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

Citation: *Minister of Employment and Social Development v TD*, 2020 SST 1021

Tribunal File Number: AD-20-735

BETWEEN:

Minister of Employment and Social Development

Appellant
(Minister)

and

T. D.

Respondent
(Claimant)

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Neil Nawaz

DATE OF DECISION: December 4, 2020

Canada

DECISION AND REASONS

DECISION

[1] The appeal is allowed. The General Division made an error of law when it found that the Claimant works for a benevolent employer. However, I have substituted my decision for the General Division's and decided to confirm the Minister's finding that the Claimant ceased to be disabled when he returned to work in March 2014.

OVERVIEW

[2] This appeal is about what is required to find an employer "benevolent."

[3] The Claimant is a qualified mechanic who has worked for a X franchise for more than 30 years. In 2008, he began experiencing weakness and fatigue, which progressed to complete paralysis of his arms and legs. He was admitted to hospital, where he was diagnosed with Guillain-Barré Syndrome (GBS). He underwent several months of rehabilitation and made a partial recovery.

[4] In January 2010, the Claimant applied for a disability pension under the *Canada Pension Plan* (CPP), claiming that he was no longer capable of work. The Minister approved the application and determined that the Claimant had a severe and prolonged disability as of December 2008.[1]

[5] A few years later, the Claimant resumed working at X—this time as a part-time supervisor. Following a review, the Minister determined that the Claimant was no longer disabled. It terminated his benefits, and demanded repayment of pension monies that he had received going back to June 2014—an amount totalling more than $38,000.[2]

[6] The Claimant appealed the Minister's decision to the Social Security Tribunal. The Tribunal's General Division held a hearing by teleconference and, in a decision dated May 4, 2020, allowed the appeal. The General Division found that, despite earning more than $40,000

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[1] Minister's approval letter dated March 5, 2010, GD2-11.
[2] Minister's demand letter dated May 16, 2018, GD2-27.

annually from 2014 onward, the Claimant continued to be eligible for the disability pension because he was working for a "benevolent employer."

[7] The Minister is appealing the Tribunal's Appeal Division, alleging that the General Division committed various errors in arriving at its decision.

[8] Last month, I held a hearing to discuss the Minister's allegations. Now, having heard arguments from both parties, I have decided that the General Division's decision cannot stand. These are my reasons.

ISSUES

[9] There are four grounds of appeal to the Appeal Division. A claimant must show that the General Division acted unfairly, refused to exercise or exceeded its jurisdiction, interpreted the law incorrectly, or based its decision on an important factual error.[3]

[10] In this appeal, I had to decide the following questions:

Issue 1: Did the General Division err in law when it found that X was a benevolent employer?

Issue 2: Did the General Division err in law by failing to consider the legislative thresholds for substantially gainful income?

Issue 3: Did the General Division base its decision on an erroneous finding that the Claimant had only one employer after 2013?

ANALYSIS

[11] My review of the record leads me to conclude that the General Division erred in law by misunderstanding what it means to be a benevolent employer and by failing to apply the income thresholds specified in section 68.1 of the *Canada Pension Plan Regulations* (CPP Regulations). Since the General Division's decision falls on these two related issues, I do not think it necessary to address the third.

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

Issue 1: Did the General Division err in law when it found that X was a benevolent employer?

[12] My review of its decision leads me to conclude that the General Division failed to properly apply the criteria for a benevolent employer.

[13] The relevant facts are not at issue. Both parties agree that X rehired the Claimant and accommodated his impairments to at least some degree. In its decision, the General Division noted that the Claimant had worked as a mechanic for X for more than 30 years. The Claimant testified that, when he attempted a return to work in March 2014, the store owner, a long-time associate, recognized that he would be unable to do his old job but asked him if he could supervise other mechanics. The Claimant said that he was kept on, even when the store changed hands, because the new owner saw that his presence seemed to keep things running smoothly.[4]

[14] From this, the General Division concluded that the Claimant was working for a benevolent employer:

> [T]he work he is doing is not representative of work he could do for any other employer. The Claimant testified that his employer is very accommodating and, as noted above, finds that the mechanics the Claimant supervises work better with the Claimant as the supervisor because the Claimant is well respected at the workplace having worked there for so many years. The employer is willing to let the Claimant take breaks whenever he wants and the Claimant can sit or stand as he wishes while supervising.[5]

