Citation: *V. R. v Minister of Employment and Social Development*, 2019 SST 14

Tribunal File Number: AD-18-358

BETWEEN:

V. R.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Neil Nawaz

DATE OF DECISION: January 10, 2019

Canada

DECISION AND REASONS

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] This application raises questions about the factors that the General Division must consider before it can rescind or amend one of its decisions.

[3] The Appellant, V. R., who is now 48 years old, was born in Sri Lanka and came to Canada in 1999. He took a job in a meat packing plant, where he worked until increasingly debilitating back pain, he says, made it impossible for him to perform his duties. In 2014, shortly after he left his job, the plant closed.

[4] In May 2015, the Appellant applied for a disability pension under the *Canada Pension Plan* (CPP). The Respondent, the Minister of Employment and Social Development (Minister), refused the application because it found that the Appellant's disability was not severe and prolonged, as defined by the CPP, as of his minimum qualifying period (MQP), which ended on December 31, 2016.

[5] The Appellant appealed the Minister's refusal to the General Division of the Social Security Tribunal. In a decision dated June 1, 2016, the General Division allowed the appeal, finding that, on a balance of probabilities, the Appellant was incapable regularly of pursuing a substantially gainful occupation as of the MQP. The General Division found that the Appellant's disability was the result of not just lower back pain, but also ongoing major depression, which had been diagnosed in a report dated December 21, 2015, by Dr. Ravi Kakar, a psychiatrist.

[6] On June 1, 2017, the Minister filed an application under section 66 of the *Department of Employment and Social Development Act* (DESDA) to rescind or amend the General Division's decision. The Minister claimed that a new material fact had come to light—one that could not have been discovered with the exercise of due diligence at the time of the hearing. The Minister

referred to a hearing, on December 12, 2016, before the Discipline Committee of the College of Physicians and Surgeons of Ontario (CPSO), in which Dr. Kakar admitted to

- failing to maintain the standard of practice of his profession in respect of record-keeping;
- displaying incompetence in respect of non-psychiatric care;
- engaging in disgraceful, dishonourable or unprofessional acts, namely
    - (i) practising outside the scope of his expertise
    - (ii) altering a patient's chart after receiving her letter of complaint;
    - (iii) misleading the CPSO regarding his having altered said chart; and
    - (iv) repeating portions of another professional's report to his own third-party medical report and failing to indicate the source of the information.

The Discipline Committee endorsed these admissions and, in written reasons dated February 15, 2017,[1] ordered Dr. Kakar's certificate of registration to be suspended for a six-month period. The Minister submitted that, if the information in the CPSO's disciplinary decision had been available to the General Division, the outcome of its decision would have been different.

[7] In January 2018, the General Division held a hearing on the matter. In a decision dated March 5, 2018, the General Division rescinded its previous decision, agreeing with the Minister that the CPSO's disciplinary decision constituted a new material fact under section 66 of the DESDA. It also reconsidered the evidence on the record and, having decided that Dr. Kakar's report was worthy of lesser weight, found that the Appellant did not have a severe disability as of the MQP.

[8] The Appellant's representative has now requested leave to appeal from the Tribunal's Appeal Division, alleging that the General Division committed various errors in the course of rendering its decision. In particular, the Appellant raises the following points:

---

[1] RA1-83.

- The General Division found that Dr. Kakar's misconduct was not discoverable at the time of its initial hearing on May 31, 2016. In fact, the CPSO's website lists information about every doctor in Ontario, including terms, conditions, and limitations on their license to practice medicine and a summary of any allegations of incompetence or professional misconduct awaiting hearing by the Discipline Committee. This information was readily available to the Minister when the General Division was deciding the Appellant's disability claim.

- The General Division found it unreasonable to require the Minister, in exercising reasonable diligence, to "search the CPSO website on an ongoing basis up to the date of a hearing with respect to every doctor who provides evidence at the hearing, to ensure that there are not any allegations against the doctor." In fact, the Minister was not expected to conduct an "ongoing" search, but to check the CPSO website at least once at some point leading up the first General Division hearing. The Minister provided no evidence that it took any steps to check Dr. Kakar's status.

