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

Citation: *S. N. v. Minister of Employment and Social Development*, 2018 SST 155

Tribunal File Number: AD-16-1356

BETWEEN:

S. N.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Neil Nawaz

DATE OF DECISION: February 15, 2018

DECISION AND REASONS

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] This appeal involves a claim of faulty language interpretation during an oral hearing.

[3] The Appellant, S. N., was born in Sri Lanka, where he completed high school. In 1984, he injured his right forearm and, although he underwent reconstructive surgery, he continued to experience chronic numbness in his hand. He immigrated to Canada in 1987 and worked mostly in factories and warehouses. He was most recently employed as a machine operator, a job that ended in April 2014 when his supervisors concluded that he could no longer work safely. He is now 54 years old.

[4] In July 2014, Mr. S. N. applied for Canada Pension Plan (CPP) disability benefits. The Respondent, the Minister of Employment and Social Development (Minister), refused his application because it did not find his disability "severe" and "prolonged," as defined by the legislation, as of his minimum qualifying period (MQP), which ended on December 31, 2011, or alternatively, during his prorated period from January 1, 2014, to August 31, 2014.

[5] Mr. S. N. appealed the Minister's determination to the General Division of the Social Security Tribunal. On October 11, 2016, the General Division held a hearing by teleconference. On hand was a professional interpreter of Tamil, who the Tribunal had retained at the Appellant's request. On October 31, 2016, the General Division issued a decision dismissing the appeal because it found insufficient evidence that Mr. S. N.'s medical condition prevented him from performing substantially gainful employment during the MQP.

[6] On December 8, 2016, Mr. S. N. requested leave to appeal from the Tribunal's Appeal Division, arguing that the General Division did not give sufficient weight to the fact that both his hands were impaired, which prevented him from working or conducting his daily activities. Following a request for further information, Mr. S. N.'s newly retained legal representative submitted a brief alleging multiple errors on the part of the General Division.

[7] In my decision dated July 31, 2017, I granted leave on the sole ground that the General Division may have disregarded indications that the translation provided at the October 2016 hearing was flawed.

[8] Having reviewed the parties' oral and written submissions against the documentary record, I have concluded that the General Division's decision must stand.

ISSUES

[9] 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 breach a principle of natural justice by ignoring problems with the quality of the Tamil interpretation during the October 2016 teleconference?

ANALYSIS

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

[10] 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.[1] 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.[2]

[11] 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*.[3] Where errors of law or failures to observe principles of natural justice were alleged, the

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[1] Subsection 58(1) of the *Department of Employment and Social Development Act* (DESDA).
[2] Subsection 59(1) of the DESDA.
[3] *Dunsmuir v. New Brunswick*, [2008] 1 SCR 190, 2008 SCC 9.

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.

[12] The Federal Court of Appeal decision *Canada v. Huruglica*[4] 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 […]."

[13] 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 ignore problems with the quality of interpretation?

[14] Mr. S. N. was unrepresented at the time of the hearing before the General Division, and he did not retain legal assistance until after he had filed his application for leave to appeal in December 2016. Although he did not characterize it as such, counsel suggested that the General Division failed observe a principle of natural justice by presiding over a hearing that was marred by inadequate language interpretation. He claimed that, because the hearing before the

[4] *Canada (Citizenship and Immigration) v. Huruglica*, [2016] 4 FCR 157, 2016 FCA 93.

General Division was conducted via teleconference, his client had difficulty participating in the proceedings. He suggested that Mr. S. N. was unable to fully understand the variant of Tamil spoken by the interpreter provided by the Tribunal.

[15] In its decision, the General Division did not mention any concerns about the quality of interpretation. I must presume that it would have become quickly apparent, even to a non-speaker of Tamil, had there been a significant problem with translation at the hearing. Unfortunately, as I noted in my decision allowing leave, the General Division member presiding over the hearing neglected to record the proceedings, and I have only Mr. S. N.'s word that the interpreter made available to him did not speak his dialect of Tamil. Of course, even if an audio recording of the hearing existed, I would be unable to assess the competence or suitability of the interpreter, although any objections that Mr. S. N. made would have been on the record.

[16] The courts have consistently held that the failure to raise an objection to a procedural irregularity at the earliest opportunity amounts to an implied waiver of any perceived breach of fairness or natural justice that may have occurred. In *Nsengiyumva v. Canada*,[5] the Federal Court of Canada addressed a comparable situation in which the language interpretation was alleged to be faulty:

> In instances where the applicant is aware that there is a difficulty with the interpreter, it is reasonable to expect the applicant to object immediately. In *Mohammadian*, at trial, 2000 CanLII 17118 (FC), [2000] 3 F.C. 371, Pelletier J. (as he then was) held at paragraph 28:
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> > It will be a question of fact in each case whether it is reasonable to expect a complaint to be made. If the interpreter is having difficulty speaking the applicant's own language and being understood by him, this is clearly a matter which should be raised at the first opportunity. On the other hand, if the errors are in the language of the hearing, which the applicant does not understand, then prior complaint may not be a reasonable expectation.

