



Citation: *KH v Canada Employment Insurance Commission*, 2022 SST 1010

Social Security Tribunal of Canada Appeal Division

Decision

Appellant: K. H.

Respondent: Canada Employment Insurance Commission
Representative: Angèle Fricker

Decision under appeal: General Division decision dated May 26, 2022
(GE-22-719)

Tribunal member: Charlotte McQuade

Type of hearing: Teleconference

Hearing date: October 7, 2022

Hearing participants: Appellant
Respondent's representative

Decision date: October 13, 2022

File number: AD-22-382

Decision

[1] I am allowing the appeal.

[2] The General Division didn't follow a fair process. So, I am sending the appeal back to the General Division for reconsideration.

Overview

[3] K. H. is the Claimant. The Canada Employment Insurance Commission (Commission) decided the Claimant had filed her biweekly claim reports late and refused the Claimant's request to backdate them as if they were filed on time. The Claimant appealed that decision to the Tribunal's General Division.

[4] The General Division scheduled a telephone hearing. The hearing was administratively rescheduled, at the Claimant's request. The Claimant did not attend the rescheduled hearing. After the hearing, the Claimant sent the Tribunal a request for an adjournment. The following day the General Division made a decision, on the record, dismissing the Claimant's appeal. The General Division treated the Claimant's request as a second adjournment request and refused it, finding the Claimant had not shown a second adjournment was justified by exceptional circumstances.

[5] The Claimant is now appealing to the Appeal Division.

[6] I am allowing the appeal. I agree with the parties that the General Division didn't follow a fair process. I am sending the appeal back to the General Division for reconsideration.

The parties agree on the outcome of the appeal

[7] Before the Appeal Division hearing, the Commission provided arguments conceding that the General Division did not follow a fair process.

[8] The Commission agrees that the General Division did not make clear to the Claimant:

- the test she had to meet in order to be granted a second adjournment of the hearing, and/or
- that if her second adjournment request was not granted prior to the hearing, and she did not attend, the General Division could proceed in her absence.¹

[9] At the hearing, the Claimant agreed with the Commission's position. Both parties agree that I should allow the appeal and that I should return the matter to the General Division for reconsideration.

I accept the proposed outcome

[10] I accept the parties' agreement that the General Division did not follow a fair process.

[11] The Claimant appealed the Commission's decision not to backdate her biweekly claims to the Tribunal's General Division. A hearing was scheduled but then was administratively rescheduled at the Claimant's request.

[12] The Tribunal sent the Claimant a new Notice of Hearing informing her of the hearing details and advising her that, as she had made her request within the two-day grace period, it was not considered an adjournment.²

[13] Two days prior to the hearing, a Tribunal registry member called the Claimant to remind her of the upcoming hearing. The notes on file from that call say that when the Claimant said she couldn't attend the hearing, it was explained to her how she could request an adjournment and she was asked to do so. The Claimant asked if she could call someone. The notes provide that the registry member would advise the Tribunal

¹ See AD6.

² See GD1A.

member of the request for adjournment but the request was needed in writing for the record.³

[14] The Claimant did not attend the hearing on May 12, 2022, and the Tribunal did not receive a written request from the Claimant to adjourn the hearing until May 25, 2022.

[15] On May 26, 2022, the General Division dismissed the Claimant's appeal, based on the documentary record. The General Division refused the Claimant's adjournment request. The General Division said this was the Claimant's second adjournment request and she had not shown that another adjournment was justified by exceptional circumstances. The General Division reasoned that the hearing had been scheduled for a date the Claimant asked for and she did not provide reasons for her request for an adjournment.⁴

[16] Parties to an appeal can request to reschedule their hearing date within two days of receiving their Notice of Hearing. The Tribunal does not consider this an adjournment request. Rather, it just reschedules the hearing administratively.

[17] Beyond this type of request to reschedule, other requests to change the hearing date are treated as adjournment requests.

[18] An adjournment request must be made in writing, with supporting reasons and filed with Tribunal.⁵ If that request is granted, the Tribunal must not grant a subsequent adjournment or postponement unless the party establishes that it is justified by exceptional circumstances.⁶

³ See AD2-1.