There is a body of case law, led by *Atkinson v Canada*,[6] that says evidence of a so-called benevolent employer must be taken into account where a pension recipient remains in the workforce despite their claimed disability. However, *Atkinson* also says that accommodating an employee does not necessarily mean that an employer is benevolent. For an employer to be found benevolent, the accommodation must go beyond what would be expected in the marketplace. Whether an employee is providing market value for his or her services depends on

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[4] Recording of General Division hearing at 9:40.
[5] General Division decision, paragraph 14.
[6] *Atkinson v. Canada (Attorney General)*, 2014 FCA 187.

the employer's performance expectations, especially as compared to other employees in the same position.

[15] The General Division's decision contains no reference to *Atkinson* or any similar case. That by itself would not have invalidated the decision if the General Division had actually followed the appropriate legal principles. However, I see several instances where the General Division went beyond the parameters that establish the benevolent employer concept.

The General Division mistook accommodation for benevolence

[16] It is clear that, when the Claimant returned to X in March 2014, he did not resume his previous job as a mechanic but began a new job as a service manager. He has continued to do this supervisory work, on a part-time basis, for the past six years. In a questionnaire completed at the Minister's request, X did not mention any special accommodations,[7] but the General Division accepted the Claimant's evidence that his employer was willing to (i) let him sit or stand as desired and (ii) take breaks whenever he wanted.

[17] From these two findings, the General Division concluded that X qualified as a benevolent employer. In coming to this conclusion, the General Division took what I regard as a leap of logic—one that flies in the face of legal precedent. In *Atkinson*, the Federal Court of Appeal found that the General Division's refusal to recognize the claimant's employer as "benevolent" was reasonable, since it had examined a number of relevant criteria, including: (i) whether the claimant's work was productive; (ii) whether the employer was satisfied with the claimant's work performance, (iii), whether the work expected of the claimant was significantly less than the work expected of other employees; (iv) whether the claimant had received accommodations that went beyond what was required of an employer in a competitive marketplace; and (v) whether the employer had experienced hardship as a result of those accommodations.

[18] *Atkinson* suggests that, before a decision-maker can deem an employer "benevolent," it must first make a robust inquiry into whether the claimant is providing that employer with value for its money. I see little indication the General Division made such an inquiry in this case. The

[7] Employer's questionnaire dated June 14, 2017 and completed by Judy Walsh, office manager for Robert G. Aylward Sales Ltd. (the Canadian Tire franchisee), GD2-89.

General Division found that the Claimant's work for X was less than substantially gainful, but it based this finding on a pair of commonplace accommodations (the right to take breaks and to sit or stand as required) that one might see featured in any number of supervisory or managerial roles. Furthermore, the General Division did not conduct a meaningful inquiries into whether the Claimant received a reasonable reward for the work that he did, whether he faced productivity expectations that were significantly lower for him as compared to his peers, or whether he was provided accommodations over and above what might be expected in a commercial workplace.

[19] The Claimant argued that his earnings were possible only with the backing of a benevolent employer. The General Division erred in law by failing to recognize that, to succeed, such an argument requires a high evidentiary threshold.

The General Division ignored or misinterpreted the meaning of "regularly"

[20] In my view, the General Division erred in how it interpreted the word "regularly" as it appears in the CPP's definition of disability. In order to prove a severe disability, a claimant needs to show that they are "incapable regularly of pursuing any substantially gainful occupation."[8] In a case called *Villani*, the Federal Court of Appeal explained that a claimant does not have to be incapable at all times of pursuing any conceivable occupation. Rather, a claimant needs to be "incapable of pursuing with **consistent frequency** any truly remunerative occupation" [my emphasis].[9]

[21] In *Atkinson*, the Federal Court of Appeal has endorsed the idea that "predictability is the essence of regularity."[10] It is not the employment that must be "regular," said the Court, but rather the incapacity to work. In this case, the General Division noted that, since returning to X in March 2014, the Claimant had consistently worked three to four hours per day, five days a week.[11] The General Division did not mention, although there was evidence to this effect on file, that the Claimant had also maintained a 9:00 a.m. to 2:00 p.m. schedule (including a one-hour break for lunch) and had recorded good attendance with no absences for medical reasons.

