



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *CS v Minister of Employment and Social Development*, 2020 SST 981

Tribunal File Number: AD-20-773

BETWEEN:

C. S.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Valerie Hazlett Parker

DATE OF DECISION: November 26, 2020

DECISION AND REASONS

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] Ms. C. S. (Claimant) began to receive an *Old Age Security Act* pension and Guaranteed Income Supplement in September 2012. In 2017, the Minister of Employment and Social Development investigated, and decided that the Claimant had not been resident in Canada from May 2016 until July 2019, so was not eligible to receive these benefits for all of that time. Accordingly, an overpayment of the benefits was assessed.

[3] The Claimant appealed the Minister's decision regarding her residence in Canada from May 2016 to July 2019 to the Tribunal. The Tribunal's General Division decided that the Claimant was not resident in Canada from May 18, 2016, to January 25, 2019, and that she had resided in Canada since January 25, 2019.

[4] Leave to appeal this decision to the Tribunal's Appeal Division was granted because the appeal had a reasonable chance of success on the basis that the General Division may have failed to provide a fair process to the Claimant. However, the General Division did provide a fair process.

[5] Therefore, the appeal is dismissed.

ISSUES

[6] Did the Claimant waive her legal right to raise issues of procedural fairness?

[7] Did the General Division fail to provide a fair process because the General Division Member acted inappropriately at the hearing?

ANALYSIS

[8] An appeal to the Tribunal's Appeal Division is not a re-hearing of the original claim. Instead, the Appeal Division can only decide whether the General Division:

- a) failed to provide a fair process;
- b) failed to decide an issue that it should have, or decided an issue that it should not have;
- c) made an error in law; or
- d) based its decision on an important factual error.¹

The Claimant did not waive her legal right to raise procedural fairness issues

[9] A fair process is one where every party to an appeal has an opportunity to present their legal case to the Tribunal, to know and answer the other party's legal case, and to have a decision made by an impartial decision maker.

[10] In addition, when one party says that there are issues of procedural fairness, they must raise them at the first reasonable opportunity. If they do not, they waive their ability to raise these issues later.² The Claimant says that she was not treated fairly by the Tribunal Member. The Minister argues that the Claimant could have raised this issue on the first or second hearing date but did not. These would have been the first reasonable opportunities to do so. Therefore, she should be precluded from doing so now.

[11] However, the Claimant says that she contacted the Tribunal immediately after the General Division hearing ended and complained about the Tribunal Member's conduct. This demonstrates that the Claimant intended to complain about the hearing process.

[12] In addition, the Claimant and her representative are not legally trained. They were not aware that they could object to the member's conduct during the hearing. The Claimant raised

¹This paraphrases the grounds of appeal set out in s. 58(1) of the *Department of Employment and Social Development Act*.

²*Hennessey v Canada*, 2016 FCA 180

the procedural fairness issue in the application to the Appeal Division. This document was filed with the Appeal Division shortly after the General Division decision was made.³ It is reasonable for the Claimant to raise the procedural fairness issue for the first time in the Application to the Appeal Division.

[13] Therefore, the Claimant did not waive her right to raise this issue on appeal.

The General Division provided a fair process

[14] The Claimant says that the General Division failed to provide a fair process because it questioned all of the evidence that she presented to the Tribunal, and treated her like a liar. When considering a Tribunal Member's conduct, there are a number of legal principles to be considered, including the following:

- a) A Tribunal member is permitted latitude in how they conduct a hearing as they are the master of the proceedings and have to balance what may be competing priorities of informality, speed and fairness;⁴
- b) Within limits, Tribunal members have the right to cross-examine the witnesses they hear;
- c) Tribunal members can interrupt witnesses during their testimony for the purpose of clarifying the answers given;
- d) The tone and content of a Tribunal member's questions must be judicious; and
- e) Harassing comments and unfair questions to a witness are not acceptable.

