Citation: *Minister of Employment and Social Development v JE*, 2022 SST 1565

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	Minister of Employment and Social Development
Representative:	Ian McRobbie
Respondent:	J. E.

Decision under appeal:	General Division decision dated November 9, 2020 (GP-20-601)

Tribunal member:	Neil Nawaz
Type of hearing:	Teleconference
Hearing date:	December 1, 2022
Hearing participants:	Appellant's representative
Decision date:	December 23, 2022
File number:	AD-21-31

Decision

[1] I am allowing this appeal. The General Division made procedural and legal errors when it allowed the Respondent to keep his Guaranteed Income Supplement (GIS). To address those errors, I am returning this matter to the General Division for another hearing.

Overview

[2] The Minister is appealing a General Division decision that found she lacked the authority to reassess the Respondent's GIS entitlement.

[3] The Respondent is a senior citizen who applied for the GIS in December 2010. At the time, he was separated from his wife, whom he later divorced. In 2011, he entered into a common-law relationship with B.D., but they soon began living apart. In 2012, the Respondent lost his house because of financial troubles, and in 2015, B.D. became ill and moved into a long-term care facility.

[4] After B.D. died in 2018, the Minister reviewed the Respondent's GIS entitlement. The Minister concluded that the Respondent had been single for much of the previous seven years. It determined that the Respondent had been mistakenly paid a GIS based on his income as a single person rather than a married person.

[5] The Minister ultimately determined that the Respondent was:

- separated from his wife when he applied for the GIS in December 2010;
- in a common-law relationship with B.D. from April 2011 to August 2015; and
- separated from B.D. for reasons beyond their control after August 2015.

[6] The Minister assessed an overpayment of approximately $4,050 for the period between April 2011 and August 2015.[1]

[1] See Minister's reconsideration decision letter dated November 21, 2019, GD2-64.

[7] The Respondent appealed the Minister's assessment to the Social Security Tribunal's General Division. In November 2020, the General Division allowed the appeal, finding that the Minister lacked the authority to reassess its initial GIS approvals.

[8] The Minister then asked the Tribunal's Appeal Division for permission to appeal. The Minister's representative alleged that, in coming to its decision, the General Division made the following errors:

- It raised scope the Minister's authority of its own accord and based its decision on that issue without giving the Minister an opportunity to respond;
- It misinterpreted the law about the Minister's authority to reassess her prior decisions granting OAS benefits; and
- It found that the Respondent had not made false or misleading statements in his application forms.

[9] The Minister later filed a brief submission citing *Burke*, a recent Federal Court of Appeal decision that addresses her authority to revisit OAS decisions.[2]

[10] I granted the Minister permission to proceed because I thought she had an arguable case. Earlier this month, I held a hearing by teleconference to discuss the Minister's allegations in full.

[11] Now that I have considered submissions from both parties, I have concluded that the General Division's decision cannot stand.

Preliminary Matters

[12] This appeal was the subject of a March 2022 settlement conference, to which the Respondent was invited but did not attend.[3] Since then, the hearing in this appeal been

[2] See Minister's letter dated March 17, 2022 enclosing *Canada* (*Attorney General) v Burke*, 2022 FCA 44, AD4.
[3] See Appeal Division's settlement conference reporting letter dated March 11, 2022 (AD3).

delayed several times, first because the Respondent wanted legal representation, later because of what he claimed were serious health problems.

[13] The record shows that, after granting the Minister permission to appeal on April 1, 2022, the Appeal Division scheduled or rescheduled four oral hearings:

Scheduled Hearing Date	Adjournment Request Date	Reason for Request
June 1, 2022	May 10, 2022	The Respondent wanted a lawyer to review his CRA assessment for 2019[4]
July 22, 2022	July 18, 2022	The Respondent said he was having trouble finding a lawyer[5]
September 28, 2022	August 25, 2022	The Respondent's wife said her husband had suffered a medical crisis[6]
December 1, 2022	September 28, 2022	The Respondent said he needed additional time to recover[7]

[14] The Social Security Tribunal must conduct its proceedings as informally and quickly as the circumstances and considerations of fairness permit.[8] For that reason, adjournments and postponement are allowed only if they are made in writing with reasons. Once the Tribunal grants an adjournment request, it can't do so again unless the requesting party establishes "exceptional circumstances."[9]

[15] After three adjournments and many opportunities to provide convincing medical evidence that he was incapable of participating in a hearing, I concluded that the Respondent had failed to establish exceptional circumstances that would justify delaying this proceeding further.