[8] Section 42(2)(a) of the CPP.
[9] *Villani v. Canada* (*Attorney General)*, [2002] 1 FCR 130, 2001 FCA 248 at paragraph 38.
[10] Originally set out by *Chandler v.* Canada (*Minister of Human Resources Development)* (November 25, 1996), CP 4040 (PAB).
[11] General Division decision, paragraph 9.

[22] In short, there was no evidence before the General Division to show that the Claimant's health condition left him incapable of "regular" employment or of otherwise maintaining a consistent work schedule.[12]

Issue 2: Did the General Division err in law by failing to consider the legislative thresholds for substantially gainful income?

[23] The CPP now associates disability with an income threshold. Under section 68.1 of the CPP Regulations, "substantially gainful" salary or wages are equal to or greater than the maximum annual amount that a person can receive as a disability pension. For each of the years in question, that amount was under $16,000—a figure significantly below what the Claimant was making.

[24] As noted, this issue is connected to the previous one. In its decision, the General Division did not mention section 68.1, although it did concede that, "at first blush, it may appear that the Claimant's consistent employment since March 2014 is evidence of his ability to regularly engage in substantially gainful employment."[13] Although it did not say so directly, the General Division apparently decided that it did not need to apply section 68.1 if it first found that the Claimant was working for a benevolent employer.

[25] As we have seen, the General Division erred in its interpretation of what it means to have a benevolent employer. As a result, the General Division also erred in failing to compare the section 68.1 thresholds with the Claimant's reported earnings.

REMEDY

[12] Employer's June 2017 questionnaire, *supra* Note 6.
[13] General Division decision, paragraph 12.

There are three possible ways to fix the General Division's error

[26] The Appeal Division has the authority to address whatever errors the General Division may have committed.[14] I have the power to:

- confirm, rescind, or vary the General Division's decision;
- refer the case back to the General Division for reconsideration; or
- give the decision that the General Division should have given.

I also have the power to decide any question of fact or law necessary to carry out the above remedies.

[27] The Tribunal is required to conduct proceedings as quickly as the circumstances and the considerations of fairness and natural justice allow. In addition, the Federal Court of Appeal has stated that a decision-maker should consider the delay in bringing an application for a disability pension to conclusion. The Claimant's disability pension was suspended nearly four years ago. If this matter were referred back to the General Division, it would only delay final resolution of what has become a drawn-out proceeding.

[28] In oral submissions before me, the Claimant and the Minister agreed that, if I were to find an error in the General Division's decision, the appropriate remedy would be for me to give the decision that the General Division should have given and make my own assessment of the substance of the Claimant's disability claim. Of course, the parties had different views on the merits of the Claimant's disability claim. The Claimant argued that, whatever the General Division's errors, he is still disabled even though he has a part-time job. For the Minister, the available evidence suggested that the Claimant had regained his capacity to regularly perform substantially gainful employment.

I have enough information to decide whether the Claimant continues to be disabled

[14] DESDA, section 59(1).

[29] I am satisfied that the record before me is complete. The Claimant has filed numerous medical reports with the Tribunal, and I have considerable information about his employment and earnings history. The General Division conducted a lengthy oral hearing, in which it questioned the Claimant about his position at X and the impact of his medical condition on his ability to do his job. I doubt that the Claimant's evidence would be materially different if the matter were reheard.

[30] As a result, I am in a position to assess the evidence that was available to the General Division and to give the decision that it should have given, had it not erred. In my view, if the General Division had properly applied the law defining benevolent employers and considered the section 68.1 income thresholds, then it would have come to a different result. My own assessment of the evidence satisfies me that the Claimant ceased to have a severe and prolonged disability when he returned to work in March 2014.

It is up to the Minister to show that the Claimant is no longer disabled

[31] When the Minister approved his disability application, it accepted that the Claimant had a severe and prolonged disability as of the end of the MQP. Under the CPP, an individual has a severe disability if they are "incapable regularly of pursuing any substantially gainful occupation." A disability is prolonged if it is "likely to be long continued and of indefinite duration or is likely to result in death."[15]

[32] When the Minister terminates benefits that it had previously approved, the burden lies on the Minister to prove, on a balance of probabilities, that that the recipient's disability is no longer severe and prolonged.[16]

[33] I have reviewed the record, and I am satisfied that the Minister met that burden. I have no doubt that the Claimant continues to experience some fatigue as a result of GBS, but the available evidence amply persuades me that he is now regularly capable of pursuing substantially gainful employment.

