



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *SZ v Minister of Employment and Social Development*, 2020 SST 853

Tribunal File Number: AD-19-628

BETWEEN:

S. Z.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Kate Sellar

DATE OF DECISION: October 6, 2020

DECISION AND REASONS

DECISION

[1] I allow the appeal. The case will go back to the General Division for reconsideration. These reasons explain why.

OVERVIEW

[2] S. Z. (Claimant) worked in construction when, on December 3, 2016, he fell seven feet from scaffolding onto a concrete floor. He has been unable to return to work since the accident. He applied for disability pension under the *Canada Pension Plan* (CPP) on June 21, 2017. The Minister refused the application. The Claimant appealed to the General Division stating that he has contributed to the Canada Pension Plan and he is disabled and unable to work.

[3] The General Division dismissed the Claimant's appeal. The Claimant had to show that he had a severe and prolonged disability on or before December 31, 2011, because this is when his minimum qualifying period (MQP) ended. The General Division found that before the Claimant's accident at work, he was not disabled. As a result, he did not meet the test for a disability pension. In other words, the Claimant's injury occurred after the end of his MQP.

[4] The Claimant appealed the General Division's decision and I granted leave (permission to appeal). I found that there was an arguable case that the General Division failed to provide the Claimant with a fair process.

[5] I must decide whether the Claimant proved that the General Division made an error under the *Department of Employment and Social Development Act* (DESDA). If there is an error, I must decide how to fix (remedy) that error.

[6] The General Division made an error. The Claimant did not receive a fair process. I find that it is more likely than not that the General Division failed to explain to the Claimant that he had the option of putting his appeal on hold (adjourning). Putting the appeal on hold would have allowed the Claimant time to access a reassessment from the Canada Revenue Agency (CRA), facilitating a change to his Record of Earnings (ROE). That way, the General Division could

hear the appeal based on an updated and accurate ROE. I will return the matter to the General Division for reconsideration.

ISSUE

[7] Did the General Division fail to provide a fair process to the Claimant by failing to explain to him that he had the option of adjourning the appeal pending CRA's reassessment of his earnings?

Reviewing General Division decisions

[8] 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 three possible reasons for (referred to in the law as "grounds of") appeal.¹

Fair Process Errors

[9] The DESDA says that it is an error when the General Division fails to observe the principles of natural justice.² 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.³

[10] 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.⁴

The Minimum Qualifying Period (MQP)

[11] To qualify for a disability pension, claimants must show a severe and prolonged disability on or before the end of their MQP. The MQP is calculated based on the Claimant's contributions

¹ DESDA, s 58(1).

² DESDA, s 58(1)(a).

³ The Supreme Court of Canada explained this in a case called *Baker v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 SCR 817.

⁴ The Federal Court explains this idea in a case called *Kouama v Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 9008 (FC).

to the Canada Pension Plan. The contributions are set out in a document called the ROE. The law requires the General Division to consider the entries on the ROE to be accurate.⁵

[12] In some cases, claimants who want to challenge the information on the ROE will ask that their case at the General Division be put on hold while they attempt to fix any problems with their earnings with the Canada Revenue Agency (CRA).

Did the General Division fail to provide a fair process?

[13] The General Division failed to provide a fair process. At the General Division level, the Claimant was challenging whether the MQP was correct. It seems to me that he argued that the ROE did not accurately reflect his earnings, which in turn has an impact on his contributions to the Canada Pension Plan. Given all of the information I have, I am not satisfied on a balance of probabilities that the General Division provided the Claimant with the information he needed about the Tribunal's process. As a result, the Claimant did not have a full opportunity to make his arguments on every fact or factor likely to affect the decision.

[14] At the General Division level, the Claimant's documents state in several places that he did work and paid income taxes, but his accountant did not properly record this for the purpose of CPP.⁶

[15] Unfortunately, there is no recording of the General Division hearing, so I cannot listen to what else the Claimant or the General Division member might have said to each other about the issues the Claimant had with the ROE during the hearing. I cannot know for certain whether the General Division member talked to the Claimant about his options in terms of process.

[16] Normally the Appeal Division does not hear new evidence. The Appeal Division can make an exception to that rule when the new evidence relates to allegations that the General Division failed to provide a fair process.⁷ Accordingly, at the Appeal Division level I gave the Claimant the chance to testify under oath about what happened at the General Division hearing. The Minister's representative did not object to this approach. In this appeal, the Claimant's

⁵ *Canada Pension Plan*, s 97(1).

⁶ GD1-4, GD1-9, and GD2-15.

⁷ *Parchment v Canada (Attorney General)*, 2017 FC 354.

testimony about the General Division hearing is relevant when deciding what the Claimant may or may not have been told about the process given that he was challenging the ROE.

[17] It is clear from the Claimant's testimony at the Appeal Division that he has struggled to understand the Tribunal's process. The Claimant does not have a legal representative, and he testified with the assistance of an interpreter. He does not recall much about the hearing at the General Division level. He recalls with some detail the steps he took with the person who filed his tax returns when he realized that he had not made CPP contributions in 2015 when he worked. He does not remember the General Division member telling him that she could put the matter on hold while he pursued the reassessment.

