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

Citation: *GL v Minister of Employment and Social Development,* 2020 SST 1030

Tribunal File Number: AD-20-716

BETWEEN:

G. L.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Kate Sellar

DATE OF DECISION: December 10, 2020

Canada

DECISION AND REASONS

DECISION

[1] I dismiss the appeal. The General Division did not make an error.

OVERVIEW

[2] G. L. (the Claimant) spent more than two decades in the hospitality industry. She worked as a food and beverage coordinator at a hotel. For the next 12 years, she worked as a cook at a daycare facility. Then she worked for seven months at a call centre. She is now 59 years old.

[3] In August 2016, she was working as a cook when she fell from a deck and twisted her ankle. She has not worked since. She has osteoarthritis and deep vein thrombosis.

[4] In May 2017, the Claimant applied for a CPP disability pension. The Minister refused the application initially and on reconsideration. The Minister concluded that the Claimant did not show that her disability was severe within the meaning of the CPP on or before the end of her minimum qualifying period (MQP). The Claimant's MQP ended on December 31, 2018.

[5] The Claimant appealed the Minister's decision to this Tribunal. The General Division dismissed the appeal. The General Division found that the Claimant had some capacity for work but that she did not show that efforts to get and keep employment were not successful because of her health condition.[1] I will refer to this legal requirement as the "employment efforts test", which, according to the General Division, the Claimant failed.

[6] The Claimant received permission (leave) to appeal the General Division's decision. I must decide whether the General Division made an error under the *Department of Employment and Social Development Act* (DESDA). If there is such an error, I must then decide what I will do to fix (remedy) it.

[1] The Federal Court of Appeal described this employment efforts test in a case called *Inclima v Canada (Attorney General)*, 2003 FCA 117.

[7] I find that the General Division did not decide anything outside of its power in this case. It did not make an error in the way that it analyzed Dr. Nagel's medical opinion, and in no way required the Claimant to show more employment efforts than the law requires.

[8] The General Division did not make an error.

ISSUES

[9] The issues are:

1. Did the General Division decide anything that it does not have the power to decide?
2. Did the General Division make an error of law by failing to give reasons for failing to give weight to Dr. Nagel's medical opinion?
3. Did the General Division make an error of law by requiring the Claimant to show more employment efforts than the law requires?

ANALYSIS

Reviewing General Division decisions

[10] The Appeal Division does not give people a chance to re-argue their case in full at a new hearing. Instead, the Appeal Division reviews the General Division's decision to decide whether it committed an error calling for a review. That review is based on the wording of the DESDA, which sets out the grounds of appeal.[2] The three reasons for an appeal arise when the General Division fails to provide a fair process, makes an error of law, or makes an error of fact.

[11] When a decision-maker, in applying a legal test (like the employment efforts test), fails to consider a required element of that test, then the legal test has been altered such that it was not applied and the decision-maker has made an error of law.[3] The Federal Court has stated that "sincere" efforts meet the employment efforts test.[4]

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[2] DESDA, s 58(1).
[3] *Teal Cedar Products Ltd. v. British Columbia*, 2017 SCC 32, para. 44.
[4] *Tracey v. Canada (Attorney General)*, 2015 FC 1300, paras 42 and 43.

The General Division only decided what it had the power to decide

[12] The General Division only decided what it had the power to decide, so there is no error relating to jurisdiction.

[13] The CPP says that a person has a severe disability when they are incapable regularly of pursuing any substantially gainful occupation.[5] The General Division considers each aspect of that definition. However, the Federal Courts have also provided guidance about how to interpret this definition and has set out the required analysis. The Appeal Division has summarized the required approach by stating that when deciding whether the Claimant is incapable regularly of pursuing any substantially gainful occupation, the relevant questions are:

> 1) Did the claimant have a serious health condition that affected his or her work capacity? Did the claimant have residual work capacity? Factors to be considered include the following:
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> i. the nature of the health condition(s) and the totality of the associated physical and/or psychological functional limitations;
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> ii. the recommended treatment(s), and any unreasonable refusal to pursue such treatment(s); and
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> iii. the claimant's personal circumstances, including such things as age, education level, language proficiency and past work and life experience.
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> A total lack of work capacity is conclusive of a severe disability.
>
> 2) If there is evidence of work capacity, what do the claimant's employment efforts tell us about whether he or she was, in the real world context, "incapable" "regularly" of "pursuing" "any" "substantially gainful" occupation? Were the claimant's efforts at obtaining and maintaining employment unsuccessful by reason of the health condition?[6]

[5] *Canada Pension Plan*, s 42(2).
[6] *S. G. v Minister of Employment and Social Development*, 2017 CanLII 141823 (SST).

