Federal Court of Appeal | Cour d'appel fédérale

Date: 20231005

Docket: A-269-22

Citation: 2023 FCA 204

CORAM: **MACTAVISH J.A.**
MONAGHAN J.A.
BIRINGER J.A.

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

SABET IBRAHIM

Respondent

Heard by online video conference hosted by the Registry on September 18, 2023.

Judgment delivered at Ottawa, Ontario, on October 5, 2023.

REASONS FOR JUDGMENT BY: BIRINGER J.A.

CONCURRED IN BY: MACTAVISH J.A.
MONAGHAN J.A.

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REASONS FOR JUDGMENT

BIRINGER J.A.

I. Background

[1] This is an application for judicial review of a decision by the Social Security Tribunal [SST] Appeal Division: 2022 SST 1237 [Reasons]. It concerns the respondent's eligibility for a disability pension under the *Canada Pension Plan*, R.S.C. 1985, c. C-8 [CPP].

[2] The respondent, Mr. Sabet Ibrahim, is a 65-year-old man who worked for many years as a pharmacist. In January 2010, he stopped working due to chronic back pain caused by a car accident. He applied for a CPP disability pension. The Minister of Employment and Social Development [Minister] agreed that Mr. Ibrahim had a severe disability and was entitled to benefits. A disability is "severe" if it renders a person "incapable regularly of pursuing any substantially gainful occupation" (subparagraph 42(2)(*a*)(i) of the CPP).

[3] In 2020, the Minister terminated Mr. Ibrahim's disability pension as of July 2016. Mr. Ibrahim's medical condition had not improved. He continued to have functional limitations affecting his ability to work but from July 2016 had been paid to work as a part-time consultant in his son's business. In 2016, 2017, and 2018, Mr. Ibrahim earned amounts that were over the "substantially gainful" threshold in subsection 68.1(1) of the *Canada Pension Plan Regulations*, C.R.C., c. 385 [Regulations].

[4] The Minister determined that, because of these earnings, Mr. Ibrahim's disability was no longer "severe" as of July 2016 and $30,438.88 of disability pension amounts had been overpaid. Mr. Ibrahim requested a reconsideration of the cessation of benefits, which the Minister denied. The SST General Division dismissed Mr. Ibrahim's appeal: 2022 SST 1238.

[5] The Appeal Division of the SST overturned the General Division's decision. The Appeal Division concluded that the General Division had erred in law by failing to adequately consider whether Mr. Ibrahim was benevolently employed and not in a "substantially gainful occupation", notwithstanding his earnings.

[6] The Appeal Division made the decision that it determined the General Division should have made, concluding that Mr. Ibrahim was engaged in benevolent employment and not an "occupation". Accordingly, despite "substantially gainful" earnings, Mr. Ibrahim continued to have a "severe" disability and was entitled to a disability pension.

[7] The applicant seeks to have the Appeal Division's decision set aside and the decision by the General Division restored.

[8] For the following reasons, I would dismiss the application for judicial review.

II. Relevant Statutory Provisions

[9] In order to qualify for a CPP disability pension, an individual must have a disability that is both "severe" and "prolonged" (CPP, paragraph 42(2)(*a*)). The sole issue considered by the Appeal Division was whether Mr. Ibrahim's disability continued to be "severe" as of July 2016.

[10] Paragraph 42(2)(*a*) of the CPP provides:

42(2) For the purposes of this Act,	**42(2)** Pour l'application de la présente loi :
(a) a person shall be considered to be disabled only if he is determined in prescribed manner to have a severe and prolonged mental or physical disability, and for the purposes of this paragraph,	**(a)** une personne n'est considérée comme invalide que si elle est déclarée, de la manière prescrite, atteinte d'une invalidité physique ou mentale grave et prolongée, et pour l'application du présent alinéa :
(i) a disability is severe only if by reason thereof the person in respect of whom the	**(i)** une invalidité n'est grave que si elle rend la personne à laquelle se rapporte la

determination is made is incapable regularly of pursuing any substantially gainful occupation, and	déclaration régulièrement incapable de détenir une occupation véritablement rémunératrice,
(ii) a disability is prolonged only if it is determined in prescribed manner that the disability is likely to be long continued and of indefinite duration or is likely to result in death;	**(ii)** une invalidité n'est prolongée que si elle est déclarée, de la manière prescrite, devoir vraisemblablement durer pendant une période longue, continue et indéfinie ou devoir entraîner vraisemblablement le décès;

[11] Subsection 68.1(1) of the Regulations provides:

68.1 (1) For the purpose of subparagraph 42(2)(a)(i) of the Act, substantially gainful, in respect of an occupation, describes an occupation that provides a salary or wages equal to or greater than the maximum annual amount a person could receive as a disability pension. The amount is determined by the formula	**68.1 (1)** Pour l'application du sous-alinéa 42(2)a)(i) de la Loi, véritablement rémunératrice se dit d'une occupation qui procure un traitement ou un salaire égal ou supérieur à la somme annuelle maximale qu'une personne pourrait recevoir à titre de pension d'invalidité, calculée selon la formule suivante :
(A × B) + C	**(A × B) + C**
Where	où :
A is .25 × the Maximum Pensionable Earnings Average;	**A** représente 25 % du maximum moyen des gains ouvrant droit à pension;
B is .75; and	**B** 75 %;
C is the flat rate benefit, calculated as provided in subsection 56(2) of the Act, × 12.	**C** le montant de la prestation à taux uniforme, calculé conformément au paragraphe 56(2) de la Loi, multiplié par 12.

