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

Citation: *P. G. v Minister of Employment and Social Development*, 2020 SST 730

Tribunal File Number: GP-19-1863

BETWEEN:

P. G.

Appellant (Claimant)

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL INTERLOCUTORY DECISION
General Division – Income Security Section

Decision by: Pierre Vanderhout

Claimant represented by: Steven Yormak

Date of decision: August 20, 2020

Canada

DECISION

[1] The original General Division ("GD") decision, the full Appeal Division ("AD") decision, and the original GD hearing recording should all form part of the initial record in this appeal. The other documents from the AD proceedings should not be part of the initial record in this appeal. However, the parties could request the addition of such documents, and the GD member would have to decide at that time whether they should form part of the record.

OVERVIEW

[2] This matter has a relatively long history. The Tribunal's General Division ("GD") issued a decision after a hearing. The Claimant appealed that decision to the Tribunal's Appeal Division ("AD"). The AD allowed the Claimant's appeal of the original GD decision, and sent the matter back to the GD for reconsideration by a different GD member. Normally, the new GD member would then have access to both the previous GD file and the documents created at the AD level. This would include submissions, any new evidence, and both the GD and AD decisions.

[3] However, the Claimant also asked the AD to put conditions on the documentary record that could be considered by the new GD member. The Claimant did not want the new GD member (me) to see any evidence that the original GD member did not see. The Claimant also did not want the new GD member to see the original GD decision or the full AD decision, or hear the recording of the original GD hearing.

[4] The AD declined to rule on Claimant's request. Instead, the AD asked the new GD member to consider the Claimant's request as a preliminary issue.

[5] This interlocutory decision addresses that important preliminary issue.

Appeal procedure

[6] Because of the Claimant's request, the Tribunal constructed a special file before it was assigned to me. While I have access to the documents that were filed before the original GD

hearing, I do not have a copy of the original GD decision. I also do not have a recording or transcript of the original GD hearing.[1]

[7] I do not have any of the AD file either, except for parts of paragraphs 32-37 of the AD's decision (the "AD Instructions"). Those instructions only give instructions for the GD's consideration of the preliminary issue. Here are those instructions, in full:

> *[32] The DESD Act sets out what remedies the Appeal Division can give when it intervenes. This includes making the decision that the General Division should have made, or referring the matter back to the General Division for reconsideration. Counsel for the Claimant requests that the matter be referred back to the General Division for a new hearing. In fact, counsel argues that whenever the Appeal Division refers a matter back to the General Division, a completely new hearing should be held and that no evidence apart from that which was before the General Division in the first instance should be considered. He contends that unless the new hearing proceeds in this way, it is not a truly* de novo *hearing, and the General Division member will be perceived to be influenced by the prior General Division and Appeal Division decisions.*
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> *[33] However, the DESD Act does not require that an appeal be heard entirely afresh, or* de novo*, if it is referred back to the General Division. The DESD Act says, "the Appeal Division may … refer the matter back to the General Division for reconsideration in accordance with any directions that the Appeal Division considers appropriate…" This gives the Appeal Division the discretion to direct a new hearing if appropriate, or to direct that the appeal be reconsidered without a completely new hearing. It also permits the Appeal Division to give directions regarding what written or audio evidence is to be considered by the General Division, including the prior General Division decision, the Appeal Division decision and the recording of the prior General Division hearing. Nothing in the DESD Act restricts the Appeal Division's discretionary power of the Appeal Division when referring matters back to the General Division.*
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> *[34] In addition, if a matter is referred back to the General Division for reconsideration, it is open to the parties to present any additional evidence they choose to the General Division. This could include the audio recording of a prior General Division hearing. It would then be for the General Division member upon reconsideration to decide whether to accept this evidence, and if so what weight to give it. The General Division could also consider arguments about any perceived bias that may result as a consequence of listening to this recording.*
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> *[35] In this case, it is appropriate for the matter to be referred back to the General Division for reconsideration.* [The rest of the paragraph is redacted.]
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> *[36] The Claimant requests that the original General Division decision, the recording of the General Division hearing and this decision be removed from the record and not be*

[1] IS3-1 to IS3-2.

