Citation: *Minister of Human Resources and Skills Development v. B. P.*, 2015 SSTAD 367

Appeal No: AD-13-788

BETWEEN:

Minister of Human Resources and Skills Development

Appellant

and

B. P.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division – Appeal Decision

SOCIAL SECURITY TRIBUNAL MEMBER:	Janet Lew
DATE OF HEARING:	January 26, 2015
PLACE OF HEARING:	Edmonton, Alberta
TYPE OF HEARING:	In person
DATE OF DECISION:	March 19, 2015

PARTIES IN ATTENDANCE

Representative for the Appellant	Penny Brady (Counsel) (via videoconference)
Respondent	B. P. (in person)
Observer	Susan Johnston (paralegal-in-training with the Appellant, via videoconference)

INTRODUCTION

[1] This is an appeal from the decision of the Review Tribunal issued on May 3, 2013. The Review Tribunal calculated the Respondent's minimum qualifying period to be December 31, 2012 and found him to be disabled under the *Canada Pension Plan,* with a date of onset of June 2012. The Review Tribunal determined that disability benefits were to commence in October 2012. The Appellant appeals on the grounds that the Review Tribunal made various errors of law and errors of mixed fact and law.

FACTUAL BACKGROUND & THE REVIEW TRIBUNAL DECISION

[2] The Respondent was 55 years old when he submitted an application for Canada Pension Plan disability benefits in May 2010.

[3] The Questionnaire for Disability Benefits indicates that the Respondent was last employed between October 1988 and August 2009. He had been a fleet supervisor for the Alberta Motor Association ("AMA"), but was given an office position, due to limitations resulting from a heart attack. The Respondent indicated in the Questionnaire that he ceased working as his "heart [could not] take the work". He also noted that his memory was now very bad and that he fatigued easily, due to a heart attack. He described numerous functional limitations and restrictions.

[4] After leaving this employment, the Respondent moved to Thailand, intending to live there indefinitely because of the more favourable cost of living. For various reasons, the Respondent returned to Canada. He has not returned to Thailand because of financial constraints.

[5] At the hearing before the Review Tribunal in February 2013, the Respondent offered that he recently began working part-time at an auto repair shop, though his attendance was irregular at times, due to his health. He testified that he was usually able to work two days a week, but sometimes had to cancel because of his health. He described his employers as benevolent. The Respondent estimated that he earned approximately $1,000 per month from this employment, which was far less than his earnings had been at the AMA. These recent earnings from the auto repair shop were not reflected in the Record of Employment. (If they had been documented, they might have served to extend the minimum qualifying period.)

[6] The medical documentation before the Review Tribunal was found to be supportive of the Respondent. The Respondent has been diagnosed with coronary artery disease, ischemic cardiomyopathy, degenerative disc disease of the lumbar spine with chronic pain, hyperthyroidism, reflux esophagitis, dysthymia and recurrent major depressive disorder.

[7] The Review Tribunal accepted that the Respondent suffers from some "severe health difficulties"; however it was mindful that he was engaged in some part-time employment at an auto repair shop. In assessing whether his disability could be found "severe" under the *Canada Pension Plan*, the Review Tribunal examined whether the part-time employment qualified as "significantly gainful". Ultimately, the Review Tribunal concluded that the Respondent was unable to regularly engage in a "significantly gainful occupation". It is from this issue which the Appellant seeks to overturn the decision of the Review Tribunal.

BRIEF HISTORY OF PROCEEDINGS

[8] The Review Tribunal issued its decision on May 3, 2013. On or about August 8, 2013, the Appellant sought leave to appeal on various grounds. The Appeal Division granted leave on June 30, 2014, on the following three grounds:

(1) whether the Review Tribunal correctly defined "severe" under the *Canada Pension Plan* as meaning "incapable regularly of pursuing any substantially

gainful occupation" or did it apply another definition, such as "significantly gainful employment";

(2) whether the Review Tribunal identified the correct legal definition for "substantially gainful occupation"; and,

(3) whether the Review Tribunal applied the correct legal definition in determining whether the Respondent was engaged in a substantially gainful occupation?