[15] Whether a Tribunal member has followed these principles will depend on the facts and circumstances of each case.⁵

³ The General Division decision is dated June 26, 2020; the Application to the Appeal Division was filed with the Tribunal on September 11, 2020

⁴ See *Social Security Tribunal Regulations* s. 2 and 3 that require all appeals to be concluded as quickly as possible

⁵ *Mohammad v. Canada (Minister of Citizenship & Immigration)* (2000), 4 Imm. L.R. (3d) 152; *S. B. V. Minister of Employment and Social Development*, 2018 SST 405

[16] I listened carefully to the General Division hearing recordings (both days). The General Division member was polite and judicious throughout the hearings. She carefully explained the legal test that the Claimant had to meet, and carefully reviewed the relevant evidence with the Claimant's representative. She also ensured that all parties were looking at the same document while the evidence was discussed. The General Division member gave the Claimant's representative many opportunities to prepare and present her best legal case. For example:

- a) The Member gave the Claimant the option to first present her case, or for the General Division member to ask questions;⁶
- b) The General Division member explained the legal issues and what factors she had to look at;⁷
- c) The General Division member redirected the representative back to relevant legal issues;⁸
- d) The General Division member asked the representative if she wanted more time to prepare her case (an adjournment);⁹
- e) The General Division member asked the representative if she had anything else she wanted to say about the Claimant's social ties to Canada and Greece;¹⁰
- f) The General Division member asked the representative if there was anything else that she wanted to speak about;¹¹
- g) The General Division member did not interrupt the representative while she took time to think about anything else she wanted to say;¹²

⁶June 2, 2020, hearing recording at approximate minute 8:00, 31:34 although the exact time may differ depending on what device is used to listen to the recording

⁷ June 2, 2020, hearing recording approximate minute 25:05

⁸ June 2, 2020, hearing recording approximate minute 42:35

⁹ June 2, 2020, hearing recording approximate minute 1:14:00

¹⁰ June 8, 2020, hearing recording approximate minute 1:12:48

¹¹ June 8, 2020, hearing recording approximate minute 1:13:10, 1:55:22

¹² June 8, 2020, hearing recording approximate minute 1:20:45

- h) The General Division member allowed the Claimant to file additional documents after the hearing when it became clear that some had not been originally included in the written record because they were written in Greek.
- i) The General Division member did not interrupt the representative. She was not rude or disrespectful. Her questions were fair; and
- j) The General Division member's questions were asked to obtain information that would help her to make her decision.

[17] The General Division member's job is to receive the evidence from both parties, weigh it and make a decision based on the law and the facts. It may be necessary to ask questions about written evidence that one party presents to do this.

[18] The General Division accepted all of the evidence and weighed it to make its decision. The General Division gave reasons for its decision. For example, the General Division decision states that the General Division does not accept that the Claimant returned to Canada in October 2016.¹³ It gives four reasons for this, including that the Claimant's questionnaire states that she returned in January 2017, and that she had no medical appointments between October 2016 and January 2017.¹⁴ The General Division also considered the Claimant's flight itinerary and passport stamps in making this decision.

[19] The General Division considered the Claimant's evidence and her legal arguments. For example, the decision states that aside from a flight itinerary, there was no evidence that the Claimant returned to Canada in October 2016.¹⁵

[20] That the General Division did not accept the Claimant's legal position on this or other issues does not mean that it decided that the Claimant was lying. However, in order to succeed the Claimant had to prove that it was more likely than not that she resided in Canada at the relevant time. She failed to do so.

¹³ General Division decision at para. 23

¹⁴ General Division decision at paras. 24 to 27

¹⁵ General Division decision at para. 27

[21] The General Division member acted appropriately throughout the hearings. The General Division process was fair.

CONCLUSION

[22] The appeal is dismissed for these reasons.

Valerie Hazlett Parker
Member, Appeal Division

HEARD ON:	November 19, 2020
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	J. S., Representative for the Appellant Susan Johnstone, Representative for the Respondent