> *considered by the General Division member who will reconsider this matter. I will not address these arguments at this time. The parties should present their arguments to the General Division upon reconsideration for a preliminary decision to be made on this issue.*
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> *[37] The appeal is allowed. The matter is referred back to the General Division for reconsideration.*

[8] I do not know the basis of the AD's decision on the merits of the Claimant's appeal to the AD. Nor do I know if the AD held an oral hearing or made a recording of it. Finally, I do not know if the AD Instructions contain every part of the AD decision that is pertinent to the preliminary issue. I only know that neither party raised any objections about the AD Instructions.

The statutory framework of the AD's referral back to the GD

[9] The AD makes decisions in accordance with the *Department of Employment and Social Development Act* ("DESD Act"). The AD has four options when it rules on an appeal from the GD. It may:

> (1) dismiss the appeal;
> (2) give the decision that the GD should have given;
> (3) refer the matter back to the GD for reconsideration in accordance with any directions that the Appeal Division considers appropriate; or
> (4) confirm, rescind or vary the GD decision in whole or in part.[2]

[10] The third option applies in this case, as the AD referred the matter back to the GD for reconsideration with directions.[3]

ISSUES

[11] This appeal raises the following issues:

> (1) Is the proceeding currently before the GD a "de novo" matter?
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> (2) Can the new GD member see the prior GD and AD decisions?
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> (3) Should the prior GD recording form part of the record before the new GD member?

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[2] Subsection 59(1) of the *Department of Employment and Social Development Act*.
[3] Paragraphs 35, 36 and 37 of the AD Instructions.

(4) How should I handle other AD evidence, submissions, or decisions in this matter?

ANALYSIS

[12] I will consider each of the above issues in order. I will start with deciding whether the new GD proceeding should be "*de novo*".

(1) The new GD proceeding is not "*de novo*"

[13] The Claimant cited many sources to support the argument that the new GD hearing must be "fresh" or "*de novo*". To preserve the integrity of the new hearing, the Claimant said the new GD member could not have access to anything that was not available to the original GD member, at the time of the first GD hearing. The Claimant provided definitions of "*de novo*" and said the new GD member had to "wipe the slate clean", as if any previous hearing had not occurred.[4]

[14] In this case, the statute (the DESD Act) refers to a referral for "reconsideration" by the GD, and does not use the phrase "*de novo*".[5] In the AD Instructions, the AD acknowledges that the Claimant wanted a completely new hearing. The AD also acknowledges that the Claimant only wanted the new GD member to see what the original GD member saw at the time of the original hearing, so that the new GD hearing would truly be "*de novo*".[6]

[15] However, the AD Instructions refer to the DESD Act and affirm that an appeal referred back to the GD does not need to be heard entirely afresh (*de novo*). The AD said it could refer the matter back with instructions to have a completely new hearing, if appropriate. The AD said it could give directions about what written or audio evidence is to be considered by the new GD member. This includes the original GD decision, the AD decision, and the recording of the original GD hearing.[7] The AD Instructions added that the Claimant wanted each of those removed from the record. Other than asking me to make a preliminary decision on the Claimant's request, the AD Instructions contained no further directions.[8]

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[4] See, for example, page IS4-7: this cites Professor David Mullan's "*Administrative Law*" text.
[5] Subsection 59(1) of the *Department of Employment and Social Development Act*.
[6] Paragraph 32 of the AD Instructions.
[7] Paragraph 33 of the AD Instructions.
[8] Paragraph 36 of the AD Instructions.

