Citation: *BG v Canada Employment Insurance Commission*, 2023 SST 1229

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	B. G.
Representative:	
Respondent:	Canada Employment Insurance Commission
Representative:	Isabelle Thiffault

Decision under appeal:	General Division decision dated July 14, 2022 (GE-20-1648)

Tribunal member:	Stephen Bergen
Type of hearing:	In writing
Decision date:	~~September 7, 2023~~
CORRIGENDUM DATE:	**December 8, 2023**
File number:	AD-22-495

Decision

[1] The General Division made an error in how it reached its decision on the Claimant's antedate request. I am sending the matter back to the General Division to reconsider.

Overview

[2] B. G. is the Appellant. He claimed Employment Insurance (EI) benefits so I will call him the Claimant. The Respondent in this appeal is the Canada Employment Insurance Commission (Commission). The Claimant applied for regular benefits in February 2020[1] but asked the Commission to antedate his claim to August 17, 2012, when he believes he would have had sufficient hours of insurable employment to qualify for EI benefits.

[3] The Commission refused to antedate the claim. It said that the Claimant did not have a good reason for the delay over the entire period of the delay. The Claimant asked the Commission to reconsider but it would not change its decision. He next appealed the Commission's reconsideration decision to the General Division of the Social Security Tribunal (Tribunal). In the course of its preparations for the hearing, the General Division issued an interlocutory decision related to how it would proceed in this case.

[4] The Claimant appealed this interlocutory decision to the Appeal Division which returned the matter to the General Division for reconsideration. The Appeal Division found that the General Division acted unfairly by leading the Claimant to believe that it would not join the Claimant's two appeals but then joined them without notice. It also found that the General Division made an error of law by joining the two appeals without showing that it considered the applicable legal test.

[5] When the matter returned to the General Division, the appeal was considered by different General Division member. This member decided to proceed with the appeal by

[1] See GD3B-6.

the “Written questions and answers” method of hearing (Q&A). After reviewing the Claimant’s responses to its questions, the General Division dismissed the appeal. The Claimant appealed to the Appeal Division.

[6] I am allowing the appeal. The General Division acted unfairly in how it chose the method of hearing. I am returning the matter back to the General Division for reconsideration.

Preliminary Issues

Method of Appeal Division hearing

[7] With limited exceptions, the *Social Security Tribunal Regulations* now require the Tribunal to hold hearings in writing, by teleconference or videoconference, or in-person, *at the request of the appellant.*[2]

[8] The appellant in this case is the Claimant. The appeal record includes conflicting information on the Claimant’s preference of hearing format, so I wrote him for clarification on September 1, 2023. The Claimant responded on September 5, 2023, stating that his preference is to conduct the hearings entirely in writing.

[9] I am proceeding with an “in writing” hearing, in accordance with the Claimant’s express wishes. I have reviewed all of his submissions, as well as the Commission’s submissions, and the remainder of the record that was before the General Division.

Joinder of appeals and hearing of separate appeals by different members

[10] In the Claimant’s September 5, 2023, letter, the Claimant reiterates his complaint that the two matters will be decided by the same member, stating that this effectively results in joining the two appeal processes.

[11] I cannot revisit this issue. The Appeal Division has already refused the Claimant’s request to have the two appeals heard by separate members, and his

[2] See sections 2(1) and 2(3) of the *Social Security Tribunal Regulations, 2022.*

request to hold one appeal in abeyance until the other one is decided. This was set out in an interlocutory decision dated November 24, 2022. The Appeal Division's reasons are included in that decision.

Issues

[12] The issues in this appeal are as follows:

a) Did the General Division act unfairly in the way that it proceeded with a Q&A hearing format?

b) Did the General Division make an error of law by

   i. misapplying the case law on "good cause for delay"?
   ii. evaluating the Claimant's antedate of special benefits without factoring in "leniency"?

c) Did the General Division make an important error of fact by

   i. ignoring evidence of how the Claimant's psychological condition affected his ability to inform himself of his rights and obligations under the *Employment Insurance Act*?
   ii. failing to consider the discriminatory effect of the "reasonable person" test?