⁴ See paragraphs 6 to 12 of the General Division decision.

⁵ See section 11(1) of the *Social Security Tribunal Regulations* (SST Regulations), which says this.

⁶ See section 11(2) of the SST Regulations, which says this.

[19] The Tribunal must proceed in the party's absence if the Tribunal previously granted an adjournment at the request of the party and the Tribunal is satisfied that the party received the notice of hearing.⁷

[20] The Tribunal processed the Claimant's first request to change the date as an administrative rescheduling. The Notice of Hearing sent to the Claimant for the May 12, 2022, hearing advises her that since she submitted her first request within the two-day grace period, it was not considered an adjournment.⁸

[21] Despite that notification, the General Division treated the Claimant's first request to change the date, not as an administrative rescheduling, but rather as a first request for an adjournment. This meant the Claimant's second request was considered by the General Division as a subsequent (or second) request for an adjournment subject to the "exceptional circumstances" test.

[22] The law says that tribunals have an obligation to provide clear direction to self-represented parties as to its procedures and rules.⁹ Tribunals also have an obligation to explain critical points of law to self-represented parties.¹⁰

[23] The General Division did not provide a fair process because, prior to denying the Claimant's adjournment request, it did not inform the Claimant that it was treating her request as a second adjournment request and that the test she would have to meet for a second adjournment was to show "exceptional circumstances." Had the Claimant known that, she might have provided reasons for her request.

[24] The General Division also did not provide a fair process because it did not provide clear direction concerning the adjournment procedure. The General Division did not make clear to the Claimant that she had to provide her adjournment request in

⁷ See section 12(2) of the SST Regulations, which says this.

⁸ See GD1A.

⁹ See *Love v Canada (Attorney General)*, 2015 FC 835; See also *Sae-Bin Im v BMO Investoline Inc.*, 2017 ONSC 95.

¹⁰ See *Martinez Samayoa v Canada (Citizenship and Immigration)*, 2012 FC 441; See also *Wagg v Canada*, 2003 FCA 303 (CanLII).

writing before the hearing or that, if the adjournment was not granted prior to the hearing and she did not attend, the member could proceed in her absence.

[25] Although the Notice of Hearing sent to the Claimant does say the hearing may go ahead even if one of the parties is missing, the conversation the Claimant had with the Tribunal Registry member prior to the hearing may have confused that message.

[26] The notes of the call provide that when the Claimant said she couldn't attend the hearing, it was explained to her how she could request an adjournment and she was asked to do so. When the Claimant asked if she could call someone for the adjournment, the Registry member said he would advise the Tribunal member of the request for adjournment but the request was needed in writing for the record.¹¹

[27] The notes do not say that the Claimant was told she had to provide her written request in advance of the hearing or that if her request was not granted prior to the hearing and she did not attend, the member could proceed in her absence. It is possible this was explained to her but since it is not recorded in the notes, I cannot assume it was. The comment that the request was needed for the "record" may have confused the need to file the request before the hearing.

[28] This was a critical point of procedure as it could have affected the Claimant's decision about whether to attend the hearing or not. By not making this clear, the General Division did not follow a fair process.

[29] Since the General Division didn't follow a fair process, I can intervene in this case.¹²

¹¹ See AD2-1.

¹² Section 58(1)(a) of the *Department of Employment and Social Development Act* (DESD Act) explains this is a reason the Appeal Division can intervene in a decision of the General Division.

Remedy

[30] The parties agree that I should send this appeal back to the General Division for reconsideration.¹³

[31] I agree. The Claimant did not have a full and fair opportunity to present her case. So, I need to send the appeal back to the General Division so it can reconsider the case.

Conclusion

[32] The appeal is allowed. The General Division didn't follow a fair process. The appeal is sent back to the General Division for reconsideration.

[33] If the Claimant wishes to rely on any of the documentation she provided to the Appeal Division as evidence at her hearing before the General Division, she will need to submit that material directly to the General Division. The General Division is to communicate with the Claimant how she can file any documentary evidence she wishes to rely on.

Charlotte McQuade
Member, Appeal Division

¹³ See section 59(1) of the DESD Act which explains the remedies available to the Appeal Division.