[16] The new GD member's responsibility is to follow the guidance given by the governing statute and the appellate body that referred the matter back to the GD. Nowhere does the governing statute refer to a *de novo* hearing, or the exclusion of evidence from the prior GD proceedings. It just refers to a "reconsideration" of the matter.[9] Nor do the AD Instructions require a *de novo* hearing. In fact, the AD Instructions explicitly confirm that the DESD does not require a *de novo* hearing when a matter is referred back to the GD.[10] Instead, the AD has entrusted the new GD member to make a preliminary issue on what should be present in the record.[11] This is entirely in keeping with the AD's statutory authority to refer the matter back to the GD with any appropriate directions.[12] As a result, I do not find the various definitions or interpretations of "*de novo*" to be helpful.

[17] Based on the DESD Act and the AD Instructions, I find that my mandate is not necessarily restricted to a *de novo* hearing.

[18] This is consistent with a previous Federal Court of Appeal decision. Although it arose from an employment insurance case and the predecessor to this Tribunal, the decision in *Francella* affirmed that a "reconsideration" was not necessarily *de novo*. It depended on procedural fairness and the terms of the appellate decision. The fairness considerations would vary from case to case.[13] While I do not need to rely on *Francella*, it is consistent with my conclusion on the *de novo* issue.

[19] I will now determine whether the prior decisions ought to form part of the record.

(2) The new GD member ought to be able to see the prior GD and AD decisions in their entirety.

[20] The statutory framework supports access to the prior decisions. This is particularly true of the requirement to proceed as informally and quickly as fairness and natural justice permit. This also reduces the risk of misinterpreting the AD's findings and instructions, or making the same

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[9] Subsection 59(1) of the *Department of Employment and Social Development Act*.
[10] Paragraph 33 of the AD Instructions.
[11] Paragraph 36 of the AD Instructions.
[12] Subsection 59(1) of the *Department of Employment and Social Development Act*.
[13] *Francella v. Canada (Attorney General)*, 2003 FCA 441

mistakes as the original GD member. The Claimant made no specific allegation of bias against the new GD member, and binding authority presumes that the new GD member has integrity and is impartial. I will now explore these findings in more detail.

[21] At a minimum, the new GD member has to see the directions from the AD decision. However, I have serious concerns about the Tribunal only providing a heavily redacted or censored AD decision to the new GD member. Under this approach, somebody will have to turn the full AD decision into clear and accurate directions that are not "tainted" by the AD member's findings on other aspects of the case. If the AD member does not create those directions, it could introduce all kinds of potential errors. It is logically inconsistent not to trust the new GD member to see the whole AD decision, but trust some other unknown person to extract the right parts from it. Nor is it practical for the AD member to prepare multiple decisions: one for the parties at the AD level, and another condensed one for the new GD member. This adds delay, complexity and expense. Just like the GD, the AD has to conduct proceedings as informally and quickly as the circumstances and the considerations of fairness and natural justice permit.[14]

[22] Even if AD members created a "condensed" version of their decisions, it adds another degree of separation from the full AD decision and increases the likelihood of inconsistency. It is improper to have multiple decisions on the same issue. Important contexts and instructions could be missing or misstated, and the new GD member would have no idea that such problems existed. While the Tribunal had to create a "condensed AD decision" in this case, I find that it adds complexity, expense, delay, and the risk of misdirection.

[23] I see other compelling reasons for the new GD member to have access to not only the AD decision, but also the previous GD decision.

Considerations of fairness and efficiency

[24] Having access to prior decisions is also consistent with the fair and efficient administration of justice. Justice is not served if the new GD member makes the same mistakes as the original GD member, simply because the new GD member wasn't allowed to see the original GD decision or the AD's explanation of why that decision could not stand. As with the

[14] Paragraph 3(1)(a) of the *Social Security Tribunal Regulations*.

AD, the GD has to conduct proceedings are informally and quickly as the circumstances and the considerations of fairness and natural justice permit.[15] Not reviewing the prior decisions, particularly when an error was made before, might in itself violate the principles of natural justice. I further note that all AD decisions are published, so that they are publicly accessible in any event. It is hard to understand why the public should have access to the AD decision, when the new GD member does not.