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[4] See Respondent's email dated May 10, 2022, AD7-1.
[5] See Respondent's email dated July 18, 2022, AD8-1.
[6] See email from Linda Powers dated August 25, 2022, AD9-2.
[7] See Respondent's letter dated September 28, 2022, AD11-8.
[8] See *Social Security Tribunal Regulations*, section 3(a).
[9] See *Social Security Tribunal Regulations*, section 11.

[16] On August 25, 2022, the Respondent's wife informed the Tribunal that, three weeks earlier, her husband had suffered a stroke that left him needing 24-hour care. She asked for the upcoming hearing, which was then scheduled for September 28, 2022, to be cancelled.

[17] Since the Tribunal does not delay hearings indefinitely, I asked the Respondent, his wife, or any authorized representative to provide a list of proposed dates on which the hearing might be rescheduled.[10] Several weeks after my reply deadline, the Respondent forwarded a brief letter from one Stephanie L. Wolfe recommending that "all legal matters pertaining to J. E. be put on hold until November 4, 2022 to allow him time to recover from his recent illness and the stress related to this issue."[11] The letter did not list Ms. Wolfe's degrees or professional qualifications, nor did it mention any clinic or institution with which she was associated. Moreover, it offered no details about the Respondent's condition, his capabilities, or his prognosis. The letter also appeared to be inconsistent with the Respondent's cover letter, which asked for matters to be delayed until February 2023.[12]

[18] By then, I had already scheduled a teleconference hearing for December 1, 2022 and, based on Ms. Wolfe's letter, I saw no reason to push it back further. Still, I thought it prudent to schedule a pre-hearing conference for November 28, 2022 to discuss, among other matters, the Respondent's capacity to participate in a hearing.

[19] A few days before the pre-hearing teleconference, the Respondent asked me to cancel it, citing his absence from the country and his doctor's recommendations. I refused the request because I wanted to give the Respondent or his wife another opportunity to persuade me not to go forward with the hearing, which was now imminent.

[20] Despite his previous communication, the Respondent appeared at the pre-hearing conference. He maintained, coherently, forcefully, and at length, that he was

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[10] See Appeal Division's notice of adjournment without hearing dated August 30, 2022, AD0C.
[11] See letter dated September 26, 2022 by Stephanie L. Wolfe, AD11-6.
[12] See Respondent's letter dated September 28, AD11-8.

unable to participate in a hearing, not even by telephone. He also insisted that he had previously supported his condition with relevant medical evidence. When I expressed my view that Ms. Wolfe's letter did not justify delaying the hearing further, the Respondent claimed that he had sent in additional medical evidence. On the assumption that such evidence might have been lost in transmission, I invited him to send it in again.[13] I also informed the Respondent that, unless I saw detailed and compelling medical evidence indicating otherwise, the hearing would proceed on December 1, 2022 as scheduled.

[21] On the eve of the hearing, just before midnight, the Respondent submitted two letters. One of them, again, was Ms. Wolfe's letter of September 26, 2022. In his cover letter, the Respondent indicated, for the first time, that Ms. Wolfe was a nurse practitioner. The other letter was from a Florida general practitioner named Avelino Millares. This letter, like Ms. Wolfe's, was very brief and very vague: *"*I saw [the Respondent] in the office today. Due to medical reasons, it is strongly recommended that all legal matters be put on hold until January 15, 2023 in order for his stress related illness to recover."[14]

[22] I did not find Dr. Millares' letter to be compelling evidence that the Respondent was incapable of participating in a hearing. In the absence of details about the Respondent's illness, I concluded that four months was enough time to recover from the medical crisis that he experienced in early August. My conclusion was reinforced after reviewing the circumstances around the three previous adjournments and recalling the sustained conversation I had had with him only a few days earlier.

[23] On the morning of December 1, I opened the hearing and proceeded in the Respondent's absence.

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[13] Refer to recording of pre-hearing conference held on November 28, 2022.
[14] See letter dated November 2, 2022 by Dr. Avelino F. Millares, AD19-3.

What the Minister had to prove

[24] There are four grounds of appeal to the Appeal Division. An appellant must show that the General Division

- proceeded in a way that was unfair;
- acted beyond its powers or refused to exercise those powers;
- interpreted the law incorrectly; or
- based its decision on an important error of fact.[15]

[25] My job was to determine whether the General Division committed an error that fell into one or more of the above grounds of appeal.

Analysis

[26] I am satisfied that the General Division erred by raising an issue on its own accord and then denying the Minister an opportunity to respond to it. Because the General Division's decision falls for this reason alone, I see no need to consider the Minister's remaining allegation.

The General Division denied the Minister her right to be heard

[27] The Minister alleges that the General Division relied on a particular statutory interpretation without adequate notice that it intended to do so. In particular, the Minister says that the General Division recognized significant limits to her authority without giving her an opportunity to make submissions on the issue.