- Having erroneously found that Dr. Kakar's shortcomings were not reasonably discoverable before May 31, 2016, the General Division then considered the Appellant's disability claim on its merits. In finding that Dr. Kakar's December 21, 2015, report had been entirely discredited, the General Division went too far. Although the CPSO found that Dr. Kakar had, on occasion, exceeded the scope of his practice and exhibited a serious lack of knowledge and judgment outside psychiatry, in this case, he provided an opinion that was within his area of expertise. In any event, it had little or no impact on the General Division's original decision to grant the Appellant Canada Pension Plan disability benefits.

[9] In my decision dated July 19, 2018, I allowed leave to appeal because I saw an arguable case that the General Division had not followed *Carepa v Canada*,[2] in which the Federal Court held that a party seeking to amend or rescind a decision on the basis of new evidence must show

---

[2] *Carepa v Canada (Minister of Social Development)*, 2006 FC 1319.

what steps were taken to find the new evidence. I also saw an arguable case that the General Division based its decision on an erroneous finding that Dr. Kakar's deficiencies were so broad as to render the entirety of his December 2015 opinion worthless.

[10] Having now reviewed the parties' oral and written submissions, I have concluded that the General Division did not commit any legal and factual errors when it admitted the CPSO's disciplinary decision into evidence and relied on it to amend its June 2016 decision.

ISSUES

[11] According to section 58(1) of the DESDA, there are only three grounds of appeal to the Appeal Division: the General Division (i) failed to observe a principle of natural justice; (ii) erred in law; or (iii) 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.

[12] I must decide the following questions:

Issue 1: Did the General Division err when it found that Dr. Kakar's misconduct was not discoverable at the time of its initial hearing on May 31, 2016?

Issue 2: Did the General Division err when it found that it was unreasonable to demand that the Minister exercise reasonable diligence by searching the CPSO's website on an ongoing basis?

Issue 3: Did the General Division err when it found that Dr. Kakar's December 2015 psychiatric report had been completely discredited by the CPSO's disciplinary action against him?

ANALYSIS

[13] In *Canada v Huruglica*,[3] the Federal Court of Appeal held that administrative tribunals must look first to their home statutes for guidance in determining their role: "The textual,

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

contextual and purposive approach mandated by modern statutory interpretation principles provides us with all the necessary tools to determine the legislative intent."

[14] Applying this approach to the DESDA, one notes that sections 58(1)(a) and (b) do not define what constitutes errors of law or breaches of natural justice, which suggests that the Appeal Division should hold the General Division to a strict standard on matters of legal interpretation. In contrast, the wording of section 58(1)(c) suggests that the General Division is to be afforded a measure of deference on its factual findings. The decision must be **based** on the allegedly erroneous finding, which itself must be made in a "perverse or capricious manner" or "without regard for the material before [the General Division]." 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 commits a material factual error that is not merely unreasonable, but clearly egregious or at odds with the record.

Issue 1: Did the General Division err when it found that Dr. Kakar's misconduct was not discoverable at the time of its initial hearing on May 31, 2016?

[15] Section 66(1)(b) of the DESDA reads as follows:

> (1) The Tribunal may rescind or amend a decision given by it in respect of any particular application if
>
> (b) […] a new material fact is presented that could not have been discovered at the time of the hearing with the exercise of reasonable diligence.

[16] Under this provision, an application to rescind or amend a CPP-related Tribunal decision succeeds if the new evidence being submitted was material to the outcome of the decision and undiscoverable at the time of the hearing. In this case, the Appellant does not dispute the CPSO's finding of incompetence and professional misconduct; instead, he argues that Dr. Kakar's inadequacies were documented and available to the public at the time of the first General Division hearing.

[17] The CPSO's Discipline Committee issued an order against Dr. Kakar on December 12, 2016, and released written reasons for that order on February 15, 2017, so obviously the order

and written reasons themselves could not have been discovered with the exercise of reasonable diligence when the General Division issued its first decision on June 1, 2016. However, the Appellant submits that, while the Discipline Committee's findings were not available at the time of the General Division's first hearing, there were numerous "red flags" posted on the CPSO's website about Dr. Kakar that were accessible to the Minister had it bothered to check. The Appellant argues that the information on the website was reasonably discoverable and contained content comparable to that of the Discipline Committee's written reasons.