[25] In a recent decision, the AD said that a finding against a particular party, or even a series of findings against that party, is not in itself an indication of bias. The AD said that would apply even if the original GD member also made the decision after the matter was referred back from the AD. There may be alternative explanations for the adverse finding, including the possibility that the party's case is without substance.[16] While AD decisions are not binding on the GD, the AD's opinion is nonetheless consistent with having access to prior decisions.

[26] The only competing consideration I see is the Claimant's submission that seeing the prior decisions might taint or bias the new GD member.

Would the new GD member be biased from seeing prior decisions?

[27] The Claimant made extensive submissions about the potential bias that could arise if the new GD member were allowed to see the prior decisions. The Claimant suggests that, by seeing the reasoning chosen by another Tribunal member, the new GD member might be inclined to adopt the same reasoning (or at least the same result) from the prior decision. The Claimant suggests that this would negatively affect applicants for benefits.

[28] I do not accept this argument.

[29] Bias suggests a state of mind that is in some way predisposed to a particular result. The threshold for a finding of bias is high, and the burden of proof lies with the party alleging that it exists. In the *Committee for Justice and Liberty* decision, the Supreme Court of Canada said the test for bias is: "What would an informed person, viewing the matter realistically and practically

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[15] Paragraph 3(1)(a) of the *Social Security Tribunal Regulations*.
[16] *D. D. v. Minister of Employment and Social Development*, 2020 SST 23.

and having thought through the matter, conclude?"[17] A real likelihood of bias must be demonstrated. A mere suspicion is not enough.[18] In this case, there is no specific allegation of bias, other than a suspicion regarding any potential new GD member. This does not meet the test in the *Committee for Justice and Liberty* decision.

[30] In a case called *Gale*, the Federal Court of Appeal referred to a presumption of integrity and impartiality on the part of the decision maker.[19] This presumption exists even though there may have been prior decisions involving the parties. In fact, the presumption exists even if the decision maker had previously heard the original appeal. The presumption is upheld if there is no suggestion of bias, or reasonable apprehension of bias.[20] This is a far broader presumption than is necessary in the Claimant's case. In the Claimant's case, a new GD member will hear the current appeal, and there is no suggestion of bias or a reasonable apprehension of bias.

[31] More generally, I note that most new cases handled by the GD result from the Minister's denial of an applicant's claim. It is usually the reconsideration decision that is appealed to the GD. This means an applicant's claim has usually been denied twice by the Minister, before the GD sees it for the first time. If I accepted that a GD member would be biased or swayed by previous decisions, then no GD member would ever be able to act on a file: simply seeing the Minister's denial would create a "taint".

[32] The Claimant seeks to distinguish *Gale,* saying that the principle of "inevitable result" prevents its application to the present appeal. The Claimant says *Gale* stands for the principle that an appeal will fail (even if there were a fundamental procedural violation), if the final result would be the same even if the violation were rectified. The Claimant suggests that there is no "inevitable result" in the present appeal. I agree with that point. I also agree that the Federal Court of Appeal considered the principle of "inevitable result" in *Gale*.[21] But I do not see how

[17] *Committee for Justice and Liberty* et al. *v. National Energy Board* et al., [1978] 1 S.C.R. 369, at 386.
[18] The Tribunal's Appeal Division sets out these principles in *D. D. v. Minister of Employment and Social Development*, 2020 SST 23, at paragraph 12. While not strictly binding on the General Division, I find the principles persuasive. To the extent that they reflect the Supreme Court of Canada's holdings, they would be binding.
[19] *Gale v. Canada (Treasury Board)*, 2004 FCA 13.
[20] See *Gale*, at paragraph 18.
[21] See *Gale*, at paragraph 13.

that affects the finding, which appears elsewhere in *Gale* regarding a different question, that decision makers are presumed to be impartial and have integrity.[22]

