Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

Citation: *M. T. v. Minister of Employment and Social Development*, 2016 SSTADIS 385

Tribunal File Number: AD-15-1333

BETWEEN:

M. T.

Appellant

and

Minister of Employment and Social Development
(formerly known as the Minister of Human Resources and Skills Development)

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Neil Nawaz

HEARD ON: September 6, 2016

DATE OF DECISION: September 30, 2016

Canada

REASONS AND DECISION

PERSONS IN ATTENDANCE

Appellant	M. T.
Representative for the Appellant	Alexandra Victoros
Professional interpreter of Serbian	Ana Smiljanic
Representative for the Respondent	Sandra Doucette

DECISION

The appeal is allowed.

INTRODUCTION

[1] This is an appeal of the decision of the General Division (GD) of the Social Security Tribunal issued on October 6, 2015, which dismissed the Appellant's application for a disability pension on the basis that she did not prove that her disability was severe, for the purposes of the *Canada Pension Plan* (CPP), by her minimum qualifying period (MQP) of December 31, 2015. Leave to appeal was granted on April 29, 2016, on the grounds that the GD may have erred in rendering its decision.

OVERVIEW

[2] The Appellant was 49 years old when she submitted an application for CPP disability benefits in October 2012. She indicated that she completed high school, and after immigrating to Canada, worked for seven years as a sander for a manufacturer of office furniture, a job she gave up in May 2012 because of back pain. She also stated that she was the sole proprietor of a pizza restaurant that was effectively run by her son.

[3] In the questionnaire accompanying her CPP application, the Appellant listed as her main diagnoses as degenerative disc disease, facet arthritis and foraminal stenosis, which she said prevented her from bending or lifting and sitting or standing for prolonged periods. She had

been had been seen and treated by numerous specialists but claimed there had been no appreciable improvement in her pain or functionality.

[4] At the videoconference hearing before the GD on September 8, 2015, the Appellant testified that she immigrated to Canada in 1999 as a refugee and first lived in Quebec where she attended French language classes for seven months. She later moved to Kitchener, Ontario and attended ESL classes for nine months. She said she was able to speak and write English, although she had problems with spelling. She said that she was unable to work because of low back pain, which radiated into her legs and hips back.

[5] In its decision, the GD found that the Appellant's disability fell short of the requisite severity threshold. It noted that she reported an income of $39,124 in 2012, the year she allegedly stopped working, and $17,741 in the following year. The GD found no indication as to how her wages while working for her pizza business were determined but concluded her earnings were not token. In all probability, they were earned for part-time, and occasionally full-time, work she was doing on as a bookkeeper and office administrator.

[6] On December 9, 2015, within the applicable filing deadline, the Appellant's representative filed an application requesting leave to appeal with the Appeal Division (AD) of the Social Security Tribunal alleging numerous errors on the part of the GD. On April 29, 2016, the AD granted leave on the grounds that the GD may have made the following errors:

(a) Mischaracterizing the Appellant's business earnings for 2013;

(b) Describing the Appellant as "multilingual";

(c) Failing to apply *Atkinson v. Attorney General,*[1] which requires evidence of a so-called "benevolent employer" to be taken into account where a claimant remains in the workforce despite her claimed disability;

(d) Failing to apply *Cochran v. Canada* [2] by not considering the medical evidence around the time of the Appellant's December 31, 2015 MQP.

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[1] *Atkinson* v. *Attorney General of Canada,* 2014 FCA 187
[2] *Cochran v. Canada (Attorney General),* 2003 FCA 343

[7] In a notice dated July 4, 2016, the AD scheduled a hearing by videoconference for the following reasons:

(a) The complexity of the issues under appeal;

(b) The information in the file, including the need for additional information;

(c) The fact that an interpreter will be present;

(d) The fact that the appellant or other parties are represented;

(e) The availability of videoconference in the area where the Appellant resides;

(f) The requirements under the Social Security Tribunal Regulations to proceed as informally and quickly as circumstances, fairness and natural justice permit.

[8] The Appellant's submissions were set out in her application for leave to appeal and notice of appeal of December 9, 2015. In response to the AD's request, she made further submissions on June 6, 2016. The Respondent filed its submissions on June 13, 2016, to which the Appellant replied by way of a letter dated June 27, 2016.

