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

Citation: *S. H. v. Minister of Employment and Social Development,* 2018 SST 95

Tribunal File Number: AD-16-1349

BETWEEN:

S. H.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Neil Nawaz

DATE OF DECISION: January 31, 2018

Canada

DECISION AND REASONS

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] The Appellant, S. H., who is 52 years old, is a high school graduate with one year of secretarial training. Over the years, she has held a variety of jobs, most recently as a retail sales clerk for a jewelry store. In June 2013, she slipped and fell in a grocery store, sustaining injuries to her left leg and lower back. She has not worked since and was later diagnosed with anxiety and depression.

[3] In May 2014, Ms. S. H. 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, 2015.

[4] Ms. S. H. appealed the Minister's determination to the General Division of the Social Security Tribunal of Canada. Following a hearing by videoconference, the General Division issued a decision dated November 10, 2016, in which it found insufficient evidence that Ms. S. H.'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 December 2016, Ms. S. H.'s legal representative, Bozena Kordasiewicz, requested leave to appeal from the Appeal Division, alleging, by my count, eight errors of fact and law on the part of the General Division. In my decision dated August 11, 2017, I granted leave to appeal because I saw a reasonable chance of success for the arguments that the General

Division may have (i) misapprehended Ms. S. H.'s work experience and (ii) thereby misapplied *Villani v. Canada*[1] in assessing the severity of her disability.

[6] In submissions dated September 26, 2017,[2] Ms. Kordasiewicz took issue with my decision to restrict the scope of the appeal as it moved from the leave stage to the merits stage. Ms. Kordasiewicz had originally put forward, by my count, eight grounds of appeal on leave, and although I addressed all of them in my leave to appeal decision, I found a reasonable chance of success for only two. Ms. Kordasiewicz argues that, notwithstanding my finding that the other six grounds had no merit, she should still be permitted to argue them in the full appeal hearing. In essence, she argued that the Appeal Division has no authority, under the *Department of Employment and Social Development Act* (DESDA), to extinguish issues at the leave stage.

[7] Now, having considered the parties' submissions and reviewed the underlying record, I have come to the conclusion that the General Division's decision must stand.

ISSUES

[8] The issues before me are as follows:

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

Issue 2: To what extent does the Appeal Division have jurisdiction to restrict grounds of appeal at leave?

Issue 3: Did the General Division base its decision on an erroneous finding of fact by overlooking Ms. S. H.'s six years as a retail worker at a jewelry store from 2003 to 2009?

Issue 4: Did the General Division err in law by failing to properly apply the *Villani* "real world" test in assessing the severity of Ms. S. H.'s disability?

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[1] *Villani v. Canada (Attorney General)*, 2001 FCA 248.
[2] Duplicated in submissions dated December 5, 2017.

ANALYSIS

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

[9] 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 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]

[10] 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.

[11] 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…."

[12] 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

[3] Subsection 58(1) of the *Department of Employment and Social Development Act* (DESDA).
[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.

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: Does the Appeal Division have jurisdiction to restrict grounds of appeal at leave?

[13] In my leave to appeal decision dated August 11, 2017, I determined that two of Ms. S. H.'s eight grounds of appeal had a reasonable chance of success:

> [46] I am granting leave to appeal on the sole basis that, by overlooking the Applicant's six years of work as a retail worker at a jewelry store from 2003 to 2009, the General Division may have based its decision on an erroneous finding of fact. I also see an arguable case that this misapprehension, if that is what it was, may have had [*sic*] affected the General Division's assessment of the Applicant's *Villani* factors and their impact on her employability. In confining the appeal to these two grounds, I am satisfied, as required by *Mette v. Canada*, that they are sufficiently discrete in subject matter to be adjudicated separately from the grounds that I have disposed of at leave.

[14] Ms. Kordasiewicz submits, also relying on *Mette v. Canada*,[7] that the Appeal Division, once it allows leave, cannot restrict the scope of appeal on the merits and must conduct a full hearing on all the submissions that were argued at the leave stage.

[15] In *Mette*, the Federal Court of Appeal commented on whether each individual ground requires consideration on an appeal, as opposed to simply granting or denying an appeal based on whether it has a reasonable chance of success. At paragraphs 13–15, Dawson J.A. stated:

> [13] One final comment is directed to the submission of the Attorney General about the Appeal Division's decision not to grant leave to appeal on the issue of whether the General Division erred in finding that the evidence presented did not meet the test for new evidence. The Attorney General argues that the Appeal Division then erred by considering this

[7] *Mette v. Canada (Attorney General),* 2016 FCA 276.