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[15] CPP, section 42(2)(a)(ii).

[16] *Atkinson*, *supra* Note 5; *Boudreau v.* Canada (*Minister of Human Resources and Development)* (July 26, 2000), CP 11626 (PAB).

The Claimant's medical assessments are outweighed by the fact that he was doing substantially gainful work

[34] The Claimant's medical file contains numerous assessments confirming that he previously experienced severe symptoms of GBS, including paralysis and extreme fatigue. The file also contains more recent medical reports indicating that the Claimant continues to suffer from the residual effects of GBS.

[35] In January 2014, Dr. Hoppe cleared the Claimant to return to work on a conditional and limited basis.[17] The neurologist wrote that the Claimant was doing reasonably well, although he had never recovered fully from his GBS. His main problem was fatigue, which was associated with severe tingling throughout his body and a sensation of numbness and electric shock in his fingers and toes. Although he tired very easily, he was much better and was capable of working on his feet for three to four hours before needing to take a rest. Dr. Hoppe thought that the Claimant could work up to two days per week because, if he exerted himself, he would need to stay immobile for a couple of days.

[36] In July 2017, Dr. Fleming wrote that the Claimant's condition was chronic and that his fatigue had persisted since his GBS diagnosis in 2008.[18] The general practitioner noted that the Claimant had resumed working but on a reduced workweek to accommodate his fatigue.

[37] Both doctors were aware of the Claimant's return to work, and neither of them expressed any concern that ongoing employment would cause significant damage to his health. Moreover, whatever reservations they might have had would be outweighed by the fact that the Claimant has successfully maintained his position at X for more than six years.

X cannot be classified as a benevolent employer

[38] The Claimant has been working as a part-time supervisor at a X auto service shop since March 2014. In its June 2017 questionnaire, X said that the Claimant worked on a regular schedule for a total of 20 hours per week at an hourly wage of $37.50. The Claimant's work performance was described as satisfactory, and his attendance was described as good, with no

[17] Report by Dr. Barbara Hoppe dated January 7, 2014, GD2-87.
[18] Report by Dr. Derek Fleming dated July 13, 2017, GD2-74.

absences recorded for medical reasons. He worked independently and required no special equipment or arrangements, nor help from co-workers.[19]

[39] Although the overall burden of proof lies with the Minister, there must be a presumption, valid until proven otherwise, that an employee is providing something like fair market value to his employer. In this case, the Claimant testified that he was close to the original owner of the X franchise. When the franchise changed hands shortly after his return to work, the new owner kept him on, he said, because of the reputation that he had built up over decades working as a mechanic.[20] Both his old and new bosses allowed him to sit or stand as needed and to take breaks whenever he wanted.

[40] As I indicated earlier, I am not willing to find that X was a benevolent employer on the basis of two accommodations that are frequently seen in other workplaces, particularly for supervisory roles. More to the point, the Claimant has not produced any other evidence to counter the presumption that he was providing market value to his employer. There is nothing on the record to suggest that the Claimant was overcompensated for his work or that his employer's productivity expectations were significantly lower than what they might have been for someone else with similar qualifications in the same position. Above all, there is no indication that the Claimant was doing anything less than "real" work: his employer listed his duties as managing service technicians, booking appointments, and dealing with customer complaints. None of these responsibilities strike me as menial or trivial.

[41] I find it instructive to compare the facts of this case with the facts that underlay the *Atkinson* case. Like the Claimant, Ms. Atkinson appealed the Minister's decision to cut off her disability benefits after she recorded annual income in successive years exceeding $40,000. Like the Claimant, her new job was largely sedentary—she was hired by the Royal Canadian Mounted Police to review police records and to conduct interviews to determine whether offenders were suitable for restorative justice. Like the Claimant, she was given a number of accommodations. For instance, she was permitted to park in the fire lane, 20 steps from the door to her office building; she was provided with a headset when using the telephone; she was allowed to hold all of her meetings within the building where she worked; and she was not required to record or

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[19] Employer's June 2017 questionnaire, *supra* Note 6.
[20] Recording of General Division hearing at 9:20.

account for her hours each week like other employees, although her employment contract required her to work six hours per day for a total of 30 hours per week. Unlike the Claimant, Ms. Atkinson recorded significant absences from work.[21] Unlike the Claimant, she received help from her spouse and co-workers for tasks such as carrying binders and setting up meetings.

