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

Citation: *C. D. v Canada Employment Insurance Commission*, 2020 SST 423

Tribunal File Number: AD-20-53

BETWEEN:

C. D.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Stephen Bergen

DATE OF DECISION: May 19, 2020

Canada

DECISION AND REASONS

DECISION

[1] The appeal is allowed. The matter is referred to the General Division for reconsideration.

OVERVIEW

[2] The Appellant, C. D. (Claimant), applied for maternity benefits and selected the extended benefit option for her parental benefits. After her maternity benefits ended and she began receiving the parental benefit at the reduced rate, she asked the Respondent, the Canada Employment Insurance Commission (Commission), to change her parental benefits to the standard benefit. The Commission responded that the Claimant could not revoke her election of the reduced extended parental benefit. The Claimant asked the Commission to reconsider but it maintained its original decision.

[3] Next, the Claimant appealed to the Appeal Division of the Social Security Tribunal. The General Division dismissed her appeal. She is now appealing to the Appeal Division.

[4] The appeal is allowed. The General Division failed to observe a principle of natural justice by not giving the Claimant the opportunity to respond to additional information it requested from the Commission.

WHAT GROUNDS CAN I CONSIDER FOR THE APPEAL?

[5] "Grounds of appeal" are the reasons for the appeal. To allow the appeal, I must find that the General Division made one of these types of errors:[1]

1. The General Division hearing process was not fair in some way.
2. The General Division did not decide an issue that it should have decided. Or, it decided something it did not have the power to decide.
3. The General Division based its decision on an important error of fact.

[1] This is a plain-language version of the three grounds. The full text is in section 58(1) of the *Department of Employment and Social Development Act.*

4. The General Division made an error of law when making its decision.

ISSUE

[6] Did the General Division fail to observe a principle of natural justice by not giving the Claimant the opportunity to respond to additional information it requested from the Commission?

ANALYSIS

Fairness

[7] The Claimant argued that the General Division failed to observe a principle of natural justice. Natural justice refers to the fairness of the process. It is concerned with procedural protections such as the right of a party to be heard and to know the case against him or her, and the right to an unbiased decision-maker. For a claimant to know the case, the claimant must have complete disclosure of the evidence to which he or she needs to respond. The claimant also requires an adequate opportunity to respond to that evidence to be heard.

[8] The General Division requested information from the Commission on December 29, 2019, that was not in the GD3 reconsideration file.[2] The General Division received this additional information (the disclosure)[3] on December 31, 2019, and shared it with Claimant by email on January 2, 2020. The General Division released its decision to the parties on the same day, January 2, 2020. The General Division also issued a corrigendum on January 7, 2020, but the only change in the decision was a change to the issue date, which had been mistakenly recorded in the original decision as January 2, 2019.

[9] Although, the General Division disclosed the additional information it received from the Commission to the Claimant, it proceeded to make its decision without giving the Claimant an opportunity to respond to that additional information. The Claimant argued that the General

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[2] GD7.
[3] GD8.

Division should have given her an opportunity to respond and that it breached her natural justice rights when it failed to do so.

[10] The Commission acknowledged that the Claimant did not have an opportunity to respond to the disclosure but it submitted that this did not affect the Claimant's natural justice rights. The Commission argued that the Claimant was already aware of the information in the disclosure, which was comprised of the Claimant's most recent Record of Employment (ROE) and her full application for Employment Insurance benefits. The Claimant completed the application and was presumably familiar with its contents.

[11] In addition, the Commission argues that the Claimant answered the questions and completed the application in a manner that was internally consistent, and consistent with her testimony. Therefore, the Commission submits that the complete version of her application for benefits did not add anything to what was already before the General Division member.

[12] The Claimant responded that she had applied online using her phone, and had not printed or saved a copy. By the time of the hearing, it had been some time since she completed the application. She argued that the application was not clear and she had not understood it when she completed it. She could not remember what it involved for her appeal.

[13] The Claimant said that the full application contains more information than the abridged version in the file.[4] If she had had the full document, she might have had a better understanding of why she completed the form as she did and been better positioned to make her arguments.

[14] I have reviewed the abridged version of the application for benefits that the Commission originally disclosed in the GD3 file, and I have compared it to the full application found in GD8. Both versions of the application include the same Benefit Type section[5] in which the Claimant indicated that she was applying for the maternity benefit. Both versions contain the same Parental Information section[6] in which the application explains the benefits and the benefit options. This includes an explanation that the regular benefit is for a maximum of 35 weeks and that the extended benefit may be claimed for up to 61 weeks, but is at a reduced rate. The

[4] GD3-3
[5] Compare GD3-5 and GD8-3
[6] Compare GD3-6 and GD8-17

Parental Information section in both versions includes the Claimant's selection of the extended option and the drop-down selection bar by which she chose 57 weeks. The Claimant had all of this information without the disclosure of GD8.

