio recording of the General Division hearing, 32:00.

¹⁰ Audio recording of the General Division hearing, 34:44.

also gave evidence about the Claimant's attempt to make an application for an incapacity assessment.¹¹ At one point in the hearing, the General Division member began asking questions about the facts directly to the Claimant's lawyer, and the lawyer responded.¹² The Claimant's representative described the Claimant as a "reluctant" applicant who applied for the disability pension after she encouraged him.¹³

[19] The Claimant's lawyer argues that there is no error in terms of fair process. The Claimant's lawyer argues that the General Division made several errors of fact and errors of law. The Claimant's lawyer argues that the primary reason why she 'testified' instead of the Claimant was because of how little sleep he has had since his injury, which results in very serious memory loss and delusions which would make it impossible for him to recall any of the events he would need to testify about.

[20] The Claimant's lawyer notes that her firm was responsible for maintaining a record of the Claimant's activities after the crash anyway as part of the Claimant's case against his insurer. She says that she has worked on this file without pay (*pro bono*), and that if she had not assisted the Claimant without charge, the Tribunal's process would not be sufficiently accessible to her client or others like him.

[21] The Minister argues¹⁴ that the General Division made a fair process error. Case law explains that lawyers must not place themselves in a situation or continue to act in a matter where there is, or likely to be, a conflict of interest. The relationship between courts and the lawyers is harmed, and the administration of justice and the integrity of the system are undermined when the lawyer's objectivity and credibility are subjected to challenge in the course of deciding a case.¹⁵

¹¹ Audio recording of the General Division hearing, 39:59.

¹² For example, the General Division member asked a series of questions about powers of attorney and directives (at about 53:00), the Claimant's banking (at about the 58:00), and the Claimant's attempts to resolve his problems with sleeping (at about the 60:08), etc.

¹³ Audio recording of the General Division hearing, 52:14.

¹⁴ AD2-1 to 5.

¹⁵ Paraphrased from *Rice v Smith et al*, 2013 ONSC 1200, para 22, citing *Urquhart*, [1999] OJ No 4816 at paras 27-28.

[22] The Minister argues that the same principles about conflict of interest and the administration of justice apply to cases before administrative tribunals, including this Tribunal. The Minister cites a case from Financial Service Commission of Ontario. In that case, one party's lawyer provided an affidavit that went to the heart of the case. The Commission adjourned the case to allow the party's lawyer to comply with the Ontario's *Rules of Professional Conduct* for lawyers, which states that a lawyer who is a necessary witness should testify and entrust the conduct of the case to another lawyer.¹⁶

[23] Similarly, the Minister notes that in one case at the Canada Industrial Relations Board,¹⁷ the Board disqualified the complainant's lawyer, as well as the lawyers from that entire firm for being counsel of record. The Board cited the Canadian Bar Association's *Code of Professional Conduct*, which states that lawyers should not "testify before a tribunal" unless permitted by local rule or practice or on purely formal or uncontroverted matters.

[24] The Minister argues that the evidence the Claimant's lawyer gave goes to the heart of the issue the General Division had to decide. Allowing the Claimant's lawyer to give testimony put into question the objectivity and credibility of the lawyer in the course of deciding the case. The General Division had to consider the medical evidence and the Claimant's actions and activities to decide whether he was incapable of expressing or forming an intention to apply sooner. The Claimant's lawyer provided her view of the Claimant's state of mind and daily activities. The Minister argues that the General Division should have addressed this testimony during the hearing and explained or considered it in the decision.

[25] In my view, the General Division failed to provide a fair process. I will not deal with the allegations of errors of fact and of law, because the fair process errors require the General Division to reconsider. It seems to me that some of the Claimant's allegations about factual errors the General Division made rely on the Claimant's lawyer's evidence, which is the source of a wider fair process error.

¹⁶ *Smirin v ING Co of Canada*, 2006 CarswellOnt 3590 at para 8;; and the Law Society of Ontario *Rules of Professional Conduct*, section 3.4.

¹⁷ *CEP Union of Canada et al v Fun Telecom Inc.*, 2010 CIRB 497 at para 41; and The Canadian Bar Association *Code of Professional Conduct*, Chapter V.

[26] This Tribunal is less formal than a court process. It is important that claimants are able to access our system without a lawyer, and that our processes respect the rights of claimants to choose their lawyers.

[27] The Claimant was in a unique situation for a handful of reasons:

- He was appearing before a Tribunal that hears from people without lawyers regularly.
- He had a lawyer who was not charging him for her services; and presumably, the Claimant was capable enough to instruct that lawyer.
- That lawyer had personal knowledge of relevant evidence in his case.
- His case was about showing that he was incapable of forming or expressing an intention to apply for the disability pension sooner than he did.
- His testimony was not likely to be very detailed because, he would argue, his capacity was not any better at the time of the General Division hearing than it was when he was unable to apply for the disability pension. In other words, he may not be able to recall what his capacity was like before he applied for the disability pension for the very same reason that he did not apply sooner – he lacked capacity then, and he lacks capacity now.