[18] I also allowed the Claimant's son to testify during the hearing at the Appeal Division, as he was also present during the General Division hearing (again, the Minister's representative did not object). The Claimant's son also did not have a memory of the General Division member discussing procedural options in light of the Claimant's issue with the ROE.

[19] The General Division decision acknowledges the Claimant's statement about the problem he had with the ROE not reflecting the contributions he made when he paid his income taxes as outlined above.⁸ The decision then states:

At the hearing, the Claimant testified he did work during the period where the Record of Earnings says he did not work. He was unable to provide any details about the work he did stating that he cannot remember exactly because of his injury, but he did work. **He stated that he worked his whole lifetime and he does not know why the Record of Earnings shows that he did not work.**⁹ (emphasis added)

[20] The General Division decision concluded, based on the ROE, that the Claimant's MQP ended on December 31, 2011.¹⁰

[21] The Minister argues that the General Division provided a fair process. The Minister notes that the General Division sent the Claimant standard letters before his General Division

⁸ General Division decision, para 9.

⁹ General Division decision, paras 10.

¹⁰ General Division decision, para 13.

hearing.¹¹ These letters should have alerted the Claimant to the idea that if he had more information or documents to rely on (like a reassessment of his earnings from CRA) he needed to let the Tribunal know. The Minister argues that the Claimant knew of his earnings and that it was a question in his appeal. He also knew that he wanted to ask or that he had already asked CRA to assess his earnings. It was the Claimant's responsibility to inform the General Division that he was waiting for further information from CRA in order to make his case.

[22] More specifically, the Minister notes that by April 2019, the Tribunal wrote to the Claimant, stating that the Tribunal would assign his appeal to a member and that the member would issue a decision based on the documents in the file, or send a notice of hearing. The Minister argues that this letter should have alerted the Claimant that the central issue in his case was not addressed – the accuracy of the ROE. The Minister argues that it was the Claimant's responsibility to communicate with the Tribunal about his CRA file, and that he failed to contact the Tribunal either in writing or by phone before the hearing.

[23] In my view, the General Division did not provide a fair process to the Claimant. Based just on the information that the General Division **did** have about the Claimant's concerns about the ROE, to provide a fair process the General Division needed to inform the Claimant that:

- the General Division must assume that the ROE is accurate, and
- therefore if the Claimant was challenging the accuracy of that ROE, he could ask to put the General Division case on hold. Then he could take steps with the CRA to reassess and ultimately correct the ROE.

[24] The reassessment impacts the Claimant's MQP. It is the difference between his injury occurring during the MQP (which means he needs to show his disability was severe and prolonged and therefore he qualified for the disability pension), or being outside the MQP (and therefore he does not qualify for the disability pension).

¹¹ The April 19, 2018 letter stated that the Tribunal does not get documents or gather evidence for claimants; that the documents the Tribunal had were the only documents the Tribunal would consider; and that it is the party's responsibility to file any new documents they want the Tribunal member to consider.

[25] Since I do not have a recording of the hearing at the General Division, I need to consider and assess:

- the evidence I have from the Claimant's file;
- the General Division decision; and
- and the evidence at the Appeal Division hearing

to decide whether the General Division failed to explain to the Claimant that he had the option of requesting that his case be put on hold (adjourned).

[26] As I noted earlier, there are several places in the written documents where the Claimant explains that his accountant did not properly record his contributions to the CPP.

[27] In the decision, the General Division acknowledged that the Claimant was challenging the ROE. It is also important to consider what is missing from the General Division decision. The decision does **not** state that the General Division member explained to the Claimant during the hearing about his options in terms of procedure. It does **not** state that the Claimant considered and then decided against requesting an adjournment.

[28] At the Appeal Division level during the hearing, neither witness remembered the General Division member explaining the procedural option of an adjournment. Since neither of them could remember such a discussion during the hearing, and the decision is silent on this procedural issue, I find it more likely than not that the General Division did not outline the process option available and therefore did not provide a fair process.

[29] Once the Claimant had his reassessments, he tried to have the Tribunal consider his case in light of that corrected and updated material. He made an application to rescind or amend (change) the General Division decision based on those new documents. It may be that if the General Division had given him the opportunity to adjourn, the Claimant may well have accepted it.

[30] I accept that it is the Claimant's responsibility to gather the evidence he needs to make his case, and that the Tribunal's standard letters explain this concept to claimants in the months

leading up to the hearing. The need to explain the process to the Claimant at the hearing in this situation applies regardless of the communications the Tribunal sent before the hearing about the Claimant's responsibilities more generally.

[31] I find it more likely than not that the Claimant did not receive the information he needed about what his procedural options were at the General Division given that he seemed to take issue with the content of the ROE. I have based my decision on the Claimant's testimony at the Appeal Division, the written record, and the General Division decision.

[32] I have the option of giving the decision that the General Division should have given, or returning the matter to the General Division for reconsideration.¹² Given that the issue was one of fair process, I will return the matter to the General Division for reconsideration. The Claimant should have an opportunity to present his case for the disability pension with the benefit of the current and updated ROE.

CONCLUSION

[33] The appeal is allowed. The case will return to the General Division for reconsideration.

Kate Sellar
Member, Appeal Division

HEARD ON:	August 5, 2020
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	S. Z., Appellant C. Z., Representative for the Appellant Viola Herbert, Representative for the Respondent

¹² DESDA, s 59.