[33] Other binding decisions affirm this presumption. In 2011, the Federal Court of Appeal said judges or tribunals were unlikely to have grounds for disqualification simply because they had considered the matter before. There must be something more to establish bias. The Court found it hard to believe that judges or tribunals would consider themselves biased just because they had to reconsider or re-determine a matter.[23] The Supreme Court of Canada said that public confidence in our legal system is rooted in the fundamental belief that adjudicators must always judge without bias or prejudice, and must be perceived to do so.[24] It follows that seeing another GD member's decision would be highly unlikely to create any bias for the new GD member.

[34] I conclude that the *Gale* finding of presumed impartiality and integrity is binding on me, and cannot be distinguished.

Decisions in the immigration context

[35] In the immigration context, the Federal Court of Appeal has specifically ruled on whether adjudicators may fairly see prior decisions in the same proceedings. In the *Lahai* decision, the Federal Court of Appeal said this:

> "… I see nothing wrong with the Board member at the second hearing reading the prior decision. I agree with the motions judge that no informed person who reviewed the matter thoughtfully, realistically and practically would conclude that the Board member who conducted the second hearing could not proceed with an open mind only because he had read the first decision. The Board member at the second hearing was clearly aware that the first decision was based on incomplete information and he permitted the Appellant to lead whatever further evidence he wished.
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> We do not believe that the mere reading of a previous decision which is adverse to the Appellant can lead to a reasonable apprehension of bias…"[25]

[36] This appears to be exactly on point and binding on me. It is wholly consistent with the Supreme Court of Canada's statement on bias in *Committee for Justice and Liberty*. In response

[22] See *Gale*, at paragraph 18.
[23] *Janssen-Ortho Inc. v. Apotex*, 2011 FCA 58, at paragraph 10.
[24] *Wewaykum Indian Band v. Canada*, 2003 SCC 45, at paragraphs 57-59, as cited in *Janssen-Ortho* at paragraph 5.
[25] *Lahai v. Canada*, 2002 FCA 119, at paragraphs 19 and 20.

to *Lahai* and several other cases cited by the Minister, the Claimant argues that the Tribunal cannot apply Federal Court of Appeal decisions arising from Immigration and Refugee Board ("IRB") decisions. The Claimant says IRB decisions come from an entirely different statutory framework. The Claimant also says that the IRB decisions arise from "continuing" hearings, where evidence and findings can accumulate in a series of hearings. I am not certain that this is correct for all matters before the IRB. For example, the procedure in a detention review hearing (which appears to be a "continuing" hearing) is not necessarily the same as in a hearing on refugee status. Furthermore, principles of natural justice would always apply, even if the tribunal in question has different procedures.

[37] In the end, however, it does not matter whether *Lahai i*s binding on me. Even if *Lahai* and other Federal Court of Appeal immigration cases could be completely distinguished because of the IRB's unique framework, we are still left with the specific powers granted to the Tribunal. The AD has not directed the new GD member to disregard the previous decisions. The AD left that discretion to the new GD member. Furthermore, decisions such as *Gale* are binding authority for the principle of presumed impartiality.

[38] The Claimant also suggests that the new GD member would be improperly acting in an "appellate" capacity by having access to the prior decisions.

Is the new GD member acting in an appellate capacity?

[39] I do not agree that the new GD member would be acting in an "appellate role". The Claimant referred to s. 54(1) of the DESD Act in support of this position. That subsection says the GD can dismiss an appeal or confirm, rescind, or vary a Minister's decision. However, the Claimant says that the new GD member would be acting as an appellate review body of the AD decision, if the new GD member had access to the prior decisions (particularly the AD decision).

