



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *M. H. v Canada Employment Insurance Commission*, 2019 SST 1233

Tribunal File Number: AD-19-502

BETWEEN:

**M. H.**

Appellant

and

**Canada Employment Insurance Commission**

Respondent

---

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

---

DECISION BY: Janet Lew

DATE OF DECISION: September 23, 2019

## DECISION AND REASONS

### DECISION

[1] The appeal is allowed and the matter referred to the General Division for a rehearing.

### OVERVIEW

[2] The Applicant, M. H. (Claimant), applied for Employment Insurance regular benefits in June 2017. He filed reports with the Respondent, the Canada Employment Commission (Commission). He told the Commission that he worked in August and September 2017. He also told the Commission how many hours he worked and how much he earned during these two months. The Commission paid benefits to the Claimant based on what the Claimant declared that he had earned, but the Commission found out later that the Claimant had not declared all of his earnings.

[3] Once the Commission allocated these additional earnings, it calculated that it had overpaid benefits to the Claimant that he would have to pay back. The Commission also concluded that the Claimant had made false representations about his earnings, so it decided that he had to pay a penalty.<sup>1</sup> After reconsidering its decision, the Commission confirmed the amount of the overpayment but it reduced the amount of the penalty.<sup>2</sup>

[4] The Claimant appealed the reconsideration decision to the General Division, but it dismissed his appeal. The Claimant is now appealing the General Division's decision because he says that the General Division failed to observe a principle of natural justice. The Commission argues that the General Division made findings of fact that were compatible with the evidence and the case law, and properly applied the legal test to the facts of this case, on both the earnings and penalty issues. It did not address the natural justice issue.

[5] I find that there was a breach in the principles of natural justice because the Claimant did not get a copy of some of the documents (GD3 and GD4) on time to allow him to properly make

---

<sup>1</sup> See Commission's letter dated April 16, 2018, at GD3-53 to GD3-55. The Commission also said in the letter that it was giving him a notice of violation. This meant that he would need to work more hours to qualify for any benefits in future. In March 2019, the Commission said that in fact it had not imposed a violation against him. See GD3-66.

<sup>2</sup> See Commission's reconsideration decision dated March 7, 2019, at GD3-66 to GD3-67.

his case. For this reason, I am allowing the appeal and referring the matter to the General Division for a rehearing.

## **ISSUES**

[6] The issues are:

- (i) Did the General Division fail to observe a principle of natural justice by failing to let the Claimant know the case he had to meet?
- (ii) Did the General Division base its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the Claimant's circumstances, when it decided the appropriateness of the amount of the penalty?

## **GROUND OF APPEAL**

[7] The only three grounds of appeal under subsection 58(1) of the *Department of Employment and Social Development Act* (DESDA) are:

- (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.

[8] The Claimant argues that the General Division erred under subsections 58(1)(a) and (c) of the DESDA.

## ANALYSIS

**(i) Did the General Division fail to observe a principle of natural justice by failing to let the Claimant know the case he had to meet?**

[9] The Commission argues that I should dismiss the appeal because the General Division made findings of fact that were compatible with the evidence and the case law, and properly applied the legal test to the facts of this case, on both the earnings and penalty issues. However, I cannot ignore the Claimant's claim that he did not receive a fair hearing. It is fundamental that a party is entitled to a fair hearing.

[10] At the beginning of the hearing before me, the Claimant said that he was not interested in this ground of appeal anymore. But he still claimed that he did not get a fair hearing, though it was because the General Division member said to him that she had already made up her mind before the hearing had even started. Upon reviewing the General Division's decision, I see that the General Division member examined each of the issues in detail, so it does not appear to me that the member had already pre-determined the outcome, without considering the evidence or the issues.

[11] The Claimant returned to his argument that the General Division member failed to observe a principle of natural justice because she went ahead with the hearing even though she knew that he did not have all of the documents and therefore could not have fully known the case he had to meet. Before the General Division hearing even started, the Claimant told the General Division member that he did not have a copy of documents numbered GD3 and GD4 that the Social Security Tribunal sent to the parties. The Claimant claims that the member said to him that she would go ahead with the hearing because these documents were unimportant and would not make a difference. He says that it was procedurally unfair not to have received these documents on time for the full hearing.