THE LAW

[9] According to subsection 58(1) of the *Department of Employment and Social Development Act* (DESDA) the only grounds of appeal are that:

(a) The GD failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;

(b) The GD erred in law in making its decision, whether or not the error appears on the face of the record; or

(c) The GD based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

[10] Paragraph 44(1)(b) of the CPP sets out the eligibility requirements for the CPP disability pension. To qualify for the disability pension, an Appellant must:

(a) Be under 65 years of age;

(b) Not be in receipt of the CPP retirement pension;

(c) Be disabled; and

(d) Have made valid contributions to the CPP for not less than the Minimum Qualifying Period (MQP).

[11] The calculation of the MQP is important because a person must establish a severe and prolonged disability on or before the end of the MQP.

[12] Paragraph 42(2)(a) of the CPP defines disability as a physical or mental disability that is severe and prolonged. A person is considered to have a severe disability if he or she is incapable regularly of pursuing any substantially gainful occupation. A disability is prolonged if it is likely to be long continued and of indefinite duration or is likely to result in death.

ISSUES

[13] The issues before me are as follows:

(a) What standard of review applies when reviewing decisions of the GD?

(b) Did the GD base its decision on erroneous findings of fact when it:

(i) disregarded evidence that the $17,741 the Appellant reported in 2013 represented corporate or joint, not personal, earnings;

(ii) described the Appellant as "multilingual," having found that she was able to speak and write in English and French, in addition to her native Serbian.

(c) Did the GD err in law in making its decision by:

(i) failing to apply *Atkinson* and related cases by giving inadequate consideration to evidence that the family-run pizza restaurant was in effect a "benevolent employer;"

(ii) failing to apply *Cochran* by giving inadequate consideration to the medical evidence leading up to the Appellant's December 31, 2015 MQP.

SUBMISSIONS

(a) What is the appropriate standard of review?

[14] The Appellant submits that the appropriate standard of review for this appeal should be that of correctness because no deference is due to the GD. The AD is a superior arm of the same tribunal—there is no special expertise or experience which privileges a determination of the GD. The Appellant also notes that the member who decided this case at the GD is regularly a member of the AD, although it acknowledges that training may differ between the two divisions.

[15] On the granted grounds for appeal, the relevant issue is not the weighing of evidence but rather the GD having exceeded its jurisdiction by either failing to consider highly relevant evidence or by making statements of fact with no evidentiary support. Where jurisdiction is concerned, the standard of review is correctness.

[16] The Respondent's submissions discussed in detail the standards of review and their applicability to this appeal, concluding that a standard correctness was to be applied to errors of law, and reasonableness was to be applied to errors of fact and mixed fact and law.

[17] The Respondent noted that the Federal Court of Appeal had not yet settled on a fixed approach for the AD in considering appeals from the GD. The Respondent acknowledged the recent Federal Court of Appeal case, *Canada (MCI) v. Huruglica*,[3] which it said confirmed that the AD's analysis should be influenced by factors such as the wording of the enabling legislation, the intent of the legislature when creating the tribunal and the fact that the legislature is empowered to set a standard of review if it so chooses. It was the Respondent's view that *Huruglica* did not appreciably change the standard to be applied to alleged factual

[3] *Canada (Minister of Citizenship and Immigration) v. Huruglica,* 2016 FCA 93

errors; the language of paragraph 58(1)(c) of the DESDA continued to permit a wide range of acceptable outcomes.

[18] The Respondent submits that the AD should not engage in a redetermination of matters in which the GD has a significant advantage as trier of fact. The wording of sections 58 and 59 of the DESDA indicate that Parliament intended that the AD show deference to the GD's finding of fact and mixed fact and law.

(b) Errors of Fact

Characterization of the Appellant's 2013 Earnings

[19] The Appellant submits that the GD disregarded evidence that the $17,741 she reported in 2013 represented joint business, not personal, earnings. She states that as sole owner of the family business, all business income was reported on her tax return, even though the pizza restaurant was effectively a partnership among herself, her husband and her son. The latter two actively worked in the business, while she did not after 2013.