[14] The Claimant argues that the General Division decided more than it has the power to decide (this is called exceeding jurisdiction). The Claimant argues that the General Division decided more than just whether the Claimant's disability was severe according to the CPP, but also whether she has transferable skills and whether she was employable in any position or a substantially gainful job, which is "the purview of a specialist in human resources management."[7] It seems that the Claimant also argues that the finding that the Claimant had some capacity for work (sedentary work) was also outside the General Division's task, which was to decide whether the Claimant had a severe disability.

[15] The Minister argues that the General Division made no error of jurisdiction. Deciding whether the Claimant had transferable skills is part of the General Division's role because it is part of applying the "real world" context: looking at the Claimant's employability in light of her age, experience level of education, language proficiency and past work and life experience.[8] Considering the Claimant's transferable skills was part of that analysis and it would have been an error of law not to consider those factors.

[16] In my view, the General Division stayed within its jurisdiction in this case. It seems that the Claimant's argument that the General Division exceeded its jurisdiction hinges on some confusion about two things. First, there seems to be some confusion about the difference between finding that there is a residual capacity to work (the first question listed above), versus finding that the Claimant has a severe disability within the meaning of the CPP. It does not exceed jurisdiction to find that there is a capacity for work, and it is not the same thing as deciding whether the Claimant is incapable regularly of pursuing any substantially gainful occupation.

[17] Second, the Claimant's arguments seem to question the validity of making findings about efforts to find work and about compliance with treatment. The Claimant seems to argue that these kinds of findings are not within the General Division's power to decide because they are not discussed in the CPP. Both of those elements of the analysis are required by the Federal

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[7] AD1-9.
[8] This "real world" approach is required by the Federal Court of Appeal, explained further in a case called *Villani v Canada (Attorney General)*, 2001 FCA 248.

Court of Appeal to be part of the required analysis.[9] The General Division did not exceed any of its powers by including analysis about those issues in the decision.

The General Division analyzed Dr. Nagel's medical opinion

[18] The General Division did analyze Dr. Nagel's medical opinion and provided sufficient reason for giving it little weight. There is no error of law in that regard.

[19] The Claimant argues that the General Division did not give sufficient reasons for rejecting or giving Dr. Nagel's medical opinion so little weight. The Claimant says that the decision that the Claimant has some capacity for sedentary work is perverse because it runs altogether contrary to Dr. Nagel's evidence, as well as the evidence form the Claimant and her witnesses.

[20] Dr. Nagel's opinion stated:

> Ms. G. L. disability is prolonged given the degenerative nature of the right foot injury. The prognosis is poor given the severity and weight bearing activities of normal daily tasks. She certainly is unable to work in any capacity that would require any prolonged standing or walking including any repetitive standing or walking. This condition will prevent the patient to work at her previous employment, or any employment which would require her to stand on, or walk repetitively, or prolonged.[10]

[21] The General Division stated:

> In July 2018, Dr. Nagel stated that the Claimant was "unable to work in any capacity that would require any prolonged standing or walking." However, there is no medical opinion that the Claimant lacks the capacity for sedentary work. This suggests that the Claimant had residual work capacity as of December 2018.[11]

[22] The Minister argues that the General Division made no error in terms of assessing Dr. Nagel's medical opinion. The General Division did not ignore, reject, or give Dr. Nagel's

[9] *Inclima v Canada (Attorney General)*, 2003 FCA 117; *Lalonde v Canada (Minister of Human Resources Development)*, 2002 FCA 211.
[10] GD1-7 to 8.
[11] General Division decision, para 21.

opinion little weight. In fact, the Minister argues, the General Division accepted Dr. Nagel's medical evidence. The General Division relied on Dr. Nagel's report to conclude that while the Claimant's health condition interfered with her ability to work, she could not perform physical labour.