[9] The Appeal Division scheduled an in-person hearing of the appeal on January 26, 2015, by mutual consent of the parties.

[10] The Appellant's submissions were set out in the leave application and Notice to Appeal, in two volumes. After an extension of time was granted to the Respondent, he filed a letter date-stamped received on October 24, 2014, with a Medical Information report of Dr. Clarke, dated October 14, 2014.

[11] At the outset of the hearing before me, counsel for the Appellant withdrew the first of the three grounds of appeal, as the Appellant concedes that there is no discernible difference between "significantly gainful" and "substantially gainful". Counsel also submitted that the hearing of the appeal should be in the form of an appellate review.

ISSUES

[12] The issues before me therefore are as follows:

1. As a preliminary issue, what form of hearing should the appeal take? Should the appeal be in the form of an appellate review or an appeal in the nature of a judicial review?

2. What is the applicable standard of review when reviewing the decision of the Review Tribunal?

Grounds of Appeal

3. Did the Review Tribunal err in law in its definition of "substantially gainful occupation"?

4. Did the Review Tribunal err in law and in fact in its determination as to whether the Respondent was engaged in a substantially gainful occupation?

Remedies

5. If the standard is reasonableness, is the decision of the Review Tribunal reasonable? If the standard is correctness, what outcome should the Review Tribunal have reached?

6. If the Review Tribunal committed any errors, whether an error of law or of fact, what is/are the appropriate remedy(ies), if any?

PRELIMINARY MATTER – APPELLATE VS. JUDICIAL REVIEW

[13] Counsel submits that the policy of the Department of Employment and Social Development now is that appeals before the Appeal Division ought to proceed as an appellate review. Nonetheless, she also submits that, in form, an appellate review is not dissimilar from judicial review, and proceeded to make oral submissions as if the matter were an appeal in the nature of a judicial review.

[14] Counsel submits that the appeal is an appellate review, as the language and provisions in the *Department of Employment and Social Development Act* ("DESDA") refer to an "appeal" rather than to a judicial review. She notes, for instance, that the heading to subsection 58(1) of the DESDA refers to the "grounds of appeal", whereas the heading to section 18.1(4) in the *Federal Courts Act* refers to the "grounds of review".

[15] Counsel further submits that the Appeal Division performs a supervisory function over the General Division (or Review Tribunal in this case) and that its role is to ensure that the General Division or Review Tribunal consistently applies the law. She further submits that as the

General Division does not have greater expertise over the Appeal Division, the Appeal Division ought not to give any deference to the General Division.

[16] The Respondent did not offer any submissions on this issue.

[17] The Social Security Tribunal is a fully independent and impartial administrative tribunal that operates at arm's length from the Department. It is not bound by any internal policies, practices or procedures which the Department may have developed, and while the Department may now have adopted the policy that appeals before the Appeal Division are in the nature of an appellate review, I am by no means bound to accept that policy.

[18] As the Supreme Court of Canada set out in *Law Society of Upper Canada v. Skapinker*, [1984] 1 S.C.R. 357, headings do not operate to change the meaning of a section, where they are clear and unambiguous. I do not think that the headings were intended to define the nature of the hearing before the Federal Courts, in the case of section 18.1 of the *Federal Courts Act,* and before the Appeal Division, in the case of subsection 58.1(DESDA). Surely it cannot be that a descriptive heading alone could be so definitive. We would still need to look at the language of the statute for direction in determining the nature of the hearing.

[19] I recently examined the issue as to the nature of the hearing of an appeal before the Appeal Division. In *F.D. v. Minister of Employment and Social Development* (March 19, 2015) SST-AD-200 (unreported decision), I addressed some of the issues which Counsel now raises, and ultimately determined that appeals before the Appeal Division are to proceed as appeals in the nature of a judicial review. Counsel has not persuaded me that the nature of the appeal ought to be otherwise. I come to this conclusion, as I did in *F.D.*, as I find that subsection 58(1) of the DESDA limits the grounds of appeal available to an appellant, and that this therefore effectively defines the nature and scope of appeals before the Appeal Division as being an appeal in the nature of a judicial review. I find this subsection of the DESDA to be the single biggest difference between the former Pension Appeals Board and the Appeal Division; similar provisions notably did not govern the Pension Appeals Board. I also find that the existence of these grounds of appeal under subsection 58(1) of the DESDA does not displace the "*Dunsmuir"* analysis on the standard of review. (My discussion of the standard of review follows below.)