[20] The Respondent submits that the GD's conclusion that the Appellant was an active participant in the family business was reasonable in the context of the evidence before it. In 2013, the Appellant declared that she was 100 percent owner of Magic Pizza. The GD found that the Appellant had 2013 earnings from employment of more than $17,000, based on tax filings from the Canada Revenue Agency, which showed her gross self-employment income from Magic Pizza of more than $124,000 and business expenses totaling $106,000. The business expenses included no expenditures for salaries, wages and benefits.

[21] The Respondent submits that the GD justifiably found that the Appellant had earnings in 2013 earnings, while recognizing that her common law spouse and son worked in the pizza restaurant. The Appellant admitted that she assumed a role akin to that of an office administrator, and while the Appellant's son spouse and common law spouse may have worked in the restaurant, there is no evidence either were paid salary or wages.

Finding that the Appellant Is Multilingual

[22] The Appellant objects to the GD's finding that she was "multilingual," based on her supposed ability to speak and write in English and French, as well as her native Serbian. While the Appellant acknowledges that she had seven months of French lessons and nine months of English lessons after immigrating to Canada, her French was non-existent and her English was limited.

[23] The Respondent acknowledges that there is nothing on the record to indicate the Appellant is multilingual (i.e. able to communicate in more than two languages) but submits that the GD's mischaracterization of her facility with languages is not a material error. The GD did not infer from the Appellant's presumed linguistic proficiency the kind of intelligence and adaptability that would permit her to carry on working despite her claimed impairments.

(c) Errors of Law

Failure to apply L.F.

[24] The Appellant, citing a case of the now-defunct Pension Appeals Board, *L.F. v. MHRSD*,[4] submits that the GD gave inadequate consideration to whether her sporadic work at the family pizza restaurant was meaningful and competitive.

[25] The Respondent submits that there is no evidence suggesting that the Appellant's work at Magic Pizza was held to anything less than a commercial standard. The record shows that the Appellant was 100 percent owner of the business and a remunerated office administrator up until at least the end of 2013. Furthermore, the Appellant's son and common law spouse worked in the restaurant for no salary or wages. At the time of hearing before the GD, Magic Pizza was still in operation, and the Appellant stated that she continued to do bookkeeping for the business. While the Appellant may have since transferred some or all of her ownership in the business, no documentation was provided to support this claim. In short, there is nothing in the evidence to suggest that the business, *vis a vis* the Appellant, was "a benevolent employer."

[4] *L.F. v. Minister of Human Resources and Skills Development* (PAB CP26809 September 20, 2010)

Failure to apply Cochran

[26] The Appellant submits that the General Division erred in failing to consider the medical evidence around the time of her MQP of December 31, 2015, focusing instead on her health during the period in which she last showed earnings.

[27] The Respondent submits that a tribunal need not refer in its reasons to each and every piece of evidence before it but is presumed to have considered all the evidence. However, in this case, there was a dearth of documentation from the final two years of the MQP that corroborated the Appellant's claim of capacity as of December 31, 2015. Given this, the GD's decision was reasonable and contains no reviewable error that would permit the intervention of the AD. In accordance with the Federal Court of Appeal's decision in *Cochran*, the GD considered the available evidence before it and found a woman in her early fifties with transferable office administration and bookkeeping skills, who regularly spent large amounts of time at her business, of which she was 100 percent owner up to 2013.

ANALYSIS

(a) Standard of Review

[28] Until recently, it was accepted that appeals to the AD were governed by the standards of review set out by the Supreme Court of Canada in *Dunsmuir v. New Brunswick.*[5] In matters involving alleged errors of law or failure to observe principles of natural justice, the applicable standard was held to be correctness, reflecting a lower threshold of deference deemed to be owed to an administrative tribunal often analogized with a trial court. In matters where erroneous findings of fact were alleged, the standard was held to be reasonableness, reflecting a reluctance to interfere with findings of the body tasked with hearing factual evidence.

[29] The *Huruglica* case has rejected this approach, holding that administrative tribunals should not use standards of review that were designed to be applied by appellate courts. Instead, administrative tribunals must look first to their home statutes for guidance in determining their role.