[12] The General Division member asked the Claimant several times whether he wanted to go ahead with the hearing. She told him that it was his decision alone to make. She offered an adjournment of the hearing to the following week, but he said he wanted to go ahead and did not want to wait for a new hearing. The member also gave a brief summary of the contents of GD3 and GD4 and offered to adjourn the proceedings if it became apparent that it was necessary for

the Claimant to have them. The member presented several options to the Claimant. The Claimant responded as follows, at different points during the hearing:

- Uhhh, I'm not sure about it, like, uuuu we can proceed and see like I don't know ... Uhhh, I don't know ... uhhh I don't know what GD3 and what GD4 are talking about.<sup>3</sup>
- Yes, so what is the issue?<sup>4</sup>
- Uhhh, yeah, go ahead. I don't ... to stop you.<sup>5</sup>
- If GD3 and GD4 are like, important, so I need to take a look at them.<sup>6</sup>
- I checked my spam. I checked my spam in my in-box. Because I don't want to say anything that I'm not really aware of.<sup>7</sup>
- If you say it's fair to open a question without GD3 and GD4, I'm going to trust you. I already trust you, but if you say it's fair.<sup>8</sup>
- Believe me, I don't know what about GD3 and GD4 talk about and I don't know if I read them what I'm going to know. Sometimes it's government paper make my mind like wandering like too much information and very high level. Like my mind, my brain really not smart to understand this (illegible) especially English is not my first language. Like I was not born in Canada. Sometimes maybe like I receive mail, I have to use the dictionary to go through like what's the meaning ... to understand the whole content...<sup>9</sup>
- Believe me, [proceeding with the hearing is] up to you.<sup>10</sup>

---

<sup>3</sup> At approximately 3:54 to 4:21 of the audio recording of the General Division hearing.

<sup>4</sup> At approximately 9:07.

<sup>5</sup> At approximately 10:31.

<sup>6</sup> At approximately 12:54.

<sup>7</sup> At approximately 14:37.

<sup>8</sup> At approximately 15:05.

<sup>9</sup> At approximately 15:25.

<sup>10</sup> At approximately 18:39.

- Yes, but you don't ... like, it's not in my favour. And it's not fair to have like take decision without papers. Like if you were, sounds very harsh to me.<sup>11</sup>
- Uhhh, I really don't know. I don't wanna, like you're the government ...<sup>12</sup>
- I can continue. I can continue but if there is like something really important I can wait until I get [document GD-] three and [document GD] four.<sup>13</sup>
- Ok, go ahead because I'm already stressed.<sup>14</sup>
- Ok, go ahead please because I'm tired. I'm tired of my life.<sup>15</sup>

[13] There were several times when the General Division member stated that she would have to grant an adjournment of the hearing. But, after the member offered an adjournment, the Claimant would suggest that he was prepared to go ahead with the hearing because he trusted the General Division member to tell him what GD3 and GD4 were all about. He also said that he was busy with other things in his life.

[14] Approximately 30 minutes into the hearing, the member arranged to have GD3 and GD4 sent by email to the Claimant. Roughly about half an hour later, the Claimant confirmed that he received GD3 and GD4.<sup>17</sup> The member also directed the Claimant to portions of the documents, which he was able to locate, but the member otherwise did not take a break to give the Claimant a chance to review the documents.

[15] Document GD3 is 71 pages long and includes a copy of the Claimant's Employment Insurance application, his biweekly reports to the Commission, employer's payroll information, the Commission's initial and reconsideration decisions, the Claimant's request for reconsideration, overpayment calculation and Notice of Debt, and phone log notes. Document GD4, which contains the Commission's arguments, is 14 pages long. The Commission's arguments included 6 pages from parts of the *Employment Insurance Act* and the *Employment Insurance Regulations*.

---

<sup>11</sup> At approximately 21:38.

<sup>12</sup> At approximately 22:01.

<sup>13</sup> At approximately 25:00

<sup>14</sup> At approximately 29:40.

<sup>15</sup> At approximately 31:57.

[16] The Claimant continues to be unrepresented. English is not his first language and he has trouble understanding and communicating in English. He is not very sophisticated. These are important factors.

[17] While the Claimant said at the time that he wanted to go ahead with the General Division hearing, there is some indication that he said this because he felt stressed and pressured to go ahead with the hearing. He thought that the General Division member wanted to go ahead with the hearing, so he thought he should go ahead with it.

[18] Although the General Division member gave the Claimant a copy of GD3 and GD4 during the General Division hearing, the Claimant says that he did not actually get a chance to review them. He noted that the documents were long and that it would have taken him a long time to go through them. He says that he needs more time to look at documents because he has limited English and because he is not sophisticated.

