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

Citation: *N. A. v. Minister of Employment and Social Development*, 2017 SSTADIS 738

Tribunal File Number: AD-17-74

BETWEEN:

N. A.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Neil Nawaz

DATE OF DECISION: ~~December 14, 2017~~

CORRIGENDUM DATE: December 29, 2017

Canada

DECISION AND REASONS

DECISION

[1] The appeal is allowed.

OVERVIEW

[2] The Appellant, N. A., who is now 53 years old, suffers from arthritis. She worked as a baker in a Tim Horton's restaurant until January 2015, when arm and shoulder pain forced her to resign. There was also evidence that she had previously owned a pizza restaurant, which was sold in 2008. In May 2015, Ms. N. A. applied for Canada Pension Plan (CPP) disability benefits, but the Respondent, the Minister of Employment and Social Development (Minister), refused her application because it did not find her disability "severe" and "prolonged," as defined by the legislation, as of her minimum qualifying period (MQP), which ended on December 31, 2016.

[3] Ms. N. A. appealed the Minister's determination to the General Division of the Social Security Tribunal (Tribunal). In a decision dated October 29, 2016, it found insufficient evidence that Ms. N. A.'s medical condition prevented her from performing substantially gainful employment during the relevant period. It also found that she had residual capacity to pursue lighter sedentary work within her restrictions. In January 2017, Ms. N. A. requested leave to appeal from the Tribunal's Appeal Division. In my decision dated September 27, 2017, I granted leave because I saw at least an arguable case that the General Division may have (i) misstated and misapplied the test for severity and (ii) based its decision on an erroneous inference that Ms. N. A.'s previous experience as a business owner rendered her employable, even with her physical limitations and personal background.

[4] In view of the requirement under the *Social Security Tribunal Regulations* to proceed as informally and as quickly as circumstances, fairness and natural justice permit, I have decided to dispense with an oral hearing and consider this appeal on the basis of the existing documentary record. For the reasons that follow, I have concluded that the General Division's decision **[cannot]** ~~must~~ stand.

PRELIMINARY MATTER

[5] On November 15, 2017, Ms. N. A.'s legal representative submitted a package[1] to the Tribunal that contained a written argument, as well as various imaging reports, doctor's letters and clinical notes, none of which, it appears, were ever presented to the General Division. I have decided not to consider these medical documents for the purposes of this appeal. According to the Federal Court's decision in *Belo-Alves v. Canada*,[2] the Appeal Division is not ordinarily a forum in which new evidence can be introduced, given the constraints of subsection 58(1) of the *Department of Employment and Social Development Act* (DESDA), which do not give the Appeal Division authority to consider new evidence or entertain arguments on the merits of an appellant's disability claim.

ISSUES

[6] The issues before me are as follows:

Issue 1: How much deference should the Appeal Division extend to General Division decisions?

Issue 2: Did the General Division misapply the test for severity?

Issue 3: Did the General Division erroneously infer that Ms. N. A.'s experience as a restaurant owner rendered her employable, even with her physical limitations and personal background?

ANALYSIS

Issue 1: How much deference should the Appeal Division show the General Division?

[7] The only grounds of appeal to the Appeal Division are that the General Division erred in law, failed to observe a principle of natural justice, or 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.[3] The Appeal Division may dismiss the appeal, give the decision that the General

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[1] Labelled AD3 in the record.
[2] *Belo-Alves v. Canada (Attorney General)*, [2015] 4 FCR 108, 2014 FC 1100.
[3] Subsection 58(1) of the *Department of Employment and Social Development Act* (DESDA).

Division should have given, refer the matter back to the General Division for reconsideration, or vary the General Division's decision in whole or in part.[4]

[8] Until recently, it was accepted that appeals to the Appeal Division were governed by the standards of review set out by the Supreme Court of Canada in *Dunsmuir v. New Brunswick*.[5] Where errors of law or failures to observe principles of natural justice were alleged, the applicable standard was held to be correctness, reflecting a lower threshold of deference deemed to be owed to a first-level administrative tribunal. 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.

[9] The Federal Court of Appeal decision *Canada v. Huruglica*[6] 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. This premise led the Court to determine that the appropriate test flows entirely from an administrative tribunal's governing legislation: "The textual, contextual and purposive approach mandated by modern statutory interpretation principles provides us with all the necessary tools to determine the legislative intent […]"

[10] 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 tribunal's home statute. 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, which suggests that the Appeal Division should afford no deference to the General Division's interpretations. The word "unreasonable" is not found in paragraph 58(1)(*c*), which deals with erroneous findings of fact. Instead, the test contains the qualifiers "perverse or capricious" and "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 Appeal Division should intervene when the General Division bases its decision on an error that is clearly egregious or at odds with the record.