[18] At the outset, I must note that the Appellant presented this very argument to the General Division when it considered the Minister's rescind and amend application in January 2018. In the end, the General Division disagreed with the Appellant because:

> The [Appellant] did not provide any evidence as to what information was specifically available on the CPSO website as of the date of the GD hearing or in advance of the hearing. The Tribunal does note that the agreed facts submitted as evidence before the CPSO included a timeline of relevant events regarding Dr. Kakar's ability to practice, including a period of cessation of practice due to an undertaking and the areas of practice that Dr. Kakar could practice in. In particular, the Tribunal notes that Dr. Kakar gave an undertaking on February 25, 2014 to cease practicing medicine and that undertaking was lifted January 22, 2015. The [Minister's] submissions are that this information was not publically available prior to the release of the CPSO decision. No evidence was led to contradict this submission.[4]

Under the DESDA, the Appeal Division lacks the authority to reassess the merits of a case that has already been presented to the General Division. I can only determine whether the General Division has erred according to the three narrowly defined grounds set out in section 58(1).

[19] The Appellant argues that the first sentence of the above passage was in itself erroneous because he did, in fact, direct the General Division's attention to an extract from the CPSO's website showing that information about complaints and practice restrictions against Dr. Kakar would have been accessible before the May 2016 hearing. I disagree. The General Division was careful to write that the Appellant did not provide evidence about what **specific** information was

---

[4] General Division decision dated March 5, 2018, at para 35.

available on the CPSO website at the time of the first hearing. In doing so, the General Division did no more than accurately reflect the unsurprising fact that the Appellant did not submit a screenshot or printout of Dr. Kakar's CPSO webpage as it existed before June 2016. Rather, the General Division referred to a general CPSO policy statement entitled, "What's Public (and What's Not) About Doctors."[5] Among other things, the statement says the CPSO's public register contains a wide variety of information, including:

- the terms, conditions, and limitations on each doctor's certificate of registration;
- a summary of allegations of professional misconduct or incompetence, if any, awaiting hearing by the Discipline Committee that relate to a doctor, including the "Notice of Hearing" that sets out the allegations, as well as the status of the discipline proceeding;
- findings of malpractice or professional negligence made on or after June 4, 2009; and
- if the Discipline Committee makes a finding of professional misconduct or incompetence against a doctor, a brief summary of the facts on which the finding was based, the penalty, and whether the finding is under appeal.

[20] The policy statement also listed information that was not made public, including:

- the fact of an investigation—be it a complaint from the public, an inquiry into a physician's capacity to practise related to their health, or a concern arising from another source; and
- the outcome of investigations that find no concerns with the physician's care or conduct or find concerns of a minor nature that pose little risk to the public.

[21] The Discipline Committee's written reasons contain a summary of an Agreed Statement of Facts and Admissions, which indicates that the CPSO initiated an investigation after receiving

[5] RA1-105.

the first in a series of complaints about Dr. Kakar in October 2012. The Agreed Statement also detailed four previous practice restrictions against Dr. Kakar:

- In June 2009, after the CPSO's Complaints Committee issued a verbal caution about his practice standards, Dr. Kakar entered into an undertaking that required him to complete remedial courses and practise under the guidance of a clinical supervisor;
- In October 2013, Dr. Kakar entered into an undertaking to restrict his practice to psychiatry only;
- From February 25, 2014, to January 22, 2015, Dr. Kakar entered into an undertaking to cease practising medicine because he was suffering from situational depression; and
- In February 2016, Dr. Kakar entered into an undertaking to practise under supervision pending a hearing of the CPSO's Discipline Committee.[6]

Based on this information, I am prepared to accept that the CPSO's website listed at least some practice restrictions on Dr. Kakar before the June 2016 General Division hearing. I also find it likely that a "summary of allegations" awaiting hearing was publicly available around February 2016, when the most recent complaints against Dr. Kakar were referred to the CPSO's Discipline Committee.

[22] However, until the Discipline Committee delivered its December 2016 order, which was later confirmed in its February 2017 written reasons, there had never been a specific finding of professional misconduct or incompetence against Dr. Kakar. It is true that practice restrictions had been previously imposed on Dr. Kakar, but they were either voluntary or the result of negotiated settlements with the CPSO's Complaints Committee—one level removed from its Discipline Committee. I am not sure that those practice restrictions were in fact penalties, but I

[6] CPSO Discipline Committee written reasons, RA1-93.

have no such doubt about a six-month suspension, which was significantly more serious than any of the conditions to which Dr. Kakar had been previously subject.