[15] However, the GD8 version of the application is the only version that contains a Reason for Separation section,[7] which is where the Claimant indicated that she left work to go on maternity leave. It also contains a Maternity Information section,[8] which was not in the abridged application in the previously disclosed (GD3) file. The Maternity Information section asks the Claimant for her baby's expected date of birth. This is also where the application offers the Claimant a choice between selecting "to receive parental benefits immediately after [her] maternity benefits", or instead selecting "up to 15 weeks of maternity benefits". Only GD8 contains the Last Employer Information, which includes the Claimant's expected date of return. This was given as September 8, 2020.[9]

[16] In addition to the full application, GD8 also included the Claimant's Record of Employment, which the Commission had not placed on the GD3 file. The ROE confirms that the Claimant's last paid day was June 28, 2019, that she was leaving work on maternity leave, and stated that her expected date of "recall" was unknown.

[17] The question is whether the Claimant could have been prejudiced by the fact that she was not given an opportunity to respond to information that was found in the GD8 disclosure but had not been given to the Claimant earlier.

[18] I do not accept the Commission's argument that she should be deemed to have notice of the full text of the form because she was the one who filled it out. The Claimant completed an online version of the application on July 14, 2019, but she did not see the full form again until the General Division forwarded it to her on January 2, 2020.

[19] The Claimant's argument is that she selected the wrong benefit because she misunderstood how the election worked. In particular, she did not understand that she was entitled to 15 weeks of maternity benefits in addition to the weeks of parental benefits that she

[7] GD8-11
[8] GD8-16
[9] GD8-10

selected. Given that the full copy of the application that is in the new disclosure is 23 pages, and contains detailed instructions and explanations about the benefits, I do not accept that she should be deemed to be aware of those portions of the application that are not found in the 11-page abridged version in the GD3 file. In particular, I do not accept that she should be deemed to be aware of the Maternity Benefit section or Last Employer Information section.

[20] The Commission also argued that the Claimant was not prejudiced by not having an opportunity to respond to the disclosure because none of the additional information in the disclosure could have changed the decision.

[21] The General Division requested the documents in the disclosure because it considered that they were relevant to the appeal.[10] In other words, the disclosure could have changed the decision, depending on what it contained.

[22] In seeking the ROE and a copy of the full application, the General Division was likely interested in whether the Claimant's return to work date was consistent with an election of standard benefits or extended benefits. When it obtained the documents, the General Division noted that the full application gives the Claimant's return to work date as September 8, 2020.[11] This is similar to the Claimant's testimony that her original intention was to take a 14-month leave so that she could stay at home until the end of August 2020 and then return to work. The General Division did not refer to the ROE, which had stated that the return to work date was "unknown".

[23] The Commission may be correct that the disclosure confirms dates or selections that were already in evidence. However, it is possible that the Claimant might also have noticed some error or some omission that could have helped her to understand or explain why she made the choice that she did. At least part of the Claimant's argument was that she made a mistake because the application was not clear. She said that the full application contained more information and she might have used that information to develop her argument. One section of the application that is

[10] General Division decision, para 4.
[11] The General Division actually said, "September 8, 2019". I presume that this is a slip and that it intended to say September 8, 2020, as per GD8-10. This would also be consistent with the General Division's statement that it confirms her original intention to stay home until the end of August 2020.

missing from the abridged version in GD3 is the Maternity Information section. This may have been relevant to the Claimant's understanding of her election.

[24] The Claimant did not provide the Appeal Division with a more detailed explanation of how she was prejudiced by her inability to respond to the disclosure. However, I do not feel that it is appropriate to foreclose the Claimant's ability to respond to the disclosure based on my own view of whether the documents may have supported her argument. The Claimant would know better than I whether the disclosure would have helped her better frame her argument, or make some alternate argument.

[25] When I am assessing a possible breach of the Claimant's natural justice rights, I am not concerned with whether the Claimant was *necessarily* prejudiced but with the *possibility* that she *may* have been prejudiced. I am also concerned that justice be seen to be done. I find that there is a possibility that the Claimant was prejudiced. If I were to deny the Claimant the opportunity to respond to the disclosure, I would risk bringing the administration of justice into disrepute.

[26] Therefore, I find that the General Division failed to observe a principle of natural justice by not offering the Claimant an opportunity to respond to the disclosure. This means I must consider the appropriate remedy.

REMEDY

Nature of remedy

[27] I have the authority to change the General Division decision or make the decision that the General Division should have made.[12] I could also send the matter back to the General Division to reconsider its decision.

[28] Both the Claimant and the Commission have argued that I should make the decision that the General Division should have made. I do not agree. I have found that the General Division failed to observe a principle of natural justice by failing to give the Claimant an opportunity to respond to a disclosure of documents. The appropriate remedy would be to give the Claimant the opportunity to respond any additional arguments she might make, as well as rebuttal evidence if

[12] My authority is set out in section 59 of the DESD Act.

she has any. I have heard why the Claimant believed the General Division should have given her an opportunity to respond to the Commission's disclosure. However, I have not heard what she would have said and I have not seen what she might have submitted in response. That would be "new" evidence, and the Appeal Division does not have the ability to consider new evidence.

[29] In my view, it is not appropriate for me to substitute a decision for that of the General Division. The record is not complete until the Claimant has responded to the disclosure. Therefore, I am referring the matter to the General Division for reconsideration.

CONCLUSION

[30] The appeal is allowed. The matter is referred to the General Division for a reconsideration.

Stephen Bergen
Member, Appeal Division

HEARD ON:	May 7, 2020
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	C. D., Appellant D. T., Representative for the Appellant Anik Dumoulin, Representative for the Respondent