Analysis

[13] The Appeal Division may only consider errors that fall within one of the following grounds of appeal:

a) The General Division hearing process was not fair in some way.

b) 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 (error of jurisdiction).

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

[14] The General Division based its decision on an important error of fact.[3]

Fairness of the General Division process

[15] The Claimant argues that the General Division made a procedural fairness error when it proceeded by Q&A.

[16] He says that the General Division selected the Q&A method of hearing without consulting him, and that he felt constrained by the format to respond only to the specific questions. The Claimant asserts that he needed more time to respond as well, but that the General Division refused his request for an adjournment or extension. As a result, he was forced to leave out arguments and he was unable to address all of the issues that he thought were important.[4]

[17] I note that the Commission has conceded that the General Division made an error of procedural fairness.[5]

– Context

[18] When the Claimant first appealed the Commission's reconsideration decisions, the General Division member gave the Claimant time to decide if he wanted to join the two appeals. The Claimant eventually decided that he wanted to have the two appeals heard separately.

[19] The Claimant was left with the impression that the General Division would honour the Claimant's choice. However, without further notice to the Claimant, the General Division issued an interlocutory decision in which it decided to join the appeals. The Claimant appealed this decision to the Appeal Division, which found that the General Division acted unfairly by changing its process without notice to the Claimant. The Appeal Division sent the matter back for the General Division to reconsider.

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[3] 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* (DESDA).
[4] See AD1-4,5.
[5] See AD20-1.

[20] Despite the error identified by the Appeal Division, the record shows that the General Division made extraordinary efforts to ensure that it understood the Claimant's procedural preferences and that the Claimant understood the issues or potential issues in the appeal. To that end, the member held six separate pre-hearing conferences with the Claimant between August 2020 and September 2021.

[21] In those pre-hearing conferences, the General Division canvassed the requested hearing method, whether the two appeals should proceed separately or be joined, the order in which the appeals ought to proceed, and scheduling to accommodate the Claimant's other legal processes. It even considered whether the Claimant wished to proceed with a Charter challenge to the legislation or the Commission's policies or procedures.

– **Choice of hearing method**

[22] After the Appeal Division returned the file to the General Division, a new member was assigned to the file. The new member decided to proceed by way of written Q&A. In this kind of hearing, the General Division member reviews the file and identifies questions whose answers will be relevant to their decision. The General Division sends those questions to the Claimant (in this case) who is invited to respond. The Claimant may respond with argument and/or evidence.

[23] The member sent questions to the Claimant on June 7, 2021, with the expectation that the answers he obtained would provide the information he needed. He did not ask the Claimant for his hearing method preference, or consult with the Claimant on the questions chosen.

[24] The Claimant had two weeks to respond to the questions. He requested additional time to file a response, but the General Division denied his request. The Claimant filed substantial submissions by the deadline, but he responded under protest. He said that the timeframe did not accommodate his mental disability. He also argued

that the scope of the questions was limited and that he had not been given enough time to present a full answer.[6]

[25] The General Division denied the Claimant's appeal based on the answers to its questions, the Claimant's other submissions on the file, and the other information in the record.

– **Reasonable expectation of consultation**

[26] The General Division is master of its own procedure. At the time that it considered the Claimant's appeal, it was under no obligation to follow the Claimant's preference in selecting the method of hearing. As it happens, the Claimant had selected more than one "preferred" method of hearing in his original June 2020 Notice of Appeal. One of the methods he had preferred was "Written questions and answers".[7]

[27] However, the Claimant's preference as expressed on the Notice of Hearing was not his last word on the subject. Nor was it the First Panel's last word. The General Division incorrectly assumed that the Claimant intended to continue with the same preference or preferences of hearing that he had expressed in the Notice of Hearing for the original process.