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[5] *Dunsmuir v. New Brunswick*, [2008] SCR 190, 2008 SCC 9

[30] Although *Huruglica* deals with a decision that emanated from the Immigration and Refugee Board, it has implications for other administrative tribunals. In this case, the Federal Court of Appeal held that it was inappropriate to import the principles of judicial review, as set out in *Dunsmuir*, to administrative forums, as the latter may reflect legislative priorities other than the constitutional imperative of preserving the rule of law. "One should not simply assume that what was deemed to be the best policy for appellate courts also applies to specific administrative appeal bodies."

[31] This premise leads the Court to a determination of the appropriate test that flows entirely from an administrative tribunal's governing statute:

> … the determination of the role of a specialized administrative appeal body is purely and essentially a question of statutory interpretation, because the legislator can design any type of multilevel administrative framework to fit any particular context. An exercise of statutory interpretation requires an analysis of the words of the IRPA [*Immigration and Refugee Protection Act*] and its object… The textual, contextual and purposive approach mandated by modern statutory interpretation principles provides us with all the necessary tools to determine the legislative intent in respect of the relevant provisions of the IRPA and the role of the RAD [Refugee Appeal Division].

[32] The implication here is that the standards of reasonableness or correctness will not apply unless those words or their variants are specifically contained in the founding legislation. Applying this approach to the DESDA, one notes that paragraphs 58(1)(a) and (b) do not qualify errors of law or breaches of natural justice, suggesting the AD should afford no deference to the GD's interpretations.

[33] The word "unreasonable" is nowhere to be found in paragraph 58(1)(c), which deals with erroneous findings of fact. Instead, the test contains the qualifiers "perverse or capricious" or "without regard for the material before it." As suggested by *Huruglica*, those words must be given their own interpretation, but the language suggests that the AD should intervene when the GD bases its decision on an error that is clearly egregious or at odds with the record.

(b) Involvement in Pizza Restaurant

[34] As the Appellant's 2013 earnings and her activities at the family pizza restaurant are inextricably linked, I will deal with these issues together.

[35] It is clear from its analysis that the GD regarded the $17,000 in reported in earnings for 2013 as a significant factor in determining that the Appellant was not disabled according to the standard set out in the CPP. Furthermore, while the Appellant reported no income in 2014 or 2015, the final two years of the MQP, it appears the GD simply did not believe her evidence that she did at most nominal work at Magic Pizza during that period. In my view, the GD arrived at these conclusions by making a series of findings that, in some cases, were not fully supported by the evidence, as I will now discuss.

Characterization of $17,000 Reported Income

[36] The GD noted several times in its decision that the Appellant reported that she is 100 percent owner of the business (paragraphs 10 and 41), but I have not was unable to confirm that statement in either her self-employment questionnaire or her testimony, in which she characterized the pizza restaurant as a family business on several occasions. The evidence suggests that Magic Pizza is an unincorporated business in which all three of the Appellant's family members, including herself, had an interest. It appears they made a choice to report whatever income accrued from the business through the Appellant's personal income tax returns, but I do not feel that that this can be deemed equivalent to owning the entire business; at the very least her husband and son have a beneficial interest, particularly as they work there.

[37] It was therefore puzzling that, throughout the decision, the GD treated the $17,000 income as if it entirely belonged to the Appellant. In paragraph 44, the GD wrote:

> The Appellant in 2012 the year she allegedly stopped work in May 2012 had an income of $39, 124.00 and in 2013 the year she supposedly did not work her earnings were $17,741.00. These earnings are not token wages. There is no indication as to how her wages while working for her company were determined. It is however in all probability for the work she was doing on part time and occasionally full time as a bookkeeper and office administrator.

