



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *E. V. v Canada Employment Insurance Commission*, 2019 SST 791

Tribunal File Number: AD-19-124

BETWEEN:

**E. V.**

Appellant

and

**Canada Employment Insurance Commission**

Respondent

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**SOCIAL SECURITY TRIBUNAL DECISION**  
**Appeal Division**

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DECISION BY: Stephen Bergen

DATE OF DECISION: August 22, 2019

## **DECISION AND REASONS**

### **DECISION**

[1] The appeal is allowed.

### **OVERVIEW**

[2] The Respondent, the Canada Employment Insurance Commission (Commission), determined that the Appellant, E. V. (Claimant), had been overpaid because it had not included his Canada Pension Plan income in his earnings. The Claimant argued that he should not have to repay the Commission because the overpayment was a result of the Commission's own mistake. Nonetheless, the Commission maintained its decision on reconsideration. The Claimant appealed to the General Division of the Social Security Tribunal.

[3] The Claimant did not join his scheduled teleconference General Division hearing and the General Division member proceeded in his absence and dismissed his appeal. The Claimant now appeals to the Appeal Division.

[4] The appeal is allowed. The General Division failed to observe a principle of natural justice by not offering the Claimant an opportunity to be heard after he failed to appear for the teleconference hearing. I have referred the matter back to the General Division for reconsideration.

### **ISSUE**

[5] Did the General Division fail to observe a principle of natural justice by proceeding with its decision after the Claimant did not appear for the hearing?

### **ANALYSIS**

[6] The Appeal Division may intervene in a decision of the General Division, only if it can find that the General Division has made one of the types of errors described by the "grounds of appeal" in s.58(1) of the *Department of Employment and Social Development Act* (DESD Act).

[7] The grounds of appeal are as follows:

- a) The General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;
- b) The General Division erred in law in making its decision, whether or not the error appears on the face of the record, or;
- c) The General Division based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

**Did the General Division fail to observe a principle of natural justice by proceeding with its decision after the Claimant did not appear for the hearing?**

[8] The Claimant had a General Division teleconference hearing scheduled for 9:30 a.m. EST on December 11, 2018. He called the Tribunal at 10:14 a.m. EST on December 12 to say that he missed his hearing and that he had thought his hearing was on December 12, 2018. In other words, the Claimant called the Tribunal on the day after the hearing date, at a time that was 45 minutes after the time that he had expected the hearing to begin. The Claimant explained in submissions to the Appeal Division that he has a learning disability and that he had written the wrong date down in his calendar.

[9] At his Appeal Division hearing he elaborated, saying that he was generally slower, that any new information just goes in and out, and that he has to reinforce any learning by repetition. While I do not accept that his learning disability would have prevented him from noting the correct hearing date, it is possible that the Claimant could have had more difficulty to recall the date correctly, or to transcribe it to his calendar accurately, than someone who did not have his disability. But regardless of whether the Claimant's learning disability was a factor, I remain satisfied that the Claimant intended to appear for the hearing and that he acted diligently to notify the Tribunal when he learned of his mistake.

[10] Unfortunately for the Claimant, the General Division member proceeded in his absence under the authority of section 12(1) of Regulations, and the member issued her decision on the following day, December 12, 2018.

[11] There is no indication on the file or in the decision that the General Division member attempted to determine why the Claimant did not join the hearing as scheduled.

[12] The Tribunal did not direct the decision of December 12, 2018, to the parties until December 13, 2018, which is the day after the date that the Claimant called the Tribunal about his hearing. This suggests that Tribunal staff had the opportunity to inform the General Division member of the Claimant's mistake and of his intention to participate in the hearing before the Tribunal issued the decision. The Tribunal file does not suggest that the Claimant's call was brought to the attention of the General Division member before the Tribunal issued the decision.

[13] However, the Tribunal file records that the Claimant called with an explanation for missing the hearing. This record would have been accessible to the member before the decision issued. Had the General Division member been aware of the Claimant's continuing intention to participate in an oral hearing and of his explanation for having missed the hearing, the member would have had an obligation to take consider this information before completing her decision.

[14] I am not suggesting that a General Division member has a positive obligation to confirm that there had been no new developments in a file up to the very moment that his or her decision issues. However, the question of whether the Claimant's natural justice right to be heard was compromised does not depend only on the diligence, or intentions, or propriety of the Tribunal or General Division member's actions. The Claimant intended to participate in the hearing, he informed the Tribunal of his continuing intention to participate before the decision issued, and the General Division issued the decision without considering his intention to participate or his reasons for missing his scheduled teleconference.

[15] The Commission's written submissions accept that the General Division failed to observe a principle of natural justice by denying the Claimant an opportunity to be heard. I agree. I find the General Division made an error under section 58(1)(a) of the DESD Act.

## **CONCLUSION**

[16] The appeal is allowed.

[17] The Claimant has not yet had an opportunity to be heard so the record is not complete. Therefore, under the authority of section 59 of the DESD Act, I refer the matter referred back to the General Division to reschedule an oral hearing and reconsider the matter.

Stephen Bergen  
Member, Appeal Division

HEARD ON:	August 15, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	E. V., Appellant