[40] This suggests that the new GD member can overrule what the AD decided. However, the new GD member is actually compelled to follow the directions of the AD.[26] A lower court cannot tell an appellate court what to do. Furthermore, by sending the matter back to the GD, the AD has not made a decision on the merits of the case. The AD only made a ruling on whether the

[26] Subsection 59(1) of the *Department of Employment and Social Development Act*.

original GD decision could stand. I do not see how the new GD member could be handling an "appeal" from the AD, if the AD did not even make a decision on the merits.

[41] Subsection 54(1) of the DESD Act does not help in this case. It only addresses appeals directly from the Minister's reconsideration decision. As noted above, the AD has the authority under s. 59(1) of the DESD Act to send matters back to the GD for reconsideration, along with any directions that the AD considers appropriate. This affirms the GD's subservient role to the AD, rather than put the GD in a supervisory or appellate role over the AD.

[42] As the new GD member is not acting in an appellate role, the Claimant's submission does not affect my findings on access to previous decisions. I will now consider the original GD recording.

(3) Should the prior GD recording form part of the record before the new GD member?

[43] For the reasons set out below, I find that the prior GD recording should be available to the new GD member. However, the decision of whether to actually consider the previous GD recording is discretionary and will depend on the particular situation. In some cases, the new GD member may decide not to consider the recording.

[44] The prior GD recording could be highly relevant. It likely contains "sworn" evidence on the exact issue facing the new GD member. It might also be a waste of resources for everyone involved to redo an entire hearing, especially if there were no real concerns about the first hearing. Other benefits may include the unavailability of witnesses who were at the first hearing. It might also be difficult for witnesses to testify again, if their evidence is of a sensitive nature.

[45] The Claimant does not identify any particular issues with the prior GD recording. However, the Claimant is concerned that access to the prior GD recording could violate the Tribunal's duty of procedural fairness. The Claimant submits authority from the Supreme Court of Canada in support of this argument.[27]

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[27] *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paragraphs 28 and 30, *Iwa v. Consolidated-Bathurst Packaging Ltd.*, [1990] 1 SCR 282 at pp. 329 and 335, and *Singh v. Minister of Employment and Immigration*, [1985] 1 SCR 177 at paragraph 59.

[46] While Supreme Court of Canada decisions bind the Tribunal, the thrust of these decisions is that a party must have the opportunity to fully present their case. Sometimes, this will require the opportunity to give oral evidence, so credibility can be assessed. However, if the recording of the first GD hearing is included, nothing should stop the parties from fully presenting their case. They can give additional oral evidence to supplement or clarify the previous evidence. If, for some reason, the new GD member elects to decide the Claimant's appeal without a new oral hearing, that may well form the basis of a successful appeal to the AD.[28]

[47] A breach of procedural fairness or natural justice at the prior GD hearing may make it less desirable for the new GD member to consider the previous GD recording. However, even that would not guarantee the exclusion of the previous recording. Exclusion is more likely in the case of outright bias by the original GD member. But other procedural fairness concerns, such as not fully hearing from a particular witness, could be remedied by accepting the recording of the first hearing and "filling in the gaps" at the second hearing. In other words, a weakness from the first hearing could be overcome by supplementing the evidence rather than redoing the entire hearing. Again, the statutory framework and the AD Instructions support access to the prior recording, although the new GD member can ultimately decide not to consider it.

[48] The Claimant's procedural fairness argument presumes the worst procedural outcome: that the new GD member will not want to hear any new evidence. However, it is impossible to inoculate the Tribunal from improper procedural decisions, unless the Tribunal is not permitted to make any decisions at all. This defeats the purpose of an administrative tribunal. It also contradicts the *Social Security Tribunal Regulations*, which set out how the Tribunal must conduct the proceedings before it.[29]

[49] Whatever the outcome of a proceeding before the GD, the unsuccessful party may apply for leave to appeal.[30] In some situations, no leave to appeal is necessary because an automatic right of appeal exists.[31] I acknowledge that some cases at the GD level may be very complex. They could involve highly technical arguments regarding statutory interpretation, or raise