[23] I agree with the General Division that the findings of the CPSO's Discipline Committee were qualitatively different from the material about Dr. Kakar's practice that was publicly available on the CPSO's website at the time of the first General Division hearing. By December 2016, when the Discipline Committee issued its order against Dr. Kakar, what had previously been allegations against him were established facts, and what had previously been a hypothetical penalty was real.

Issue 2: Did the General Division err when it found that it was unreasonable to demand that the Minister exercise reasonable diligence by searching the CPSO's website on an ongoing basis?

[24] The General Division then found that, whatever information was available on the CPSO website before the first hearing, the Minister could not be faulted for failing to discover it earlier than it actually did. In paragraph 36 of its March 2018 decision, the General Division wrote:

> […] the Tribunal is not prepared to accept that the [Minister], in meeting its responsibility of reasonable diligence, is required to search the CPSO website on an ongoing basis up to the date of a hearing and with respect to every doctor who provides evidence at the hearing, to ensure that there are not any allegations against the doctor or other information that may suggest an issue with the doctor's competency. The Tribunal finds that such a requirement exceeds what could be described as reasonable diligence on the part of the [Minister] when it is the Respondent in an appeal of a reconsideration decision to the GD.

Again, bearing in mind that the General Division is to be permitted some leeway in its fact-finding mandate, I see no error in the above passage. The Appellant insists that information calling Dr. Kakar's competence and professional integrity into question was "readily available" before the May 2016 hearing. I disagree. Even if I assume that such information was on the CPSO website, I do not see how the Minister, in practical terms, could have known about it. A key word in section 66(1)(b) is "reasonable," which modifies "diligence": a party, even one with the Minister's resources, cannot reasonably be expected to monitor or routinely investigate all of

the physicians and other treatment providers whose reports are submitted to it in the course of the thousands of disability applications it receives each year.

[25] The Appellant counters that he is not arguing that the Minister should have been obligated to search the CPSO website on an ongoing basis but only once at some point in the months leading up to the General Division hearing. The Appellant alleges that, although the General Division invoked *Carepa v Canada*,[7] it did not actually follow it and relieved the Minister of its duty to show what steps, if any, it took to find evidence of Dr. Kakar's incompetence before the General Division issued its first decision.

[26] The Minister admits that it did not investigate Dr. Kakar, even once, prior to the first General Division hearing, but I do not think that this omission bars it, under the law, from raising evidence of the psychiatrist's disgrace once that evidence surfaced. *Carepa* involved a claimant who sought to introduce new medical evidence to amend or rescind a decision of the old Review Tribunal denying her Canada Pension Plan disability benefits. The Federal Court found that the Review Tribunal's refusal to do so was reasonable:

> In this regard, it bears noting that the document in question is a 1994 report that had been completed by Ms. Carepa's personal physician, and that it bears Ms. Carepa's own signature. As a consequence, Ms. Carepa had to have been aware of the existence of the document well before she appeared before the Review Tribunal in 1998.
>
> Ms. Carepa has not provided an affidavit in support of her application for judicial review, and there is no evidence as to what, if any, steps she may have taken to locate the document, nor is there any explanation as to why the document could not have been provided by her in the context of the 1998 Review Tribunal proceedings.

I do not read this passage to mean that a party seeking to rescind or amend a decision must outline the steps that it took to find "new facts" in every situation. In the above case, the circumstances created a presumption that Ms. Carepa knew, or should have known, about the medical report that she sought to introduce. The circumstances of this case create no such

[7] *Carepa v Canada (Minister of Social Development)*, 2006 FC 1319, paras 25 and 26.

presumption; there was nothing on the face of the record to cause the Minister to suspect that Dr. Kakar was any less competent than any other psychiatrist. At the hearing before me, the Minister's representative could not say precisely when his client discovered Dr. Kakar's CPSO disciplinary history or what event had led to its discovery. Even so, I am nevertheless satisfied that the information was not reasonably discoverable until the issuance of the Discipline Committee's written reasons in February 2017. Whatever did eventually trigger the discovery, it is reasonable to assume that actual findings of professional misconduct and incompetence against a psychiatrist, would have greater currency than mere allegations. Likewise, one might reasonably expect that the outright suspension of a CPSO member would be more newsworthy than his being subject to temporary practice restrictions.