[12] There is no disagreement that Mr. Ibrahim's earnings met the "substantially gainful" monetary threshold during the relevant period. He earned $23,100 in 2016, $28,600 in 2017, and

$28,600 in 2018. The central issue considered by the Appeal Division is whether, notwithstanding these earnings, Mr. Ibrahim's disability continued to render him "incapable regularly of pursuing any substantially gainful occupation".

III. Standard of Review

[13] The standard of review for the Appeal Division's decision is reasonableness (*Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at para. 115 [*Vavilov*]; *Walls v. Canada (Attorney General)*, 2022 FCA 47 at para. 7). The determination for this Court is not whether Mr. Ibrahim was entitled to a disability pension, but whether the Appeal Division's decision setting aside the General Division's decision was reasonable.

[14] The central issue considered by the Appeal Division was the interpretation and application of subparagraph 42(2)(*a*)(i) of the CPP and subsection 68.1(1) of the Regulations. Matters of statutory interpretation are not treated differently from other questions of law (*Vavilov* at para. 115; *Balkanyi v. Canada (Attorney General)*, 2021 FCA 164 at paras. 12-13 [*Balkanyi*]).

[15] Administrative decision-makers are not required to engage in a formalistic statutory interpretation exercise or engage the same array of legal techniques that might be expected of a lawyer or judge. Nonetheless, the interpretation of the statutory provision must be consistent with the text, context and purpose of the provision (*Vavilov* at paras. 119-120; *Mason v. Canada (Citizenship and Immigration)*, 2023 SCC 21 at para. 69 [*Mason*]).

[16] Factual findings made by the decision-maker are owed deference and will not be interfered with, absent exceptional circumstances (*Vavilov* at paras. 125-126; *Mason* at para. 73).

IV. Applicant's Position

[17] At its core, the applicant's position is that the Appeal Division's decision was unreasonable because it did not accept that "substantially gainful" earnings determined under subsection 68.1(1) of the Regulations were dispositive of whether Mr. Ibrahim was "incapable regularly of pursuing any substantially gainful occupation." The applicant also submits that aspects of the Appeal Division's reasons are unreasonable.

V. Analysis

A. *Reasonableness Review*

[18] To determine whether the Appeal Division's decision was reasonable, the Court must ask "whether the decision bears the hallmarks of reasonableness—justification, transparency and intelligibility—and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov* at para. 99).

[19] A reasonableness review is concerned with the decision as a whole (*Vavilov* at paras. 15, 85, 99, and 116). Reviewing courts should not engage in a "line-by-line treasure hunt for error" (*Vavilov* at para. 102, citing *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper Ltd.*, 2013 SCC 34 and *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62).

[20] It is not sufficient for an applicant to simply point to errors; those errors must be "sufficiently central and significant to render the decision unreasonable" (*Vavilov* at para. 100; *BCE Inc. v. Quebecor Media Inc.*, 2022 FCA 152 at para. 43).

B. *The Concept of "Benevolent Employment"*

[21] Before reviewing the Appeal Division decision, I address the concept of "benevolent employment". The term does not appear in the CPP or the Regulations but features prominently in the Appeal Division's decision and the submissions made in this Court.

[22] The term was in the Canada Pension Plan Adjudication Framework [Framework], a document issued by the Department of Employment and Social Development to provide CPP decision-makers with the factors and legal principles required to adjudicate disability pension applications. The Framework was on the Government of Canada website at the time of the SST hearings. The hearings proceeded on the basis that the concept of "benevolent employment" could apply to Mr. Ibrahim, although the parties disagreed on whether it did.

[23] The Framework stated that in determining capacity for work, there may be rare circumstances where an individual receives earnings from employment, but because they are working for a "benevolent employer", their performance and productivity may be limited or non-existent. The document explained that even though such an individual may work regular hours and earn income in excess of "substantially gainful" amounts, the individual could still be considered to have a "severe" disability because they are "incapable" of working in a competitive workforce.

[24] The Framework defined "benevolent employer":

> A "benevolent employer" is someone who will vary the conditions of the job and modify their expectations of the employee, in keeping with her or his limitations. The demands of the job may vary, the main difference being that the performance, output or product expected from the [employee], are considerably less than the usual performance output or product expected from other employees. This reduced ability to perform at a competitive level is accepted by the "benevolent" employer and the [employee] is incapable regularly of pursuing any work in a competitive workforce.
>
> Work for a benevolent employer is not considered to be an "occupation" for the purposes of eligibility or continuing eligibility for a CPP disability benefit.