[20] Had I been prepared to accept that the appeal should have been heard as an appellate review or hearing *de novo,* I might have adjourned the appeal to allow the parties to call witnesses and to adduce evidence. This would have permitted the parties to adduce evidence, including any evidence of the Respondent's recent employment earnings. Indeed, counsel for the Appellant had attempted to file a Record of Earnings with the leave application. The Record indicated that the Respondent had employment earnings of $10,004 and $52,625 in 2011 and 2012, respectively. In the leave application, I determined however that subsection 58(1) of the DESDA does not permit me to consider any new records of opinions, unless they related to or formed any part of the grounds of appeal. The subsection does not provide the parties with an opportunity for reassessment of the evidence or for a re-hearing.

[21] Similarly, the Medical Information report of Dr. Clarke, dated October 14, 2014, filed by the Respondent, is inadmissible for the purposes of an appeal, as it does not relate to any of the grounds of appeal under subsection 58(1) of the DESDA.

STANDARD OF REVIEW

[22] The Respondent did not make any submissions on the standard of review.

[23] Counsel on the other hand submits that as the issues herein involve questions of law, a correctness standard applies. She refutes any notion that the definition of "substantially gainful occupation" involves an interpretation of the "home statute" of the Social Security Tribunal, and submits that while the decision of *Dunsmuir v. New Brunswick*, 2008 SCC 9 is "instructive", it is not determinative of the issues in these proceedings. Counsel submits that as a correctness standard applies, I must show no deference to the Review Tribunal and must conduct my own analysis. Counsel further submits that if I should arrive at a different result from the Review Tribunal, I must substitute my own decision in the place of the decision of the Review Tribunal.

[24] In *F.D.,* I also reviewed the issue of the standard of review. *Dunsmuir* is the leading authority on the standard of review, and I find it to be not only determinative, but binding on me. There, the Supreme Court of Canada determined that there are only two standards of review at common law in Canada: reasonableness and correctness.

[25] Questions of law generally are determined on the correctness standard. The correctness standard is generally reserved for jurisdictional or constitutional questions, or questions which are of broad general importance to the legal system as a whole and outside the expertise of the tribunal. When applying the correctness standard, a reviewing court will not show any deference to the decision-maker's reasoning process and instead, will conduct its own analysis. Ultimately if a reviewing court disagrees with the decision of the decision-maker, the court must substitute its own view as to the correct outcome. The correctness standard is vital, as it promotes and ensures just decisions, consistency and predictability in the law.

[26] Questions of mixed fact and law are generally determined on the reasonableness standard. *Dunsmuir* also set out a list of factors which leads to the conclusion that a decision-maker should be afforded deference and should apply a reasonableness test.

- A privative clause: this is a statutory direction from Parliament or a legislature indicating the need for deference
- A discrete and special administrative regime in which the decision-maker has special expertise (labour relations for instance)
- The nature of the question of law. A question of law that is of "central importance to the legal system ... and outside the ... specialized area of expertise" of the administrative decision-maker will always attract a correctness standard *(Toronto* (City) *v. C.U.P.E.,* [2003]3 S.C.R. 77, at para.62). On the other hand, a question of law that does not rise to this level may be compatible with a reasonableness standard where the two above factors so indicate.

[27] The Supreme Court of Canada in *Smith v. Alliance Pipeline*, [2011] SCC 7, [2011] S.C.R. 160, at para. 26, also set out the scope of the standard of reasonableness to include issues that (1) relate to the interpretation of the administrative tribunal's "home statute" or statutes closely connected to its function with which it has familiarity and expertise, (2) raise matters of fact, discretion or policy or (3) involve inextricably intertwined legal and factual issues.