[38] This quotation contains language that, in my view, paints a picture that is not supported by the record. As mentioned, there is no evidence of a "company"—only a family-run business from which collective earnings were reported, for income tax purposes, by a single member. All the evidence suggests that the Appellant—and indeed her husband and son—were not paid "wages" but collectively benefitted from the business earnings generated by the restaurant. I have listened to relevant portions of the hearing recording, which indicates the Appellant

consistently denied the $17,000 was hers alone. At 1:05:47, she was asked about what she did to earn her reported income in 2013 and replied: “It was the family. We are together as a family. It’s all of us.” This statement—which represented the Appellant’s attempt to address one the main points raised against her disability claim—was not further explored by the GD in questioning and was not reflected anywhere in the GD’s decision. Instead, the GD attributed the entire amount to the Appellant and drew an adverse inference because she supposedly earning a substantially gainful income after the date she claimed to be disabled: “This income cannot be categorized as nominal, token or illusory compensation.”

Activities at Magic Pizza

[39] In her application for leave, the Appellant alleged that the GD gave inadequate consideration to whether her sporadic work at the family pizza restaurant was meaningful and competitive. I granted leave because I thought there was an arguable case that the GD had disregarded evidence that Magic Pizza, as a family-run business, was in effect a “benevolent employer.”

[40] The decision leaves no doubt that the GD found the Appellant’s work at the restaurant after May 2012, when she left her full-time employment as a furniture sander, to be comparable to a job in the competitive labour market. As discussed, the GD’s emphasis on the Applicant’s “100 percent” ownership of the business elided the reality that it was jointly owned with her husband and son, who would presumably be more willing to accommodate her impairments than arms-length business partners. In paragraph 42, the GD wrote that the Appellant testified that she went to the restaurant daily and attended to administrative tasks such as answering the phone, paying bills and ordering supplies. My review of the recording of the hearing indicates that the Applicant in fact testified (at 45:48) that she “tried” to do these things and went to the restaurant mainly to keep her husband company. In the end, the GD found that the Appellant had capacity to perform not only part-time, but also full-time, work.

[41] The CPP links disability with incapacity to *regularly* to pursue substantially gainful occupation. From this has flowed the concept of the so-called “benevolent employer”—a boss who may be a friend, family member or otherwise sympathetic individual who is willing to overlook commercial imperatives and extend unusual accommodations whose productivity has

been diminished because of health conditions. I recognize that the onus is on an applicant to introduce evidence that they have benefitted from such an employer, but if it has done so, the GD is then under an obligation to meaningfully address it. In this case, the GD gave scant consideration to the possibility that the Appellant's work at Pizza Magic after May 2012 was held to something less than a commercial standard, even though she explicitly advanced this argument, both in her written and oral submissions. In her application for benefits, she insisted her son ran the store for her, and in her testimony, she said her husband operated the business. At the 1:10:10 mark of the hearing recording, the Appellant's representative can be heard directly asking her whether her son and husband accommodated her at the restaurant. She responded, "Of course. They are aware of my capabilities. They also help me at home. They know how I feel," In addition, the Appellant's representative explicitly argued in her final oral submissions that accommodations extended by the family at the restaurant should be taken into account

[42] In my view, the GD's failure to contend with evidence of a benevolent employer is as much a breach of the principles of natural justice as it is an error of law. An administrative tribunal owes an applicant due consideration of the significant evidence and arguments that she puts forward in support of her claim.

Finding of Non-Credibility

[43] My review of the GD's decision suggests that a major reason—if not the major reason—that it denied the Appellant's disability claim was because it disbelieved her testimony that she came to the family pizza restaurant every day but did not perform any significant work. Indeed, the GD found that the Appellant's believability was poor in general, declaring in paragraph 43, "Due to inconsistent evidence, the Appellant's credibility is questionable."

[44] However, in support of this rather sweeping statement, the GD does not cite any concrete examples of the Applicant's lack of veracity, offering only this general statement:

> The Appellant's documented evidence (Questionnaire dated October 8, 2012 and the Questionnaire dated June 9, 2015) and her oral testimony have inconsistent statements with regards to the date she stopped work, her role in the running and or management of her business and as to the ownership of the business.

[45] An overview of the oral and documentary evidence suggest that the Appellant was consistent in saying that she stopped her employment as a furniture sander in May 2012 and stopped full-time work at Magic Pizza in December 2013, continuing only to do some bookkeeping and administrative tasks. She never denied that all the income from the pizza restaurant was reported on her income tax return, but insisted repeatedly that it was all derived from a jointly-owned family business. While she said that she stopped working at Magic Pizza, nowhere in her questionnaires or testimony did she say that she had transferred her interest in the business, which as noted, was unincorporated. Nevertheless, without explicitly explaining its reasoning, the GD appears to have drawn an adverse inference from her "failure" to do so.