[23] In my view, the General Division did not make an error here. The General Division did not reject Dr. Nagel's report. On the contrary, the General Division relied on that report to consider what the nature of the Claimant's capacity to work was. Dr. Nagel's report did not say that the Claimant was incapable of any work whatsoever.

[24] Instead, Dr. Nagel's report stated that she could not work in any capacity that required any repetitive or prolonged standing or walking. She could not work at her old job. Dr. Nagel's opinion is consistent with a residual capacity for work. That is, that the Claimant had some capacity for work, but described the types of functional limitations she had that could impact the work she could do. The General Division accepted Dr. Nagel's evidence and gave reasons for reaching that decision, which means there is no error of law there.

[25] To the extent that the Claimant argues that the General Division's interpretation of Dr. Nagel's evidence was perverse and therefore an error of fact, I cannot accept that argument either. The General Division's assessment of Dr. Nagel's opinion was straightforward and aligned with the plain words of the opinion. The opinion clearly stated that the Claimant could not do her old job, and then described the functional limitations the Claimant had that would impact her ability to work. The opinion leaves the reader with the impression that there could be work the Claimant could still do that would fall within those functional limitations, despite not being able to continue in her old job.

Applying the correct standard to the employment efforts test

[26] The General Division did not make an error of law by requiring the Claimant to show more employment efforts than the law requires. The Tribunal and the federal courts have acknowledged that when there is evidence of some capacity for work, then Claimants need to show that efforts to get and keep employment were unsuccessful because of their health condition. The Tribunal and the federal courts have interpreted this to mean that the efforts need

to be reasonable. The General Division did not hold the Claimant to a stricter standard and demanded more than reasonable efforts.

[27] The General Division found that the Claimant had some capacity for work. The General Division correctly set out the employment efforts test.[12]

[28] The General Division summarized the Claimant's efforts for work like this:

> The Claimant testified about her efforts to find alternate employment. She stated that she had looked intermittently at an employment website called "Indeed." She stated that in January 2020, it listed 246 sedentary positions across Canada, none in her city. She did not view any other employment web sites, consult an employment agency, or consider retraining. When asked if she tried to find a job through personal contacts, she said she "kept her ears open." I am not satisfied that the Claimant made reasonable efforts to find alternate employment.[13]

[29] The General Division member summarized her conclusion about the Claimant's efforts like this:

> In the present case, the Claimant's job search was limited to an irregular check of one apparently unpromising website. This fell short of reasonable efforts at obtaining and maintaining suitable employment. The Claimant has therefore failed to show that efforts at obtaining and maintaining employment were unsuccessful because of her health condition.[14]

[30] The Claimant argues that her efforts to looks for work were reasonable and that the General Division made an error of law by not really applying the employments efforts test and asking her to show more than just reasonable efforts. The Claimant notes that she testified about how she followed the same procedures she had in the past for finding work, relying both on her network and the online job search site. The Claimant argues that the General Division member's decision that this was not a reasonable approach is not based in law and is simply her "personal opinion and would only be justifiable if she was a specialist in human resources management."[15]

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[12] General Division decision, para 22.
[13] General Division, para 23.
[14] General Division, para 24.
[15] AD2-6.

[31] The Claimant also argues that the obligation to show efforts to get and keep work were unsuccessful because of the disability is actually not a legal requirement, but part of *obiter* from the Federal Court of Appeal. *Obiter* is a latin word that means incidental opinion from the judge, and not essential to the decision. *Obiter* does not create a binding precedent that Tribunal or other courts are required to follow.

[32] The Minister argues that the General Division simply applied the facts about the Claimant's job search to the law, and reached a conclusion that the Claimant did not like. The Appeal Division cannot address errors that are simply about applying facts to the settled law. The law states that where there is evidence of some capacity for work, the claimant must show efforts to get and keep employment were unsuccessful as a result of the medical condition. The Minister argues that the facts the Claimant provided about her efforts fail to meet the test – the efforts were not sufficient.

[33] In my view, the General Division did not make an error of law. The General Division considered whether the Claimant made efforts to be employed, and decided that her efforts were not reasonable. The General Division did not fail to apply a reasonableness standard.