> ground of appeal when it dealt with the appeal on the merits and that, in any event, this finding rendered the appeal to the Appeal Division moot.
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> [14] The Appeal Division interpreted subsection 58(2) of the Act to permit it to consider all of the grounds raised because the order granting leave was not specifically restricted to the grounds that were found to have a reasonable chance of success. The decision simply stated that "[l]eave to appeal to the Appeal Division of the Social Security Tribunal is granted."
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> [15] In oral argument the Attorney General relied upon subsection 58(2) of the Act to argue that the Appeal Division was required to deny leave on any ground it found to be without merit. However, subsection 58(2) provides that leave to appeal "is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success." The provision does not require that individual grounds of appeal be dismissed. Indeed, individual grounds may be so inter-related that it is impracticable to parse the grounds so that an arguable ground of appeal may suffice to justify granting leave.

[16] Ms. Kordasiewicz submits that, since *Mette*, the Appeal Division has followed the law and changed its former practice of allowing submissions only on the grounds on which leave to appeal was granted. Ms. Kordasiewicz also referred to recent Appeal Division decisions that attempt to apply the *Mette* principles, such as *Maunder v. MESD*,[8] in which Janet Lew wrote:

> [12] From this, it is clear that, provided that the decision granting leave to appeal is not specifically restricted to the grounds that were found to have a reasonable chance of success, it is open to the parties to advance any new grounds of appeal, or even grounds on which leave to appeal had not been specifically granted, at the appeal stage.

[17] Similarly, Ms. Kordasiewicz cites *S.F. v. CEIC*,[9] in which Appeal Division member Pierre Lafontaine wrote:

> [25] The Tribunal finds that leave to appeal was granted on the basis that the dispute between the parties raised questions regarding the interpretation to be given to sections 35 and 36 of the *Regulations.*
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> [26] Furthermore, the order granting leave was not specifically restricted to the grounds that were found to have a reasonable chance of success. The decision simply states that leave to appeal is granted – *Mette v. Canada (A.G.)* 2016 FCA 276 (CanLII).

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[8] *Maunder v. Minister of Employment and Social Development* (AD-15-1290).

[9] *S. F. v. Canada Employment Insurance Commission,* 2017 CanLII 1890.

> [27] Therefore, the Tribunal will consider all grounds of appeal raised by the Appellant. At the hearing, the Respondent declared itself ready to proceed on these new grounds of appeal.

[18] Ms. Kordasiewicz argues that, in the above-noted cases, as well as others, once a single ground was deemed to have a reasonable chance of success, the appeal was allowed on all grounds that the appellant had raised. She notes that *Maunder* went even further and permitted both parties to advance new grounds of appeal that had not been considered at the leave to appeal stage.

[19] For reasons that I explained during the hearing, I must respectfully disagree with Ms. Kordasiewicz on this issue. I cannot see anything in the legislation or the emerging case law that prohibits the Appeal Division from limiting the scope of an appeal as it moves from consideration at the leave stage to consideration at the merits stage. In my view, the leave mechanism brings a measure of efficiency to the Appeal Division, giving it a tool to winnow out trivial grounds, thereby enabling it to hold full hearings only on issues of substance.

[20] Ms. S. H.'s position is that as long as there is at least one arguable ground at leave, all other grounds, however faint their chance of success on appeal, must also be heard on their merits. Put another way, Ms. S. H. seems to be arguing that the Appeal Division cannot dispose of a ground that has no reasonable chance of success on leave unless *all other* claimed grounds are similarly non-meritorious. She argues that the fact that I found some of her grounds arguable on leave means that I must open the appeal to every one of her claimed grounds, however lacking in merit they may be and regardless of whether I fully explored why they lacked merit in my leave decision.

[21] A few observations: In contrast to how the Appeal Division proceeded in *Mette* and the other cases cited by Ms. S. H., I explicitly and purposely restricted the grounds of appeal at leave. *Mette* is an unusual case, as the Federal Court of Appeal noted in paragraph 17 of its reasons, in that my colleague on the Appeal Division granted leave on the question of whether an application to reopen a decision for new evidence was statute-barred, even though she was satisfied that there was no reasonable chance of success on the merits of the application itself. She nevertheless granted unrestricted leave and left the door open to further arguments on the merits of both grounds, notwithstanding her earlier finding that the absence of new facts, as the

Court later put it, “doomed the appeal to failure.” The Attorney General argued that the Appeal Division should not have considered the merits of new facts application when it had already dealt with it at leave. It was in this very specific context that the Court remarked, as highlighted by Ms. S. H., that subsection 58(2) “does not require that individual grounds of appeal be dismissed.”