[28] For incapacity cases at this Tribunal, if the claimant is as incapable at the time of the General Division hearing as they were during the time they failed to apply, testimony from other witnesses who can fill in the blanks created by the Claimant's incapacity can be very helpful. However, the other witness cannot and should not be the Claimant's legal representative.

[29] As the Minister's representative argued, the General Division cannot allow the credibility and objectivity of the Claimant's counsel to be subject to challenge during the course of a case. The General Division member was required to confirm whether the Claimant's lawyer was going to act as a lawyer or act as a witness. When the Claimant's lawyer chose "lawyer" and then proceeded to give evidence that went to the heart of the issue, the General Division needed to address the situation. By failing to do so, the General Division failed to provide a fair process.

[30] The Claimant's lawyer (and even the Claimant) may have been comfortable with the lawyer filling in the gaps in the evidence. In that way, perhaps the Claimant waived whatever conflict could arise between them by allowing her to testify. However, it is not the relationship between the lawyer/witness and the client that the General Division is protecting by refusing to allow a person to act as both as a lawyer/witness.

[31] It undermines the integrity of the General Division's work to accept both evidence and argument from lawyers. The General Division needs to trust that lawyers who appear before it have a similar relationship with the General Division that they have with the courts: they are independent officers of the court and they must be trusted to present the case consistent with the duties of that role.

[32] There was no representative for the Minister at the General Division hearing. General Division members, like other administrative decision makers, take an active approach to adjudication. Administrative decision makers might:

- Ask questions to clarify testimony;
- Ask questions to clarify points in testimony that appear inconsistent or contradictory;
- Ask questions necessary to decide the appeal; and
- Within limits, cross-examine a witness.¹⁸

[33] The General Division cannot take on these roles with a lawyer/witness; because it would call into question the lawyer's credibility and objectivity in the case. The General Division relies on lawyers to keep the level of independence that they have when they represent their clients in court.

[34] In this case, the General Division made an error by failing to provide a fair process. Although the member made it clear that the roles of lawyer and witness could not be blurry, ultimately the General Division heard testimony from the Claimant's lawyer. The General

¹⁸ For examples from administrative proceedings where these kinds of questions are asked, see *Yusuf v Canada (Minister of Citizenship and Immigration)*, 2005 FC 271; *Quiroa v Canada (Minister of Citizenship and Immigration)*, 2005 FC 271; *Lalley v Telus Communications Inc.*, 2014 FCA 214; *Children's Aid Society of the United Counties of Stormont, Dundas and Glengarry v S.V.D.*, 2016 ONSC 350; and *Bady-Badila v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 399

Division member did not clarify before the end of the hearing (or in the decision) how they planned to deal with that evidence. It was not at all clear whether the General Division would ignore the evidence or consider and weigh it despite the warning at the beginning of the hearing not to blur the lines between lawyer and witness. Ideally, the member would clarify the plan before the hearing closed, but at minimum the issue needed to be clarified in the decision.

[35] A final note. The Claimant's lawyer was in a difficult situation here, as I have acknowledged above. There are ways for the General Division to resolve this problem in this case and in future cases if necessary. In some cases, it may be appropriate to adjourn a case to allow a claimant to decide whether they want to instruct their lawyer to proceed as a lawyer (and not as a witness). In that situation, the claimant would be relying on their own testimony, which may well put the lack of capacity "on display" for the Tribunal. By contrast, a claimant might decide to keep their witness and find another lawyer. In some cases, it will not be possible to identify another lawyer who can or will take the referral, especially for free.

REMEDY

[36] Once I have found an error by the General Division, I can return the case to the General Division for reconsideration, or I can give the decision that the General Division should have given.¹⁹

[37] The Minister argues that I should return the case to the General Division for a new hearing. This position is consistent with the standard when the error is failing to provide a fair process. To put it plainly, to fix an unfair process, you often need to start the process over again.

[38] The Claimant's lawyer argues that a new hearing is "both inappropriate and pointless for many reasons."²⁰ The Claimant's lawyer argues that she testified for the Claimant because he does not sleep and because he was battling flu-like symptoms for most of the summer. The Claimant's lawyer stated that he was unable to attend a hearing in the fall of 2019.

¹⁹ DESDA, s 59.

²⁰ AD4-2.

[39] I will return the matter to the General Division for reconsideration. If the parties have arguments to make about how best to proceed at the General Division in terms of process, they can make those arguments to the member who will hear the appeal.

CONCLUSION

[40] I allow the appeal. The General Division failed to provide a fair process. I return the case to the General Division for reconsideration.

Kate Sellar
Member, Appeal Division

HEARD ON:	December 19, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	Loretta Edlund, Representative for the Appellant Christian Malciw, Representative for the Respondent