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[4] Subsection 59(1) of the DESDA.
[5] *Dunsmuir v. New Brunswick*, [2008] 1 SCR 190, 2008 SCC 9.
[6] *Canada (Citizenship and Immigration) v. Huruglica*, [2016] 4 FCR 157, 2016 FCA 93.

Issue 2: Did the General Division misapply the test for severity?

[11] Ms. N. A. submits that the General Division applied a test for severity that was inconsistent with the statutory definition of disability. She specifically points to paragraph 27 of its decision, where the General Division found that she was not "incapable of all types of work." She argues that this was inconsistent with paragraph 42(2)(*a*) of the CPP, which requires claimants to show that there are "incapable regularly of pursuing any substantially gainful occupation."

[12] I note that the General Division correctly stated the test in paragraphs 5 and 28, but I agree with Ms. N. A. that it did misstate the test elsewhere—not just in paragraph 27, but also in paragraph 24, when it referred to the leading case of *Klabouch v. Canada*[7] in a way that subtly altered its meaning. The General Division wrote:

> The determination of the severity of the disability is not premised upon a person's inability to perform his or her regular job, but rather on his or her inability to perform any work.

[13] This closely paraphrased a passage in *Klabouch* but omitted what I see as an important qualifier in the original:

> Second, as a corollary to the above principle is the principle that the determination of the severity of the disability is not premised upon an applicant's inability to perform his regular job, but rather on his inability to perform any work, *i.e. "any substantially gainful occupation"* [my italics].

[14] However, using the wrong words does not necessarily mean that one has in fact *misapplied* a test. It is useful to also examine how a decision-maker actually treats the evidence.

[15] In its written submissions dated November 14, 2017, the Minister appears to the concede the misstatement but argues that the General Division correctly applied the test:

- It assessed Ms. N. A.'s impairments in a real-world context taking into consideration her age, education level, language proficiency and work experience;

[7] *Klabouch v. Canada (Social Development)*, 2008 FCA 33.

- It acknowledged Ms. N. A.'s arthritis diagnosis but noted that she continued to drive short distances and was able to do some cooking and household cleaning;

- It considered a medical opinion that Ms. N. A. was unable to manage even part-time work but noted that Dr. Sochocka neglected to specify her limitations;

- It found that Ms. N. A. had not pursued alternate work or retraining and whether she could perform lighter work within her limitations, she said she did not know.

[16] I am not prepared to allow the appeal on this issue, because I see indications that, despite having incorrectly stated the test twice in its decision, the General Division did not apply an overly stringent test for severity. I do so fully aware that the General Division is to be accorded only a narrow margin of error on questions of law.

[17] I am guided by *Osei v. Canada*,[8] in which the Immigration Review Board correctly stated a legal test at the beginning of the hearing, at the beginning of its reasons and at the end of its reasons, although it misstated the test in the body of its reasons. The Federal Court of Appeal wrote:

> In the same way as an improper formulation of the test by the tribunal may be obviated by a proper application, a proper formulation may be obviated by an improper application. In the instance case there is reason to fear that the tribunal did not properly evaluate the evidence that was before it because it misapplied the test which it properly understood. That being so the decision cannot stand.

[18] First, I agree with the Minister that the General Division's decision is otherwise legally sound, as the member in fact applied the proper test, thereby rendering the misstatement inconsequential. Second, much of the General Division's decision rested on Ms. N. A.'s failure to pursue alternative work, which in turn depended on a finding that she retained at least some measure of residual capacity, as required by *Inclima v. Canada.*[9] In paragraph 25, the General Division noted:

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[8] *Osei v. Canada (Minister of Employment and Immigration)*, [1990] FCJ No. 940 (FCA).
[9] *Inclima v. Canada (Attorney General)*, 2003 FCA 117.

> While the Tribunal notes that Dr. Sochocka feels she is unable to work even part time, it is not clear whether she is referring to her former employment or any employment and she does not indicate what her limitations are. It appears to the Tribunal that there is some evidence that there may be a capacity for lighter work that does not involve heavy lifting, pulling or pushing.