[28] In an August 13, 2020, pre-hearing conference, the Claimant discussed his hearing preference with the First Panel. At that time, he decided on a video conference.[8] In his final pre-hearing conference on September 2, 2021, he indicated that he would like to proceed with a "partially" written submission, that he would like to do "some of it" in writing, and that he wanted to do as much as possible in writing so that the hearing itself would not be "too long".[9] The First Panel said that they could get "started with a written submission" and then figure out how long they would need for a teleconference or video hearing."[10]

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[6] See GD35-2,3.
[7] See GD2-3.
[8] Listen to the audio recording of the August 13, 2020, pre-hearing conference at timestamp 5:50.
[9] Listen to the audio recording of the September 2, 2021, pre-hearing conference at timestamp 17:00 to 17:55.
[10] Listen to the audio recording of the September 2, 2021, pre-hearing conference at timestamp 19:15.

[29] The General Division selected a method of hearing that was contrary to the Claimant's express wishes. It also gave him only two weeks to respond to its questions and refused him an extension to complete or refine his submissions.

[30] The Claimant expected that he would have more time. The Claimant's earlier dealings with the General Division were more consultative and more flexible. In several pre-hearing conferences spanning a little more than a year, the Claimant and the First Panel hashed out the procedural details of the Claimant's two appeals. In their final conference, they discussed the fact that the Claimant might need considerable time in which to prepare submissions. He asked to have until mid-October to file submissions and the member granted his request.[11] However, he asserts that the First Panel's interlocutory decision and his appeal to the Appeal Division interrupted his submission preparation.

[31] Given that the First Panel had consulted with him extensively, the Claimant might reasonably expect that the General Division would again consult with him on the hearing process, including on the method of hearing, and the timeline.

[32] In light of the recent appeal history, the General Division might have been more sensitive to the Claimant's fairness concerns: The General Division made the decision (that is the subject of this appeal) after the Appeal Division sent it back to the General Division for reconsideration. The Appeal Division found that the First Panel made an error of procedural fairness because it surprised the Claimant with an unexpected change to an agreed process.

[33] I find that the Claimant's experience with the Tribunal led him to believe he would be accommodated, or at least consulted, on his procedural preferences. In the particular circumstances of this case, it was procedurally unfair for the General Division to have unilaterally chosen a Q&A hearing format, without any consultation or flexibility in its deadlines.

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[11] Listen to the audio recording of the September 2, 2021, pre-hearing conference at timestamp 20:35.

Remedy

[34] I have found an error in how the General Division reached its decision, so I must now decide what I will do about that. I can make the decision that the General Division should have made, or I can send the matter back to the General Division for reconsideration.[12]

[35] The Commission argues that I should send the matter back to the General Division for reconsideration. The error means that the Claimant has not had a fair opportunity to present his case, and the General Division is supposed to be the primary finder of fact.[13]

[36] The Claimant would like me to make the decision and approve his antedate request. He says that the process has gone on for far too long as it is, and that it is causing him financial and psychological difficulty.[14] The matter should not be sent back to the General Division unless I am going to deny his antedate request.[15]

[37] I cannot send the matter back to the General Division for the reason that I would otherwise deny the appeal. This would not be appropriate. I will return the matter to the General Division only if I consider that the record is not sufficiently complete for me to make the decision. To be complete, the record must include evidence from which I can make all the findings necessary to decide the issues in the appeal - after I have corrected the General Division's error.

[38] In this case, I have decided to return the matter to the General Division for reconsideration. I cannot make a decision based on the present record and be certain that I have corrected the General Division's fairness error.

[39] I am not satisfied that the only reason the Claimant required a different hearing format and/or more time was that he wanted to refine or augment his arguments. It appears that the General Division's error also affected the Claimant's ability to present

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[12] See section 59(1) of the DESDA.
[13] See AD20-1.
[14] See AD19-2.
[15] See AD21-10, para 32.

evidence. This means that the Claimant may not have had the opportunity to present all the evidence that he intended to present in support of his appeal.

[40] I will explain how I came to this conclusion.