[28] Based on these considerations, I cannot see that the issue of "substantially gainful occupation" involves a question of law of central importance to the legal system, beyond the specialized area of expertise of the Social Security Tribunal. The definition of "substantially

gainful"[1] under the *Canada Pension Plan* is likely unique to the *Canada Pension Plan* and is likely of little relevance or interest outside the parameters of the *Canada Pension Plan.* For instance, personal insurance policies have their own defined terms, and insurers likely would find any definition of substantially gainful occupation for the purposes of the *Canada Pension Plan* to be of little assistance in determining whether an insured might be engaged in a substantially gainful occupation, as an insured seeking coverage under his policy of insurance would still need to meet the definition of "substantially gainful occupation" under his own policy. Thus, I find that a reasonableness standard applies.

[29] In conducting a reasonableness review, *Dunsmuir* states that I should be concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process, and I should be able to determine how the Review Tribunal came to its decision. *Dunsmuir* states that a review for reasonableness is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law. If the decision falls within a range of acceptable outcomes, then we ought not to interfere with it.

[30] In *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board),* 2011 SCC 62, the Supreme Court of Canada indicated that a reviewing court should not undertake separate analyses of a tribunal's reasons and the result required under the reasonableness standard of review. *Newfoundland* described the review of an administrative decision as an organic exercise in which the reasons of the tribunal must be read together with the outcome and serve the purpose of showing whether the result falls within the range of possible acceptable outcomes. The Supreme Court of Canada further affirmed that reasons may not include all the arguments, statutory provisions, jurisprudence and other details the reviewing judge would have preferred, but that does not impugn the validity of either the reasons or the result. This approach is followed when the reasonableness standard of review applies.

[1] On May 29, 2014, Regulations amending the *Canada Pension Plan Regulations* came into force. The Regulations were amended by adding subsection 68.1, which defines "substantially gainful".

GROUNDS OF APPEAL

[31] Leave to appeal was granted on three grounds, one of which was withdrawn by the Appellant, leaving two remaining grounds, that the Review Tribunal: (1) might have made an error of law in how it defined "substantially gainful occupation" and (2) might have made an error of mixed fact and law in determining that the Appellant was not engaged in "any substantially gainful occupation".

1. <u>Did the Review Tribunal incorrectly define "any substantially gainful occupation" and thereby commit an error of law ?</u>

[32] Counsel submits that the Review Tribunal erred in law as it incorrectly defined "substantially gainful". The Review Tribunal relied upon *Alexander v. MHRD* (June 5, 2000), CP 9448 (PAB), in finding that the Respondent could not be engaged in "any significantly gainful employment", given the disparity in his income between his employment at the AMA and his current employment.

[33] Counsel submits that the Review Tribunal erred in making a comparative analysis of the Respondent's current to past income levels. Counsel cited *Fancy v. Canada*, 2008 FC 1414 at para. 13, submitting that it stands for the proposition that the determination of whether a disability is severe within the meaning of the *Canada Pension Plan* does not involve a comparative analysis of one's current income to that of the past.

[34] The Respondent did not make submissions on this issue.

[35] I concur with the Appellant that the Review Tribunal erred in law in relying upon *Alexander*, as it is wrong in law and inconsistent with *Fancy*, a decision of the Federal Court of Canada which is binding. While *Fancy* did not define "substantially gainful", at the same time, the Federal Court was clear that it did not involve a comparative analysis of one's current income to an employee's past income.

[36] Does this error of law call for a correctness standard? The correctness standard, as indicated above, is generally reserved for jurisdictional or constitutional questions, or questions which are of broad central importance to the legal system as a whole and outside the specialized

expertise of the tribunal. Although counsel notes that "any substantially gainful occupation" falls within subparagraph 42(2)(a)(i) of the *Canada Pension Plan* and submits that a legal interpretation is required, the question here is whether the definition of "any substantially gainful employment" is of broad central importance to the legal system as a whole and outside the specialized expertise of the tribunal. In my view, it is not, and therefore, a reasonableness standard applies. Indeed, interpretation of the expression "any substantially gainful occupation" relates to this administrative tribunal's "home statute" with which the Review Tribunal has familiarity and expertise.