[19] This passage illustrates that the General Division was cognizant, in its deliberations, of the distinction between Ms. N. A.'s capacity to perform *any* employment versus her capacity to perform her *former* employment as a Tim Horton's kitchen worker, in which lifting and reaching were integral components of the job. The General Division then proceeded to consider whether Ms. N. A.'s personal profile presented an impediment to her ability to maintain substantially gainful employment in a less physically demanding line of work. As seen in the following section, this is where I depart from the Minister.

Issue 3: Did the General Division draw an unsupported inference from Ms. N. A.'s business experience?

[20] The "real world" test, as set out in *Villani v. Canada*,[10] requires a decision-maker to consider an applicant's background in assessing disability, including factors such as age, education, language proficiency and work and life experience. Ms. N. A. submits that the General Division erred in law by focusing on her previous experience as a restaurant owner while overlooking the fact that she has only a grade five education from Turkey and has worked mainly in low-skilled manual labour jobs.

[21] The General Division correctly summarized *Villani* in paragraph 21 of its decision, and noted that Ms. N. A. was

> […] just 52 years of age and although she has limited education and some language difficulties it has not prevented her from being able to carry on her own business for a number of years or working with the public. It appears that there may be some capacity for work however she has not made any attempts to look for alternate employment.

[22] In my decision granting leave, I acknowledged that the General Division considered the Applicant's *Villani* factors but found they were, in effect, trumped by the fact that Ms. N. A.

[10] *Villani v. Canada (Attorney General)*, 2001 FCA 248.

had, at one time, owned a business. I also observed that it seemed odd that, although the decision seemed to turn on this fact, the General Division's reasons contained few details about Ms. N. A.'s business experience. The only mention of it, other than paragraph 21, came in paragraph 11, which noted that she "had previously owned and operated a pizza and sub shop which she sold in 2008."

[23] I have now reviewed the audio recording of the hearing that took place before the General Division on October 6, 2016. It indicates that the discussion about Ms. N. A.'s business experience occupied 35 seconds of the hearing[11] and did little more than establish that she had some kind of involvement in a pizza shop that was sold in 2008:

> Q: Tell me where else you've worked—or what other kinds of work that you've done?
> A: Used to… we have a pizza shop. I work there too… to 2008.
> Q: I'm sorry, which year did you sell it?
> A: Pizza shop.
> Q: It was a pizza…? Pizza and sub? When did it close?
> A: 2008.
> Q: 2008… or you sold it, did you?
> A: Yes.

[24] There appears to be no mention of the pizza shop in any of the documentary material that was before the General Division at the time of the hearing. The only evidence about it, or Ms. N. A.'s role in it, was elicited in oral questioning which, as seen above, was at best perfunctory. Having elected to ask Ms. N. A. about her past work experience, there were many questions that the General Division could have asked about her "business" experience but did not, for instance:

- Were you the sole owner of the shop or was it co-owned with your husband or other family members?
- What was your role in the operation of the shop? Were you responsible for food preparation and, if so, did you also deal with customers? Who kept the books and performed other administrative tasks?
- How long was the pizza shop in business? Did it make money? Why was it sold?

[11] From 13:42 to 14:17.

[25] The General Division based its decision on a finding that Ms. N. A. was not prevented "from being able to carry on her own business for a number of years or working with the public," but the record indicates that it never established that the Appellant (i) ran the pizza shop by herself (she distinctly used the word "we" in her testimony); (ii) did so over a period of years (the duration of the pizza business was never established); and (iii) worked with the public (she did not say what function she had in the business, nor was she asked).

[26] In my view, the General Division based its decision on assumptions about Ms. N. A.'s business experience that were not founded in fact. The Minister undoubtedly is correct to say that experience in operating a business generally improves one's employability, but owning or co- owning a business is not necessarily the same thing as running it. I am aware that the burden of proof rested on the Appellant to provide proof of her disability—and to show that she was unsuited for sedentary work; however, having found that her involvement with the pizza shop showed that she had skills beyond manual labour, the General Division was obliged, as a matter of fairness, to fully investigate her purported career as a business owner when it had the opportunity.

CONCLUSION

[27] I find that the General Division based its decision on an unproven assumption that merely owning a business necessarily conferred vocational skills on the Appellant. Moreover, if the General Division was going to ground its decision in Ms. N. A.'s supposed business experience, it should, as a matter of fairness, have asked her questions to elucidate the nature and extent of that experience.

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

Member, Appeal Division