[27] If I were to accept the Appellant's argument, post-hearing evidence of physician misconduct would be admissible only if the Minister could show that it had investigated that physician before the hearing. Such a condition would be unduly restrictive and oblivious to the reality that information may come to light in any number of ways, not all of them prejudicial to the opposing party.

Issue 3: Did the General Division err when it found that Dr. Kakar's December 2015 psychiatric report had been completely discredited by the CPSO's disciplinary action against him?

[28] Section 66(1)(b) of the DESDA makes it clear that a new fact must be **material** for a tribunal to consider it after the hearing has closed. In this case, the General Division found that the CPSO's findings of professional misconduct and incompetence against Dr. Kakar were material new facts that warranted rescinding or amending its previous decision to find the Appellant disabled under the CPP. In paragraph 33 of its decision, the General Division wrote:

> The CPSO decision provides that Dr. Kakar's misconduct was not isolated to one aspect of his practice. Rather, the CPSO found extensive shortcomings, including: exceeding his scope of practice; lack of honesty and integrity; and significant deficiencies in recordkeeping practices. The CPSO found that Dr. Kakar demonstrated a serious lack of knowledge and judgment outside of his psychiatric practice, which was labelled as "serious misconduct" requiring serious consequences. The GD Tribunal member relied on the evidence of Dr. Kakar as to his diagnosis of the [Appellant] with severe major depression and the fact that the [Appellant]

> was unable to undertake gainful employment as of December 2015. Therefore, the Tribunal finds that the CPSO decision is relevant to the [Appellant's] ability to work as of his MQP of December 31, 2016.

Of course, much depends on the meaning of "material," a word that offered considerable room for the General Division to maneuver as it attempted to establish the facts. A central theme of the General Division's decision is that, if it had known in June 2016 that Dr. Kakar had committed acts that would later cause him to plead guilty to professional misconduct, then it would have arrived at a different result. Here, the General Division found that the CPSO Discipline Committee's decision was sufficiently damning to discredit Dr. Kakar's entire career, including the third-party report that he prepared for the Appellant in December 2015. I see no reason to interfere with this finding. The Discipline Committee made broad findings about Dr. Kakar's medical practice during the period in which he produced the December 2015 report. As the General Division noted, the Discipline Committee found that Dr. Kakar kept poor records, raising a real possibility that his medical opinions may not have been adequately supported. Moreover, the Discipline Committee found that Dr. Kakar demonstrated a lack of honesty by incorporating wholesale sections of other expert reports into his own. In my view, these acts, to which Dr. Kakar, admitted, call into question the integrity of all his work as an expert witness and justifies the General Division's conclusion that the December 2015 report was worthy of lesser weight.

[29] The General Division's reversal is all the more defensible when one considers how much weight it gave to Dr. Kakar's report in the first instance. It is important to recall that the Appellant's May 2015 application for CPP disability benefits was entirely founded on physical complaints; there was no mention of depression or any other mental illness. By the time the General Division considered the matter for the first time in June 2016, the only evidence of psychological impairment on file was Dr. Kakar's report, which played a large part in the General Division's decision to grant the Appellant a pension:

> There is no significant evidence that challenges the opinion of Dr. Kakar with respect to the Appellant's ability to undertake gainful employment.
>
> […]

> Considering the totality of the Appellant's mental and physical health, that is, his lower back pain and ongoing major depression, I find that he suffers from a severe disability prior to his MQP.[8]

In the end, I do not think that the General Division deemed everything in Dr. Kakar's December 2015 report worthless, but I am satisfied that it was acting within its authority to find that the disciplinary actions against Dr. Kakar warranted a reweighing of his evidence.

[30] I do not see an erroneous finding on the issue of materiality much less one that is perverse, capricious, or made without regard for the record. To the contrary, the General Division's findings were defensible and in compliance with the legislation.

CONCLUSION

[31] For the reasons discussed above, the Appellant has not demonstrated to me that, on balance, the General Division committed an error that falls within the grounds listed in section 58(1) of the DESDA.

[32] The appeal is therefore dismissed.

Member, Appeal Division

HEARD ON:	December 12, 2018 December 21, 2018
METHOD OF PROCEEDING:	Videoconference Teleconference
APPEARANCES:	V. R., Appellant Sam Cirillo, Representative for the Appellant Christian Malciw, Representative for the Respondent

[8] General Division decision dated June 1, 2016, at paras 55 and 56.