[37] While the Review Tribunal erred in law in making a comparative analysis of the Respondent's income levels and hence found him incapable regularly of pursuing any substantially gainful employment, does that necessarily lead to an unreasonable result, or does the result fall within the range of possible acceptable outcomes? I will assess the reasonableness of the decision under the heading "Reasonableness of Decision of Review Tribunal" below.

2. <u>Did the Review Tribunal err in law and in fact in its determination as to whether the Respondent was engaged in any substantially gainful occupation?</u>

[38] An individual's capacity regularly of pursuing "any substantially gainful occupation" is one of several factors in determining whether an individual is disabled for the purposes of the *Canada Pension Plan*. The Respondent, through his own admission, realized earnings following his minimum qualifying period. Counsel for the Appellant submits that the Respondent's earnings after the minimum qualifying period demonstrate that he was and remains capable regularly of pursuing any substantially gainful occupation and that he therefore is not disabled for the purposes of the *Canada Pension Plan*.

[39] Subsection 68.1(1) of the *Canada Pension Plan Regulations*, S.R.C., c. 385, came into force on May 29, 2014. That section defines "substantially gainful". The section reads as follows:

> **68.1 (1)** For the purpose of subparagraph 42(2)(a)(i) of the Act, "substantially gainful", in respect of an occupation, describes an occupation that provides a salary or wages equal to or greater than the maximum annual amount a person could receive as a disability pension . . .

[40] If the formula were applicable, earnings equal to or greater than $14,836 for 2014 would qualify as “any substantially gainful employment”, as it would show that that occupation provides a salary or wages equal to or greater than the maximum annual amount a person could receive as a disability pension.

[41] The Respondent commenced part-time employment at an auto repair shop in or about 2012. Had subsection 68.1(1) of the *Regulations* been in force in 2012, the maximum annual amount a person could have received as a disability pension in 2012 under this formula would have been $14,226. In other words, if earnings for 2012 equaled or exceeded this amount (derived from part-time employment with a benevolent employer or otherwise), that would have been considered “substantially gainful” occupation.

[42] Prior to May 29, 2014, there was no statutory definition under the *Canada Pension Plan* for “substantially gainful”. However, the statutory definition could provide some guidance as to what qualifies as “substantially gainful”, though it is of course not applicable and of no force and effect for applications received prior to May 29, 2014.

[43] The jurisprudence provides some guidance as to what constituted “substantially gainful”, but the Review Tribunal failed to refer to any of the jurisprudence and limited its analysis to a comparative analysis. This was in error.

REASONABLENESS OF DECISION OF REVIEW TRIBUNAL

[44] How is reasonableness to be assessed? Under this standard, I am not to fact- find, re-weigh the evidence, conduct my own assessment, interfere with the conclusions or substitute my decision for that of the Review Tribunal. As set out in *Dunsmuir*, my role is to determine whether the decision of the Review Tribunal falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law before it. This does not involve a line-by-line parsing, but a review of the overall decision.

[45] Counsel submits that I should follow *Canada (Minister of Human Resources Development) v. Scott*, [2003] F.C.J. No. 80, in which the Federal Court of Appeal found that the Pension Appeals Board had erred, in finding Ms. Scott incapable of regular employment. Strayer J.A., writing on behalf of the Court, stated that it was Ms. Scott's incapacity, rather than the employment, which had to be regular, and the employment could be "any substantially gainful occupation". Strayer J.A. also found that the Pension Appeals Board had also erred by ignoring the uncontradicted medical evidence which failed to show that she was incapable of any substantially gainful occupation. The Court allowed the application and set aside the decision of the Board. It remitted the matter to a different panel of the Board for a rehearing. Counsel submits that the Federal Court of Appeal found that it was unreasonable for the Board to have found that Ms. Scott was incapable, given the evidence before it. Strayer J.A. wrote,

> 8 Additionally, in my view the Board based its decision on an erroneous finding of fact made without regard for the material before it, a ground for judicial review under paragraph 18.1(4)(d) of the *Federal Court Act* which provides a statutory standard of review generally equivalent to "patent unreasonableness". The Board had before it uncontradicted evidence from three physicians, none of whom could confirm that she was incapable of any substantially gainful occupation as of December, 1997. Further, the Board had evidence before it that, consistently with the opinions of the doctors, she has been able to work in the renting of apartments and obtains part of her livelihood, that is her accommodation, in return, a form of "substantially gainful occupation". It appears not to have had regard to this evidence.