[19] I asked the Claimant but he was not clear how he would have presented his case any differently if he had had a copy of GD3 and GD4 before the General Division hearing had even started. He has now had copies of these documents—in electronic form—for at least the past two months. He has not reviewed them since the General Division hearing, but he claims that he has limited access to a computer and no printer, so needs to have paper copies if he is to be able to properly prepare for any hearings.

[20] In summary, the Claimant says that he did not get documents GD3 and GD4 in a timely manner to be able to prepare for the hearing. Although he got a copy of these documents at the hearing, he claims that the General Division did not give him adequate time to review the documents. After the hearing, he could not examine the documents because he has very limited access to a computer and he did not have paper copies. The Claimant had authorized the Social Security Tribunal to communicate by e-mail with him, so he did not have paper copies. He says that he finds it difficult to use electronic records and needs to have paper copies of documents. He did not think to ask for an adjournment of the General Division hearing at the time because he thought the General Division member wanted to go ahead with the hearing and he did not want to prejudice his case if he asked for an adjournment.

[21] Ordinarily, the General Division member's efforts to conduct a fair hearing (offering an adjournment and providing documents to a party) would have been reasonable under most circumstances, but in this case, the Claimant claims that he has limited English, that he is not very sophisticated, and has significant mental health issues, some of which cloud his judgment. Given all of these considerations, I am prepared to find that the Claimant did not have a fair hearing and that there was a breach of the principles of natural justice under subsection 58(1)(a) of the DESDA. The appropriate remedy is for a new hearing before the General Division, so the Claimant can address any matters arising out of GD3 and GD4.

**(ii) Did the General Division base its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the Claimant's circumstances, when it decided the appropriateness of the amount of the penalty?**

[22] I will address this issue, although the Claimant did not make any oral submissions in the hearing of this appeal, simply to clarify my leave to appeal decision.

[23] The Claimant claims that he has been forced to return to work, despite his poor medical health, because of hardship brought on by his "devastating financial situation." He argues that the General Division failed to consider his circumstances when it decided the appropriateness of the amount of the penalty.

[24] The General Division noted that it did not have any jurisdiction (i.e. authority) to interfere with discretionary decisions of the Commission unless the Commission exercised its discretionary power in a non-judicial manner or acted in a perverse or capricious manner without regard to the material before it. The General Division accurately set out the law in this regard.<sup>16</sup> The General Division noted that when deciding the amount of the penalty, the Commission had to consider all the information and any mitigating circumstances. The General Division accurately set out the law in this regard.

---

<sup>16</sup> See *Canada (Attorney General) v. Uppal*, 2008 FCA 388. The Federal Court of Appeal said that the Umpire in that case exceeded his jurisdiction when he substituted his own discretion for that of the Commission. The Court of Appeal held that an Umpire cannot interfere with the quantum of a penalty unless it can be shown that the Commission exercised its discretionary power in a non-judicial manner or acted in a perverse or capricious manner without regard to the material before it.



[25] At paragraph 54 of its decision, the General Division noted that the Commission considered the Claimant's situation and his statements that he "was suffering financially, he has mental health issues, was admitted to the hospital as he was suicidal, is homeless, unemployed and has many debts he cannot afford to pay." By considering the Claimant's circumstances, the General Division concluded that the Commission had indeed exercised its discretion properly in determining the appropriateness of the amount of the penalty.

[26] Having determined that the Commission had exercised its discretion properly, the General Division did not have any jurisdiction to interfere with the Commission's exercise of its discretionary power. For this reason, I find that the General Division did not fail to consider this evidence when it addressed the issue of the appropriateness of the amount of the penalty.

## CONCLUSION

[27] The appeal is allowed. Given the nature of the breach, it is appropriate to refer this matter back to the General Division for a rehearing, to ensure that the Claimant receives a fair hearing.<sup>17</sup>

Janet Lew  
Member, Appeal Division

HEARD ON:	September 23, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	M. H., Appellant  S. Prud'homme, Representative for the Respondent (written submissions only)

---

<sup>17</sup> In future, the Tribunal should send copies of all documents to the Claimant by both email and mail, to ensure that the Claimant gets a copy of everything. As well, although the Claimant declined to have an interpreter at the Appeal Division, the Claimant claims that he has limited English and does not always understand everything, in part because of language issues, so he should reconsider and ask the Tribunal for one.