[28] In this instance, I am satisfied that the General Division committed errors. It raised an issue on its own without giving the parties notice of its intention to do so, and it then based its decision on that issue without giving the Minister an opportunity to respond.

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[15] See *Department of Employment and Social Development Act* (DESDA), section 58(1).

The General Division failed to consider the legal test for raising a new issue

[29] From what I can tell, the Respondent never argued that the Minister lacked the authority to revisit its decision to grant him the GIS. There is certainly nothing to that effect in any of his written submissions to the Minister or the General Division. No recording exists of the oral hearing before the General Division, but I doubt that the Respondent raised the issue there either.

[30] The first indication that the Minister's authority was at issue came several weeks later, when the General Division issued its decision. It would have been one thing if the General Division had raised the issue in passing or as a matter of interest. However, its decision relied entirely on a particular interpretation of the *Old Age Security Act* (OASA) and *Old Age Security Regulations* (OASR) that strictly limited the Minister's powers.

[31] In a case called *Mian*, the Supreme Court of Canada said that decision-makers are permitted to raise new issues, but only if failing to do so would risk a significant injustice.[16] Three other questions must be asked:

- Does the decision-maker have jurisdiction to raise the new issue?
- Is there enough information on the record to resolve the issue?
- Would raising the issue cause procedural prejudice either party?

If a new issue must be raised, the decision-maker must provide the parties with adequate notice and opportunity to respond.

[32] I see nothing in its decision to suggest that the General Division turned its mind to any of the above considerations. That was an error of law.

The General Division breached a rule of procedural fairness

[33] The *Mian* case is founded on one of the primary principles of procedural fairness—the right to be heard. That right includes both a party's right to know the case against them and the right to an opportunity to respond to that case.[17] Denial of the right

[16] See *R v Mian,* 2014 SCC 54.
[17] *Baker v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 SCR 817.

to be heard is well established as a breach of natural justice and constitutes grounds for a new hearing.

[34] The General Division's decision followed a line of reasoning introduced by an Appeal Division case called *B.R. v Canada*.[18] That case found that the Minister's power to revisit her prior approvals under the under the OASA and OASR was not open-ended and could be exercised only in cases of fraud.

[35] *B.R.* was later overturned on judicial review, but it was never universally accepted within the Tribunal. Some members followed it,[19] some rejected it,[20] and others attempted to find a middle ground.[21]

[36] When the General Division issued its decision in November 2021, the debate over *B.R.* had been going on for more than three years. Yet the General Division treated *B.R.* as settled law and offered no hint that it was controversial. The General Division might have found *B.R.* "persuasive," but it didn't explain why, and it didn't acknowledge that there was another side to the story. What's more, the Minister was never given a chance to tell that story.

[37] The General Division issued its decision without providing notice to the Minister that its authority for re-assessing claimants' eligibility for OAS benefits would be raised as a new issue either during or after the hearing. Without adequate notice, the Minister was unable to know the case against it and respond to a new issue that ultimately determined the appeal in the Respondent's favour.

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[18] *B.R. v Canada (Minister of Employment and Social Development)*, 2018 SST 844.
[19] See *Minister of Employment and Social Development v J.A.*, 2020 SST 414; *Minister of Employment and Social Development v M.B.*, 2021 SST 8. This last case went before the Federal Court of Appeal as *Burke*.
[20] See *R.S. v Minister of Employment and Social Development*, 2018 SST 1350; *R.D. v Minister of Employment and Social Development*, GP-18-1472
[21] See *M.R. v Minister of Employment and Social Development,* 2020 SST 93.

Remedy

[38] When the General Division makes an error, the Appeal Division can fix it by one of two ways: it can (i) send the matter back to the General Division for a new hearing or (ii) give the decision that the General Division should have given.[22]

[39] The Tribunal is required to proceed as quickly as fairness permits. I would usually be inclined to give the decision that the General Division should have given and decide this matter on its merits, but I do not think that the record is complete enough to allow me to do so. That is because the General Division hearing went unrecorded and, as a result, I have no way of reviewing the Respondent's testimony about his domestic arrangements during the years in question.

[40] Unlike the Appeal Division, the General Division's primary mandate is to weigh evidence and make findings of fact. As such, it is inherently better positioned than I am to hear the Respondent's testimony and to explore whatever avenues of inquiry that may arise from it. In this particular instance, I feel my only option is to refer this matter back to the General Division for rehearing.

Conclusion

[41] For the above reasons, I find that the General Division erred in law and breached a principle of procedural fairness. Because the record is not sufficiently complete to allow me to decide this matter on its merits, I am referring it back to the General Division for a fresh hearing.

[42] The appeal is allowed.

Member, Appeal Division

[22] See DESDA, section 59(1).