[46] In *Dunsmuir*, the Supreme Court of Canada collapsed reasonableness simpliciter and patent unreasonableness into a single form of "reasonableness" review. Patent unreasonableness however was a standard that was highly deferential to the decision- maker.

[47] As an aside, the Federal Court of Appeal in *Scott* found that the standard of review on the issue of Ms. Scott's incapacity was one of correctness. It did so as the Board had misstated the legal test altogether. Here, the Review Tribunal had correctly identified the test of whether the Respondent's disability was severe, but misinterpreted the test and how it was to apply, and hence, a reasonableness standard applies.

[48] While counsel submits that the decision of the Review Tribunal should be subject to a correctness standard, she submits that it cannot survive even if it were subjected to a reasonableness standard, given the evidence. She submits that the Respondent was working two to three days per week, managed a long trip to Thailand and in 2010, took a teaching course so he could teach English. Counsel submits that I should follow *S.E. v. MHRSD,* (December 16, 2013) SST-CP-28475 (unreported decision), in finding that attending school on a part-time basis can be evidence of work capacity. There, my colleague found that the appellant S.E. had the capacity to work, as she was able to spend approximately 35 to 40 hours per week on her schooling. S.E. also worked on a part-time basis. There, S.E.'s schooling could be seen as full-time, given that she spent approximately 35 to 40 hours per week on her schooling; it is unclear from the decision whether this time included any commuting to and from school, homework and assignments.

[49] While there are some parallels between S.E. and the Respondent, in that both worked part-time and have attended some schooling, there is insufficient evidence before me of the extent of the Respondent's training as an English language teacher. In any event, I do not find *S.E.* to be of particular assistance and distinguish it on the facts.

[50] On the evidence before it, the decision of the Review Tribunal could be seen to be reasonable. Unlike *Scott*, there was medical evidence which could have supported a finding that the Respondent is disabled. And, while the Respondent worked on a part- time basis, the evidence indicates that his attendance was irregular and that he had benevolent employers who accommodated his disability. While the Respondent may have attended English teaching course and was able to travel to and return from Thailand, there is insufficient information on the record as to the evidence before the Review Tribunal as to how these relate to the Respondent's capacity to work. So, it cannot be said that the Review Tribunal's assessment of the facts was necessarily unreasonable.

[51] However, the decision is not defensible on the law. It was unreasonable for the Review Tribunal not to have considered *Fancy* and to have undertaken a comparative analysis of the Respondent's earnings to determine if he was able to regularly pursue any "substantially gainful" occupation.

[52] For this reason, the decision of the Review Tribunal cannot stand.

REMEDIES

[53] Under subsection 59(1) of the DESDA, the Appeal Division may dismiss the appeal, give the decision that the General Division (or Review Tribunal) should have given, refer the matter back to the General Division for reconsideration in accordance with any directions that the Appeal Division considers appropriate or confirm, rescind or vary the decision of the General Division (or Review Tribunal) in whole or in part.

[54] It is beyond my jurisdiction to decide on any "new evidence" which the Appellant might wish to place before me in the way of current Record of Earnings, even if they purportedly show that the Respondent has earnings in excess of levels which suggest that he was or is capable regularly of pursuing any "substantially gainful" occupation, after his minimum qualifying period. That evidence has not been and should be tested, and should be reconciled, in the face of the Respondent's testimony that his earnings were approximately $1,000 per month.

CONCLUSION

[55] For the reasons stated above, the Appeal is allowed and the matter referred to the General Division for a rehearing consistent with these reasons.

Janet Lew
Member, Appeal Division