[41] The Claimant asked the Commission to reconsider its decision to deny the antedate in ~~2019~~ **[2020]**. In an April 20, 2019, letter to the Commission, the Claimant said that he had not yet obtained all the medical certificates he needed, and that the reason for his delay in filing his application for benefits was related to his mental health and disability. He said that adequate documentation and consultation with his doctor was important. Still speaking of the affect of his health issues and disability, he later wrote that he expected that he would be able to provide sufficient evidence to support the antedate and ultimately the claims.[16]

[42] At the time he filed his original Notice of Appeal to the General Division (First Panel), he had still not obtained the evidence he felt he needed. He said that "given the short time frame and the problems created by the pandemic", it had been difficult for his doctor, to "provide a complete response that would likely requir[e] an extensive review of my medical history from 2011 and 2012 and possibly for other periods between 2012 and today."[17]

[43] He reiterated this concern in his first pre-hearing conference before the First Panel. He said that he anticipated filing additional medical records.[18] He said that he would need time to get medical records for 2011, 2012 and possibly up to the current day.[19]

[44] He recounted how the First Panel planned to give him over a month "to prepare an initial submission outlining [his] case **and the evidence** in support of it", but that this process was aborted, when he had to appeal to the Appeal Division.[20] In contrast, he

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[16] See GD3B-32, 34.
[17] See GD2-16.
[18] Listen to the audio recording of the August 13, 2020, pre-hearing conference at timestamp 7:00.
[19] Listen to the audio recording of the August 13, 2020, pre-hearing conference at timestamp 9:10.
[20] See GD3-35-2.

said that the Q&A format permitted him only to answer the specific questions posed, and **did not allow him to submit anything else.**[21]

[45] When the Claimant applied to the Appeal Division for leave to appeal, he critiqued the General Division member for not asking for medical evidence.[22] He also linked to documentary medical evidence, which he presumably expected the Appeal Division to review.[23] In a subsequent submission, he acknowledged that his application for leave included some evidence not found in prior submissions.[24]

[46] Throughout the Claimant's engagement in the appeal process, he has maintained that his mental health and disability are relevant to his appeal. He has argued that the General Division failed to appreciate how his psychological condition affected his ability to diligently enquire as to his rights and responsibilities under the EI Act. Among his arguments, he has asserted that the "reasonable person" test was inappropriate, that the General Division did not consider how a reasonable person in his "circumstances" (i.e., with his particular psychological disability) would behave, and that it did not appreciate the "exceptional" nature of his psychological condition.

[47] The Claimant must prove that he had a good reason for delay throughout several years of delay. Medical evidence would be relevant if it could establish that his psychological condition was a factor in this delay.

[48] The Claimant did not have an opportunity to present evidence in his first round with the General Division. He appealed the interlocutory decision of the First Panel, so he never had a full hearing.

[49] I have found that it was unfair for the second panel of the General Division to have proceeded by Q&A in the manner that it did. One way in which this was unfair was that the Q&A process interfered with the Claimant's ability to present evidence.

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[21] See GD35-3
[22] See AD1-12, paras 42, 56.
[23] Ibid. at para 43.
[24] See AD4-4, para 13.

[50] Since the Claimant appears to believe that he has, or can obtain, evidence that would be relevant to the appeal, I must give him a remedy by which he may present that evidence.

[51] The Appeal Division is not empowered to hear or consider evidence that was not before the General Division (including the documentation to which he refers in his leave to appeal application). Therefore, I cannot remedy the procedural fairness error by giving the decision that the General Division should have given. I must return the matter to the General Division, which will be able to consider any additional evidence he wishes to submit.

[52] I appreciate that the Claimant argued that the General Division made other errors as well. It is not necessary that I consider any of those other errors since I am returning the matter to the General Division for a full reconsideration. A new panel of the General Division will be considering his evidence and arguments afresh.

Conclusion

[53] I am allowing the appeal. The General Division made an error of procedural fairness.

[54] I am returning the matter to the General Division for reconsideration. If the Claimant has other evidence that he would like considered, he may produce it to the General Division.

Stephen Bergen
Member, Appeal Division