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

Citation: *R. D. v. Minister of Employment and Social Development*, 2018 SST 72

Tribunal File Number: AD-17-154

BETWEEN:

R. D.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Neil Nawaz

DATE OF DECISION: January 25, 2018

DECISION AND REASONS

DECISION

[1] The appeal is allowed.

OVERVIEW

[2] The Appellant, R. D., who is now 60 years old, was born in Brazil, where she received the equivalent of a high school education and worked as a salesperson and a real estate agent. She immigrated to Canada in 2001 and found employment cleaning houses. She had recently started a new job as a home support worker when she was involved in a 2007 motor vehicle collision that left her with injuries to her neck and back. She was later diagnosed with fibromyalgia. Other than two briefly held jobs, she has not worked since.

[3] In November 2013, Ms. R. D. applied for disability benefits under the *Canada Pension Plan* (CPP). The Respondent, the Minister of Employment and Social Development (Minister), refused her application because her disability was not "severe and prolonged" as of her minimum qualifying period (MQP), which ended on December 31, 2009.

[4] Ms. R. D. appealed the Minister's determination to the General Division of the Social Security Tribunal of Canada. In a decision dated November 10, 2016, it found insufficient evidence that Ms. R. D.'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.

[5] In February 2017, Ms. R. D. requested leave to appeal from the Appeal Division. In my decision dated August 11, 2017, I granted leave on the sole ground that the General Division may have erred in law by failing to apply *Villani v. Canada*[1] in assessing the severity of her disability.

[6] Now, having considered the parties' submissions and having reviewed the underlying record, I have come to the conclusion that the General Division's decision cannot stand.

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

ISSUES

[7] 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 err in law by failing to properly apply the *Villani* "real world" test in assessing the severity of Ms. R. D.'s disability?

ANALYSIS

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

[8] 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.[2] The Appeal Division may dismiss the appeal, give the decision that the General 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.[3]

[9] 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*.[4] 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.

[10] The Federal Court of Appeal decision *Canada v. Huruglica*[5] 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

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[2] Subsection 58(1) of the *Department of Employment and Social Development Act* (DESDA).
[3] Subsection 59(1) of the DESDA.
[4] *Dunsmuir v. New Brunswick*, [2008] 1 SCR 190, 2008 SCC 9.
[5] *Canada (Citizenship and Immigration) v. Huruglica*, [2016] 4 FCR 157, 2016 FCA 93.

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 […]."

[11] 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.

Issue 2: Did the General Division improperly apply the *Villani* "real world" test?

[12] In *Villani v. Canada*, the Federal Court of Appeal held that disability is to be assessed in a "real world" context, taking into account a claimant's employability given his or her age, work experience, level of education, and language proficiency. It is not sufficient to merely cite *Villani*; a decision-maker must also demonstrate that it made a genuine attempt to apply its principles to the evidence at hand.

[13] Ms. R. D. submits that the General Division misapplied *Villani* when it concluded that her disability fell short of severe, even in the face of evidence that her personal background would impede her ability to retrain or find alternative employment. In particular, Ms. R. D. took issue with the General Division's finding that she had "transferable skills that would allow her the opportunity to find alternate employment," even though her Canadian work history had been confined to domestic labour. She also noted that she was 59 years old at the time of the hearing (52 at the end of her MQP) and that she did not learn English until adulthood. Although she acknowledged that she was able to answer questions in English at the hearing, she disputed the General Division's suggestion that her proficiency was sufficient for office work.

[14] I see merit in Ms. R. D.'s submissions. Although the General Division correctly summarized *Villani* in paragraph 31 of its decision, I see a mixed error of law and fact in how the General Division applied it in considering Ms. R. D.'s work history. In paragraph 35, the General Division wrote:

> The Appellant is nearing the end of her work career as she was 59 years of age at the time of the appeal hearing. She had received her education in Brazil and had been involved as a sales person during her time living in that country. Upon arriving in Canada the Appellant had found work doing domestic cleaning and helping her husband with the requirements around his church. She indicated to the Tribunal that she had taken ESL courses upon arriving in Canada and had requested an interpreter during the appeal hearing but the Tribunal found that the Appellant's level of English was very good and the interpreter was not pressed into service for most of the hearing. The Tribunal found that the Appellant was an intelligent individual who had a good understanding of the English language and was able to answer all the questions posed to her by her Representative. The Tribunal took into account the *Villani* factors and found that the Appellant had transferable skills that would allow her the opportunity to find alternate employment however the Tribunal does note that the Appellant's work history in Canada has been one of domestic labour and given the Appellant's symptoms is hesitant that the Appellant could find alternate employment outside of this area.

[15] This is a case where the General Division appears to have understood the particulars of Ms. R. D.'s history but then drew insupportable inferences from them. I recognize that the General Division is permitted to weigh evidence and make findings of fact so long as it remains within the parameters of subsection 58(1) of the DESDA. For that reason, I do not find the General Division's assessment of Ms. R. D.'s spoken English to be "perverse," "capricious," or "without regard for the material." However, I am less comfortable with the General Division's finding that Ms. R. D. had transferable skills, despite there being no evidence that she had ever done anything other than various types of unskilled manual labour since arriving in Canada. Although she had sales jobs in Brazil, it was unclear how substantive they were, and she presumably performed them in her native language. In Canada, Ms. R. D.'s skills, such as they are, qualify her for only a subset of jobs for which her injuries would appear to be a significant impediment. It is true that even low-wage, low-skill jobs teach valuable life lessons in punctuality, tenacity, and interpersonal communication, but these are not "transferable skills" as are commonly understood in the vocational context.

[16] Having drawn what, in my view, was a perverse inference about Ms. R. D.'s transferable skills, the General Division's *Villani* analysis, however lengthy and well-intentioned, was irredeemably tainted. Moreover, having found that Ms. R. D. was employable, despite her impairments, the General Division then undermined its conclusion by expressing doubt that anyone would hire her for "alternate" employment, which I assume means sedentary, or lower impact, work in sales or clerical positions.

[17] On questions of fact, the trier of fact is owed a measure of deference, but not where the General Division contradicts itself, thereby casting doubt on the internal logic of its decision. I am satisfied that the General Division failed to take a realistic look at Ms. R. D.'s prospects for finding alternative work, given her impairments and personal background.

CONCLUSION

[18] The appeal is allowed. 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

HEARD ON:	January 9, 2018
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	R. D., Appellant Italica Battiston, for the Appellant Stéphanie Pilon, for the Respondent