[22] If subsection 58(2) “does not require” individual grounds to be dismissed at leave, it does not prevent such an action either. A contextual reading of the language used by the Court suggests that, contrary to Ms. S. H.’s assertion, it was actually *condoning* the final disposition of individual grounds at the leave stage. Indeed, the intent of paragraph 17 is to recognize that the DESDA confers discretionary power on the Appeal Division to manage individual grounds as it sees fit: To paraphrase the Court, grounds may be so intertwined that a single arguable ground of appeal *may* suffice to justify granting leave on all of them; the corollary of this is that grounds may be sufficiently discrete in subject matter that they can be disposed of separately, whether at the leave or merits stage. In this appeal, the two grounds for which I allowed leave were interconnected, and I found that one could not be advanced to a discussion on the merits without the other. Furthermore, those two grounds could be differentiated and isolated from the other six, which I ultimately found meritless at leave.

[23] Even though the Federal Court of Appeal determined that subsection 58(2) of the DESDA “does not require that individual grounds of appeal be dismissed,” the Court did not find that the Appeal Division’s surgical approach, when determining whether errors alleged in applications for leave have a reasonable chance of success, was inappropriate or unreasonable. Rather, the Court clarified that, in certain instances, the grounds of appeal may be so interrelated that it would be difficult to examine each ground on its own. The Court noted that in such cases, it would be sufficient to grant leave to appeal on *a* ground, rather than looking separately at the merits of all grounds.

[24] This case can be distinguished from *Mette*, as several of the alleged errors brought forward in Ms. S. H.’s application for leave to appeal are not interrelated. The Appeal Division disposed of those that had no reasonable chance of success and requested further submissions on those that did. In cases where the grounds of appeal are separate and distinct, as they are

here, it is appropriate for the Appeal Division to limit its scope of appeal to the ground that leave was granted on for two reasons.

[25] First, in the interest of judicial economy and natural justice, it is crucial for parties to "present their cases fully; to know the case they have to meet; and to have their cases heard by an impartial decision-maker."[10] This is encapsulated in section 2 of the *Social Security Tribunal Regulations*, which states that they "must be interpreted so as to secure the just, most expeditious and least expensive determination of appeals and applications." To allow an appellant to re-argue a ground of appeal at a hearing would go against the interest of judicial economy and natural justice. In order for leave to appeal to be granted, the ground of appeal raised must be one of the errors enumerated in subsection 58(1) of the DESDA and must have a reasonable chance of success. That is, there must be an arguable ground upon which an appeal *might* succeed. In order for an appeal to succeed before the Appeal Division, an appellant must show that on a balance of probabilities, the General Division's decision contains that error. The standard for the leave to appeal stage is notably lower than the standard once leave has been granted. Therefore, if the ground has failed to meet a lower threshold of success at the leave to appeal stage, to re-examine the ground again at the appeal would be a waste of judicial resources. If the ground does not have a reasonable chance of success, then it certainly will not succeed on a balance of probabilities. Allowing an argument to be re-heard at the hearing will not change the outcome.

[26] Second, the Appeal Division is *functus officio* after determining leave to appeal. In *Canada v. O'keefe*,[11] the Federal Court held that

> [t]he *DESDA* does not give statutory authority to the SST-AD to appeal or to review its own final and binding decisions regarding leave, nor is any other appeal mechanism provided. Upon granting or refusing leave, the SST-AD is *functus officio* with respect to their decision under section 58 of the *DESDA*.

[27] The Appeal Division has held on previous occasions,[12] following the Federal Court's reasoning in *O'keefe,* that decisions on applications for leave to appeal are final decisions, and

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[10] *M. C. v. Minister of Employment and Social Development,* 2016 SSTADIS 308.
[11] *Canada (Attorney General) v. O'keefe,* 2016 FC 503.
[12] *H. M. v. Minister of Employment and Social Development,* 2015 SSTAD 988; *Minister of Employment and Social Development v. S. D.,* 2016 CanLII 59173.

that the principle of *functus officio* applies. To allow an appellant to re-argue grounds of appeal that were determined not to have a reasonable chance of success would be akin to re-opening the leave to appeal decision of the Appeal Division. In addition, an appeal to the Appeal Division is not the proper forum to challenge the Appeal Division's decision on leave to appeal. If an appellant wishes to challenge the Appeal Division's decision on leave to appeal, the only avenue available to the appellant is the one set out in the legislation at section 58 of the DESDA*,* which provides that "[t]he decision of the Tribunal on any application made under this Act is final and, except for judicial review under the *Federal Courts Act,* is not subject to appeal to or review by any court."

[28] In confining this appeal to the specific grounds set out in the penultimate paragraph of the decision granting leave, I am satisfied that I remain within the parameters of section 58 and the Court's direction.

Issue 3: Did the General Division overlook Ms. S. H.'s six years at a jewelry store?

[29] Ms. S. H. submits that the General Division disregarded her testimony that she had worked for six years at Charm Diamond Centres, a job that ended in 2009. I saw a reasonable chance of success for the argument that the General Division may have assumed those six years were instead spent in secretarial positions, thereby exaggerating her experience in white-collar positions and giving rise to a distorted picture of her employability.

