



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *D. D. v Canada Employment Insurance Commission*, 2019 SST 159

Tribunal File Number: AD-19-82

BETWEEN:

D. D.

Applicant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Leave to Appeal Decision and Decision by: Shirley Netten

Date of Decision: February 22, 2019

DECISION AND REASONS

DECISION

[1] The application for leave to appeal is granted, and the appeal is allowed. This matter will be returned to the General Division for reconsideration.

BACKGROUND

[2] The Canada Employment Insurance Commission (Commission) issued a penalty against D. D. (Claimant), in relation to his Employment Insurance (EI) sickness benefits in 2017. The Commission reduced the penalty on reconsideration, and the Claimant appealed the remainder of the penalty to the General Division of the Social Security Tribunal.

[3] A member of the General Division ultimately chose to proceed by way of “Questions and Answers.” The Notice of Hearing setting out the questions was sent to the claimant on November 23, 2018, and an amended version correcting the response deadline was sent on December 6, 2018. Both Notices of Hearing were sent to the email address listed on the Notice of Appeal that the Claimant completed some five months earlier, on June 27, 2018.

[4] The member proceeded to issue a decision on January 1, 2019, without having received a response to the questions that he set out in the Notice of Hearing. The member noted that both parties had consented to communication by email, and that voicemail messages had been left for the Claimant and his representative with respect to the deadline error.

AGREEMENT

[5] A settlement conference was held in this matter, under section 17 of the *Social Security Tribunal Regulations*. The parties have agreed that the Claimant’s application for leave to appeal should be granted and that his appeal should be allowed on the ground that the General Division failed to observe a principle of natural justice. The parties have further agreed that the appropriate remedy is to return this matter to the General Division for reconsideration.

[6] This outcome is consistent with the relevant provisions of the *Department of Employment and Social Development Act* (DESDA) and with the evidence on file, as set out below.

[7] The Appeal Division must grant leave (permission) to appeal unless the appeal “has no reasonable chance of success.”¹ One of the grounds of appeal to the Appeal Division is that the General Division failed to observe a principle of natural justice.² It has long been held that the right to be heard is a fundamental natural justice right, and that a breach of this right constitutes grounds for a new hearing.

[8] The following details support a finding that the Claimant did not have a reasonable opportunity to respond to the questions posed in the Notice of Hearing:

- The record of a telephone call from the Claimant to the General Division on January 9, 2019, indicates that the Claimant sought an update on his appeal, and was shocked to learn that a decision had already been issued. The Claimant did not receive the Notices of Hearing because his email address had changed between June 2018 and November 2018.
- Although the member wrote in his decision that the Claimant had consented to communication by email, he did not reference any specific evidence of this. Having reviewed the initial Notice of Appeal and all communications between the Claimant and General Division staff in the record, I see no such consent. It is unclear whether the Claimant received the voicemail message regarding the response deadline, but even if he had, such a message (referencing a date in a document that had not been received) would not be an adequate substitute for the Notice of Hearing.
- Unlike the form currently used for EI appeals to the General Division,³ the form in effect when the Claimant filed his Notice of Appeal⁴ did not contain an authorization to correspond by email using an email address provided. Also unlike the form currently used, the Claimant’s form did not alert him to the possibility that email communication would be presumed after an email from him was received.
- In the Appointment of a Representative form completed on October 10, 2018, the Claimant’s representative did not authorize communication by email. In any case, the

¹ DESDA, ss 58(2) and 58(3).

² DESDA, s 58(1)(a).

³ SST-NOA-GD-EI (2019-01) E.

⁴ SST-NOA-GD-EI (2016-10) E.

Tribunal had advised the Claimant in correspondence in October 2018 that he would personally receive information about his hearing.

[9] In this context, I agree with the parties that the Claimant did not have an adequate opportunity to present his evidence to the General Division. By proceeding in the absence of a response to the emailed Notices of Hearing, in circumstances where the Claimant did not authorize and was not aware of communication by email, the General Division failed to observe a fundamental principle of natural justice. The Claimant had a reasonable chance of success in his appeal to the Appeal Division, and leave to appeal is granted. The Claimant also succeeds in his appeal to the Appeal Division, and his appeal is allowed.

[10] The record in this matter is not complete, and consequently I cannot provide a decision on the substance of the Claimant's appeal. Rather, this matter must be returned to the General Division to be heard anew, as the parties have agreed. The General Division is directed to review the form of hearing in this matter, in light of the Claimant's statement that he has changed jobs and may now be available for teleconference proceedings (which was the original method selected by the General Division member). The General Division is also directed to provide the Claimant with a copy of the questions posed in November 2018, so that he is aware of the information that had been requested.

CONCLUSION

[11] The application for leave to appeal is granted, and the appeal is allowed. This matter is returned to the General Division for reconsideration.

Shirley Netten
Member, Appeal Division

REPRESENTATIVES:	D. D., self-represented L. Laviolette, for the Respondent
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