[46] It is within the jurisdiction of a trier of fact to make a finding of credibility, but there must be some reasonable basis underpinning it. In this case, I will allow the appeal on the ground on the grounds that it disregarded oral and written evidence that the Appellant's involvement in the family pizza restaurant was passive and enabled through accommodations permitted by her husband and their son.

(c) Multilingual Capability

[47] I granted leave to appeal on this ground because the GD's conclusion that the Appellant was "multilingual" appeared at odds with the available evidence, which indicated that, while the Appellant was fluent in Serbian had some facility in English, she had had limited exposure to French. It seemed possible, even likely, that one might acquire proficiency in English after living and working in Ontario for nearly15 years, but I found it hard to image how one might approach fluency in French after only a few months of FSL classes.

[48] I see from its submissions that the Respondent has essentially conceded that the GD went too far in its characterization of the Appellant's language skills. However, it also suggests that this error was immaterial because the GD did not make larger inferences from it about the Appellant's intelligence and adaptability in the labour market. Having reviewed the decision in more detail, I must disagree. The Appellant's purported facility with languages is clearly an significant factor for the GD, as it devotes two full paragraphs (47 and 48) to the issue, before concluding: "She is a smart woman who despite apparent English language deficiencies, opened

a business and was able to ran and manage it all while she was for some part still working for her former employers."

[49] This statement is part of a pattern seen throughout the decision, in which the GD imputes to the Appellant attributes and capabilities that are supported by only a small crumb of evidence. A few months of FSL classes means the Appellant is "multilingual," which in turn means she is "smart" and capable of running a business despite impairments. The fact that modest net earnings from the family's small pizza store flow through her income tax return means that she is the "100 percent owner" of a company and a "savvy businesswoman" who is "able to work at a physically demanding job." The $17,000 in earnings reported in her 2013 income tax return was assumed to be proof that the Appellant had substantially gainful income, despite evidence that it was shared among three family members.

[50] I would allow the appeal on this ground.

(d) Cochran

[51] The Appellant submits that the GD erred in failing to consider the medical evidence around the time of her MQP of December 31, 2015, focusing instead on her health in 2013, the year in which she last reported income. The GD's analysis spends very little time considering the Appellant's condition after December 2013 (the date on which she indicated in the Self-Employment Questionnaire that she could no longer work "full-time"). It is true, as noted by the Respondent, that there are few medical reports from the last two years of the MQP, but it appears that, having found the Appellant capable of work as of 2013, the GD found she was just as capable as work in 2014 and 2015, based largely on her purported lack of credibility. My review of the written and oral evidence indicates that the Appellant consistently said she ceased active work at the restaurant by December 2013, but it seems the GD simply did not believe her when she insisted that she came to Magic Pizza every day for at least eight hours simply to keep her husband company—apart from performing a little bookkeeping. In its submissions, the Respondent quoted several paragraphs from the GD's decision, but they amounted to merely a series of expressions of disbelief did not evince a genuine attempt to assess the Appellant's condition as of the MQP date.

[52] I am ordinarily loath to interfere with a decision of GD based on it assessments of credibility. As discussed above, the GD was certainly within its authority to find that the Appellant was non-credible, provided there was a reasonable basis for it. However, I found the GD's reasons for disbelieving the Appellant to be capricious and divorced from the factual record. This, combined with the fact that the GD dwelt at length in its analysis on the Appellant's reported $17,000 in earnings in 2013, yet was silent about her zero earnings in 2014 and 2015, leads me to conclude that it did not give adequate consideration to her condition as of the MQP date.

CONCLUSION

[53] For the reasons discussed above, the appeal succeeds on all grounds for which leave was allowed.

[54] Section 59 of the DESDA sets out the remedies that the AD can give on appeal. To avoid any apprehension of bias, it is appropriate in this case that the matter be referred back to the GD for a *de novo* hearing before a different GD member.

Member, Appeal Division