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[28] See decisions such as *Turner v. Canada Border Services Agency*, 2012 FCA 159.
[29] Paragraph 3(1)(a) of the *Social Security Tribunal Regulations*. A similar provision governs the interpretation of the Regulations: see s. 2 of the *Social Security Tribunal Regulations*.
[30] Section 39 of the *Social Security Tribunal Regulations*.
[31] For example, an appeal of a summary dismissal: see s.34 of the *Social Security Tribunal Regulations*.

difficult credibility issues. They could involve disputes over procedural fairness. In such cases, the GD may not always make the correct decision. However, the GD cannot be bypassed simply because it might make an error. The GD is the adjudicator of first instance, and it must exercise that role even in the most difficult cases. The AD remains available for review, if necessary.

[50] While other GD decisions only have persuasive value, my conclusion is consistent with a 2017 GD decision in another matter that was referred back from the AD.[32] In that case, the GD accepted that the new GD member could conduct a redetermination by listening to previous hearing's recording, reading the previous GD decision, and having a further hearing only to clarify or add to the evidence that had already been presented. However, the GD advised that issues of natural justice, bias, or procedural fairness could interfere with that finding.[33] As noted, I have not seen any such issues in the present case.

[51] I will now briefly address any other evidence, submissions or decisions that were not before the original GD member but were filed or created at the AD.

(4) I make no finding with respect to other AD evidence, submissions or decisions

[52] The AD Instructions do not specifically address the issue of whether the record should contain any other evidence, submissions, or decisions from the AD (the "Other AD Documents").[34] However, the Claimant apparently said that "no evidence apart from that which was before the GD in the first instance should be considered."[35]

[53] This is a circular problem. Because I cannot see anything beyond the brief AD Instructions, I do not know if the Claimant abandoned this request and focused on the prior decisions and the GD recording. This reinforces my earlier finding that the full AD decision should be available.

[54] There are operational aspects to this issue as well. The current practice at the Tribunal is to copy everything (including the Other AD Documents) when a matter is sent back to the GD

[32] *A. M. v. Minister of Employment and Social Development*, 2017 SSTGDIS 98.
[33] *A. M. v. Minister of Employment and Social Development*, 2017 SSTGDIS 98, at paragraphs 10-11.
[34] Paragraph 36 of the AD Instructions.
[35] Paragraph 32 of the AD Instructions. This appears to contradict the idea of a *de novo* hearing, as a *de novo* hearing would presumably involve new oral evidence that the original GD member did not hear.

for reconsideration. This would include new evidence filed at the AD, submissions in advance of the AD's decisions, and the AD decisions themselves. This is efficient and reduces the risk of an administrative error by Tribunal staff.

[55] However, as the AD Instructions provided me with specific directions and did not mention the Other AD Documents, it is not appropriate for me to consider such documents in this preliminary decision. I am therefore not ordering the Other AD Documents to be part of the record in this particular reconsideration hearing, at this particular time.

[56] This should not be taken as a ruling on excluding the Other AD Documents in general, or even in this particular appeal. I base my decision not to include them at this time on the narrow AD Instructions. Had the AD Instructions directed me to consider the Other AD Documents, I might have determined that they should form part of the record too.

[57] In any case, as the AD Instructions point out, parties may generally present any additional evidence of their choosing to the GD. It would then be up to the new GD member to decide whether to receive this evidence. In so doing, the new GD member could also consider arguments from the parties about perceived bias.[36]

CONCLUSION

[58] I find that the original GD decision, the full AD decision, and the original GD hearing recording should all form part of the record in this appeal.

[59] I make no finding on whether other evidence, submissions, or other decisions from the AD proceedings should be part of the record. For this case only, this means that they should not be part of the record initially provided to the new GD member. This does not mean that the new GD member cannot receive them later, if either party wishes to file them.

Pierre Vanderhout
Member, General Division - Income Security

[36] Paragraph 34 of the AD Instructions.