[42] Given all of this, the Federal Court of Appeal decided that it was reasonable for the General Division to find that the RCMP did not qualify as a benevolent employer. It did so despite evidence that Ms. Atkinson had benefitted from significant accommodations—accommodations that I would suggest exceed those that have been extended to the Claimant. I find it hard to accept that this X franchise, which is run, not by a family member or even a long-time friend, would be paying the Claimant more than $40,000 per year for part-time work if it were not receiving fair value in return.

The Claimant's recent earnings are well above substantially gainful

[43] The Claimant works only 20 hours per week, but performing a part-time job does not necessarily mean that one is disabled or incapable of regularly performing substantially gainful employment.[22]

[44] As noted earlier, section 68.1 of the SST Regulations associates "substantially gainful" with a specific dollar value, depending on the year. Any amount earned over the maximum annual amount that a person can receive as a disability pension is deemed to be substantially gainful.

[45] Both parties agree that the Claimant has earned the following amounts since resuming employment:

Year	Reported income	Maximum amount
2014	$58,210	$15,175
2015	$46,900	$15,175
2016	$49,000	$15,489
2017	$40,000[23]	$15,763

[21] The evidence showed that Ms. Atkinson worked approximately 70 percent of the hours required of her.
[22] *J. W. v. Canada (Minister of Human Resources and Skills Development)*, 2014 SSTAD 12.
[23] Respondent's Service Canada Earnings Details, GD2-44.

At the General Division, the Claimant also testified that he had also earned something in the neighbourhood of $40,000 in each year since 2017.[24] It is obvious that the Claimant's earnings have significantly exceeded the maximum allowable amount for several years running.

[46] At the General Division, the Claimant insisted that his job took a heavy toll on him, even though it was part-time and, as he saw it, heavily accommodated. He testified that, when he returned from work each day, he was so exhausted that he had to immediately lie down and nap for three to five hours.[25] Unlike the General Division, I am not inclined to place great weight on the effect that the Claimant's job had on him after working hours. The General Division emphasized the Claimant's fatigue after performing even a relatively flexible, part-time supervisory job, but surely the more important fact is that, whatever effect the work has on him, he has nevertheless succeeded in doing it for the past six years. According to the philosophy that governs the CPP, claimants are either regularly capable of a substantially gainful occupation or they are not. The legislation makes no allowances for how difficult a claimant finds a job; it only cares whether the claimant is able to perform the job on a sustained basis and whether that job is substantially gainful.

The Claimant's disability was not prolonged

[47] Under the CPP, disability must be severe and prolonged. I have already found that the Claimant's disability ceased to be severe when he returned to work in March 2014. Although it is not, strictly speaking, necessary for me to do so, I also find that his disability was not prolonged. To be prolonged, a disability must be of indefinite duration; the Claimant's disability came to a definite end when he commenced substantially gainful employment as a X auto shop supervisor.

[48] It is unfortunate that the Claimant must return three years of benefits, and I regret that my decision will cause him financial hardship. However, he received those benefits after he had ceased to be disabled. He knew, or should have known, that he was obliged to immediately report any return to work to the Minister.[26] He did not meet that obligation. Years later, when the Minister learned of the Claimant's employment earnings, it had the right to investigate whether he had regained his ability to work, and it had the right to terminate his benefits once it decided

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[24] See General Division decision, paragraph 12.
[25] Recording of General Division hearing at 9:10 and 31:40.
[26] See section 70.1 of the CPP Regulations.

that his disability was no longer severe and prolonged. I am satisfied that, in doing so, the Minister acted in compliance with the law.

CONCLUSION

[49] I am allowing this appeal. The General Division erred by misconstruing what it means to have a benevolent employer, but my own review of the evidence convinces me that the Claimant no longer has a severe and prolonged disability. I do not think it defies logic to infer capacity from a job in which the Claimant earned significant wages in at least four consecutive years, well above the statutory thresholds set out in section 68.1 of the CPP Regulations.

Member, Appeal Division

HEARD ON:	November 4, 2020
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	Suzette Bernard, representative for the Appellant T. D., Respondent