[17] Nothing in Mr. S. N.'s submissions convinced me that he attempted to raise concerns about the quality of the interpreter's work with the General Division during the hearing or as

[5] *Nsengiyumva v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 190.

soon as possible afterward. In the absence of an audio recording or, for that matter, any affidavit evidence about the proceedings, I saw fit to hear sworn testimony from Mr. S. N. himself.

[18] Under oath, Mr. S. N. maintained that vital information was lost at the hearing. He testified that he and the interpreter never met and participated in the teleconference from separate locations. He said that sometimes the presiding General Division member did not understand what he meant to say, and sometimes he could not understand what the member was saying.

[19] The hearing lasted about 90 minutes. He understood that there was a problem almost immediately, even though his English is poor. Asked to provide specific examples of mistranslation, Mr. S. N. testified that when he said he went to the temple, the interpreter said something different. On another occasion, he attempted to tell the General Division member that he had experienced chest pain for two or three years. The interpreter translated this to mean that he "recently" had chest pain.

[20] Mr. S. N. is originally from Jafna, which is in the northern part of Sri Lanka. He said that the interpreter was a native speaker of Tamil but that he spoke in a different "draggy" dialect that he could not place. He suspects it is spoken in the east.

[21] At one point, he objected and asked for clarification, but the interpreter essentially told him that he was speaking correctly and to be quiet.

[22] To his knowledge, the General Division member never became aware of the problem with translation. Mr. S. N. was asked whether he attempted to let the member know about his difficulties. He replied that he never had a chance to do so. He insisted that he did attempt to communicate his unease through the interpreter. He did not know why his message was not conveyed to the member. He was asked whether he thought the interpreter had attempted to cover up the problem. He replied that he did not think so and speculated that perhaps the message was incorrectly translated.

[23] Mr. S. N. was asked whether he had subsequently contacted the Tribunal about his difficulties with the interpreter. He replied that he received a letter after the hearing but could not understand it. At that point, he took it to a lawyer. He acknowledged that he had never

attempted to contact to the Tribunal. Asked why not, he replied that he could not understand anything.

[24] Mr. S. N. was asked who had helped him complete the December 2016 application for leave to appeal, which did not mention any difficulties with mistranslation. He replied that he did not know.

[25] In the end, I was unable to place significant weight on Mr. S. N.'s testimony, which, in my estimation, did not rebut the presumptions that (i) the interpreter did his job adequately and (ii) the presiding General Division member would have done something to address an apprehension that the proceedings were being mistranslated. Mr. S. N. submits that he and the interpreter were at odds during the hearing yet claims that the General Division member either did not notice the tension or, if she did, chose to ignore a potential violation of Mr. S. N.'s right to be heard. Mr. S. N. would also have me believe that the interpreter, who swore an oath to faithfully translate English into Tamil and back again, supressed attempts to raise an alarm about the accuracy of his work.

[26] Mr. S. N. was under an obligation to object to the quality of the interpretation at the first reasonable opportunity, but he did not do so until July 2017, more than 10 months after the hearing occurred. Other than vague testimony, he did not offer any evidence to demonstrate that he raised the issue before the General Division or within a reasonable time after the hearing. I am influenced by *Xu v. Canada*,[6] in which the Federal Court stated:

> As important as this right is, the burden on a person raising interpretation issues is significant. Such a claim must overcome the presumption that a translator, who has taken an oath to provide faithful translation, has acted in a manner contrary to the oath. Simply alleging mistranslation will not be sufficient—the burden is to show that on a balance of probabilities mistranslation occurred.

[27] On balance, I am not satisfied that Mr. S. N. raised a concern about the quality at the earliest reasonable opportunity. His failure to do so raises doubt in my mind that there was, in fact, any significant breach of natural justice at the hearing in this regard.

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[6] *Xu v. Canada (Citizenship and Immigration)*, 2007 FC 274.

CONCLUSION

[28] Mr. S. N. has failed to convince me, on balance, that there was a significant problem with the quality of the interpreter's work. More to the point, he has failed to adduce convincing evidence that he raised the issue of inadequate interpretation at the General Division hearing or within a reasonable period afterward. As this constitutes an implied waiver of any perceived breach of procedural fairness, Mr. S. N. is precluded from raising this issue for the first time before the Appeal division.

[29] This appeal is therefore dismissed.

Member, Appeal Division

HEARD ON:	December 20, 2017 January 15, 2018
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	S. N., Appellant Rajan Mahalirajan, representative for the Appellant Jean-François Cham, representative for the Respondent Dale Randall, observer with the Department of Justice Sumanthi Halan, Tamil interpreter