[34] If the General Division applies the law to the facts and the Claimant simply does not like the result, that situation cannot form the basis of an error under the DESDA. In this case, the issue is that the General Division set out the correct test, and I am satisfied (with the benefit of a full review) that this was the test the General Division actually applied. The Claimant disagrees with the General Division's conclusion about what constitutes a reasonable effort in this circumstance, but the General Division did not fail to apply that standard.

[35] The Federal Court has found that failing to pursue any employment or retraining opportunity failed to meet the employments effort test because it was not reasonable.[16] The Claimant showed some efforts for a job search. This is not a case where there were no efforts at all to get and keep work. She testified that she checked websites like Indeed a couple times a

[16] *Williams v. Canada (Attorney General)*, 2010 FC 701 (CanLII); *B. G. v Minister of Employment and Social Development*, 2015 CanLII 107682 (SST); *Minister of Employment and Social Development v V.C.*, 2019 SST 135 (CanLII), para 33.

week, "periodically for a while" and then she would stop and start up the search again a few months later.[17]

[36] A colleague on the Appeal Division has found that Claimants do not have to have actually worked in order to meet the reasonable efforts – that goes further than the employment efforts test requires. Evidence of job search and retraining efforts are relevant.[18] The efforts the Claimant made here did not result in any actual work. The efforts to find work were unsuccessful – there is no debate about that.

[37] So the remaining questions are whether the efforts were reasonable and whether the reason they were unsuccessful was the Claimant's disability. The General Division found that the efforts were not successful. The General Division reasoned that the efforts themselves were not sufficient to meet a reasonable standard regardless of why they were unsuccessful.

[38] The General Division acknowledged that the Claimant is a woman in her late fifties who, although she has some clerical training and experiences, has apparently never held a job that did not have a significant active component to it.

[39] The General Division concluded that the Claimant's efforts to get and keep employment "fell short" and amounted to an irregular check of "one apparently unpromising website."

[40] It seems to me that the General Division's decision reflects an expectation in this circumstance for the Claimant to have looked on more than one platform when the website she used was not turning up results, and that the regularity with which the Claimant checked the site was not sufficient. The analysis that exists in the decision shows that the General Division member considered the frequency of the search (which she found to be irregular) and the breadth of the search (which she described as one unpromising website) to be insufficient.

[41] I am satisfied that the General Division gave reasons to support why, in her estimation, the efforts fell short of reasonable. I cannot find here that considering the frequency and the breadth of the efforts in the way that the General Division did amounts to requiring efforts that

[17] Recording of the General Division hearing, at about 39:40.
[18] *F. D. v Minister of Employment and Social Development*, 2015 SSTAD 364 (CanLII), paras 60 and 61.

are more than “reasonable.” And while the Claimant showed some efforts, the General Division did not make an error of law by finding that they fell short of reasonable given their frequency and breadth.

[42] A final note on the efforts test. The Claimant’s argument that the employment efforts test is actually *obiter* and therefore not binding is an important argument that I have considered carefully. However, it is not an argument that I can accept.

[43] The Claimant’s argument that the employment efforts test is actually just *obiter* is important to consider carefully. When the Federal Court of Appeal reviews a decision from this Tribunal, the Court looks at whether the Tribunal’s decision was reasonable. As a result, not everything the Federal Court of Appeal has to say in any given case ought to be read as direction from the Court to the Tribunal about how the law must be applied in every given case. And certainly, the employment efforts test comes from a decision that was delivered from the bench orally which heightens the possibility that it was not meant to lay a new framework of analysis for the Tribunal.

[44] However, I am confident that the employments efforts test as the Federal Court of Appeal described in in that case (*Inclima*) was absolutely essential to the decision and was not incidental in any way. Had the Federal Court of Appeal reasoned only that employment efforts were relevant in a general way, I do not believe it would have reached the decision it did in that case. Finding that where there is evidence of a residual capacity to work, a Claimant must show that efforts to get and keep employment were unsuccessful because of the disability was the central finding in *Inclima* and was not *obiter*.

CONCLUSION

[45] I dismiss the appeal. The General Division did not make an error.

Kate Sellar
Member, Appeal Division

HEARD ON:	September 30, 2020
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	Garry Hartle, Representative for the Appellant Suzette Bernard, Representative for the Respondent