[30] Under paragraph 58(1)(*c*) of the DESDA, a factual error by itself is insufficient to overturn a decision; the General Division must have also *based* its decision on that error, which itself must have been "made in a perverse or capricious manner or without regard for the material before it." In other words, the error must be material *and* egregious.

[31] In paragraph 12 of its decision, the General Division wrote:

> She re-entered the work force first in a secretarial position typing minutes and then in 2009 worked for a retail jewelry store. She testified she was fired because her boss was having an affair and this made the Appellant anxious so her boss reacted by terminating her employment.

[32] This passage implies that Ms. S. H. worked at a jewelry store for only a brief period before being fired in 2009.However, the audio recording of the hearing[13] confirms that she testified that she had worked at Charm Diamond Centres from 2003 to 2009. The question is whether the General Division overlooked Ms. S. H.'s six years as a retail worker at Charm Diamond Centres and, if so, whether it assumed those years were instead spent in secretarial positions, thereby exaggerating her experience in white-collar positions and giving rise to a distorted picture of her employability.

[33] Indeed, work experience did play a prominent role in the General Division's analysis, particularly when it came time to assess Ms. S. H.'s impairments in the context of her personal characteristics and background. At paragraph 46 of its decision, the General Division wrote: "She obtained significant work experience including some skills from self-employment. She has worked in a secretarial position, retail, self-employment selling water systems, and helping her husband's business…."

[34] Having considered the parties' submissions, I am prepared to find that the General Division did, in fact, commit a factual error, but I do not think it was significant, nor would I characterize it as "perverse," "capricious," or "without regard for the material." First, the General Division cited several factors underlying its decision, not just her intrinsic employability, but also a comparative lack of "severe" medical findings, inconsistencies between her testimony and the documentary evidence vis à vis her reported functionality, her failure to pursue alternative employment despite retaining some capacity, and indications that she was non-compliant with healthcare recommendations.

[35] Second, and more important, while the General Division may have misapprehended Ms. S. H.'s experience as an office worker, the mistake was one of degree, not of kind. The evidence shows that she does have training as a secretary and that she worked in that field at the beginning of her career. In addition, she did work as a minute-taker in 2003, although, it seems, for only a brief period.

[36] In all, I am not convinced that the General Division *based* its decision on a finding that Ms. S. H. had more experience as an office worker than she did in reality. The General Division

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[13] Heard at the 19:00 mark.

took note of her long and varied work history—and this did no more than accurately reflect the facts. The General Division, as trier of fact, is entitled to a measure of deference, and its finding that Ms. S. H. had qualities that lent her value in the labour market was defensible. On balance, I am not convinced that what I see as a minor factual error warrants overturning the entire decision.

Issue 4: Did the General Division improperly apply the *Villani* "real world" test?

[37] In *Villani*, 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.

[38] Ms. S. H. submits that the General Division failed to adequately consider her *Villani* factors. She acknowledges that the General Division correctly cited *Villani* at paragraph 45 of its decision, and that it noted aspects of her personal background and characteristics, including her age (50 at the time of her MQP), education (a high school diploma and a six-month secretarial course) and language proficiency (as a native English speaker). However, she alleges that the General Division erred in concluding that there was "no indication of cognitive barriers to retraining or upgrading her education to enhance her employable skills." Ms. S. H. submits that the General Division ignored her testimony that she was incapable of retraining or returning to the workforce in a sedentary job because of tremors, anxiety, and low back and left leg pain.

[39] In my leave to appeal decision, I made it clear that I was permitting this ground of appeal to proceed only because it dovetailed with Ms. S. H.'s allegation that the General Division had misconstrued her past employment. In other words, I was prepared to find that the General Division's *Villani* analysis might have been tainted by its exaggerated view of Ms. S. H.'s secretarial experience.

[40] I do not think that the General Division's apparent misperception of Ms. S. H.'s work history had any bearing on its examination of her employability. In paragraph 46 of its decision, the General Division made what I see as a genuine attempt to view Ms. S. H.'s impairments

through the lens of her age, education, language skills, and work experience. While Ms. S. H. may not agree with its conclusion, I see no error of law in how the General Division performed its analysis.

CONCLUSION

[41] Ms. S. H. has not satisfied me that the General Division erred in finding that her disability fell short of the severity threshold. This appeal is therefore dismissed.

Member, Appeal Division

HEARD ON:	January 10, 2018
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	S. H., Appellant Bozena Kordasiewicz, for the Appellant Faisa Ahmed-Hassan, for the Respondent Philipe Sarrazin, for the Respondent (observer) Marie-Andrée Richard, for the Respondent (observer)