C. *The Appeal Division's Statutory Interpretation was Reasonable*

[25] The General Division concluded that Mr. Ibrahim had functional limitations that prevented him from working as a pharmacist. The General Division found that Mr. Ibrahim's part-time sedentary work in his son's business was "substantially gainful" and not benevolent, and that, accordingly, Mr. Ibrahim's disability was no longer "severe". Mr. Ibrahim was not entitled to a disability pension as of July 2016.

[26] The Appeal Division determined that the General Division had erred in law within the scope of subsection 58(1) of the *Department of Economic and Social Development Act*, S.C. 2005, c. 34 [DESDA] in failing to fully consider whether Mr. Ibrahim's employment in his son's business was benevolent and, accordingly, whether he had a "substantially gainful occupation".

[27] In accordance with subsection 58(1) of the DESDA, the Appeal Division may only intervene in a decision of the General Division if it finds the latter to have: (1) failed to observe a

principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction; (2) erred in law in making its decision; or (3) based its decision on an erroneous finding of fact made in a perverse or capricious manner or without regard for the material before it.

[28] The Appeal Division, relying on the authority provided by subsection 59(1) of the DESDA, gave the decision that it concluded the General Division should have given. The Appeal Division concluded that notwithstanding the earnings from working in his son's business, Mr. Ibrahim remained "incapable regularly of pursuing any substantially gainful occupation".

[29] In reaching its conclusion, the Appeal Division applied general principles of statutory interpretation and was "alive to [the] essential elements" (*Vavilov* at para. 120; *Mason* at para. 69) of the text, context and purpose of subparagraph 42(2)(*a*)(i) of the CPP and subsection 68.1(1) of the Regulations (Reasons at paras. 69-71).

[30] Subsection 68.1(1) of the Regulations provides that "substantially gainful, *in respect of* an occupation, describes an occupation that provides a salary or wages equal to or greater than" a prescribed amount [emphasis added]. The Appeal Division reviewed the text and purpose of that provision, and considered the extrinsic aids submitted by the Minister.

[31] The Appeal Division accepted that subsection 68.1(1) provides a benchmark dollar amount and that its purpose was to ensure consistency on what counts as "substantially gainful" amounts (Reasons at paras. 80-85).

[32] However, the Appeal Division did not accept that this earnings threshold was determinative of whether an individual remains "incapable regularly of pursuing any substantially gainful occupation" or, in the words of the Appeal Division, "trump[s] other aspects of the test for a severe disability" (Reasons at para. 86).

[33] The applicant submits that the Appeal Division's conclusion was based on the flawed premise that regulations do not change existing laws (Reasons at para. 92). Regulations can change existing laws, consistent with the specific provisions of the enabling statute and its overriding purpose. I do not accept the applicant's submission about the impact of the Appeal Division's misstatement; it did not affect its reasoning or conclusions.

[34] Understood in context, the Appeal Division's observation was that subsection 68.1(1) of the Regulations defined (and, presumably, changed the law on) what was meant by "substantially gainful" but did not define or interpret "occupation" or the other words and phrases in subparagraph 42(2)(*a*)(i) of the CPP (Reasons at paras. 77 and 92-94).

[35] Analyzing the text of both provisions, the Appeal Division rejected the notion that subsection 68.1(1) of the Regulations obviates the need to consider all of the words in subparagraph 42(2)(*a*)(i) of the CPP. This was a reasonable conclusion. It finds support in the text of subsection 68.1(1) of the Regulations that prescribes "substantially gainful" amounts "in respect of an occupation".

[36] The Appeal Division also relied on this Court's decision in *Villani v. Canada (Attorney General)*, 2001 FCA 248 [*Villani*], which held that each word in subparagraph 42(2)(*a*)(i) must be given meaning (*Villani* at para. 38).

[37] The Appeal Division considered the term "occupation" in subparagraph 42(2)(*a*)(i) of the CPP. The Appeal Division observed that the term is undefined in the CPP and the Regulations and that there was no court decision to follow (Reasons at paras. 66 and 91).

[38] The Appeal Division concluded that a substantially gainful "occupation" does not include benevolent employment. The Appeal Division relied on the definition of "benevolent employment" in the Framework and the statement that "[w]ork for a benevolent employer is not considered to be an 'occupation' for purposes of eligibility or continuing eligibility for a CPP disability benefit" (Reasons at para. 19).

[39] The Appeal Division elaborated. A person can be incapable regularly of pursuing any substantially gainful occupation and still have a friend or family member who creates a "job" for them or pays them more than the market requires for their work (Reasons at para. 95). The earnings are "not really from an occupation" (Reasons at para. 94). Just like an inheritance and investment income (which also improve an individual's financial situation), benevolent employment "doesn't tell us anything about a claimant's capacity for pursuing any substantially gainful occupation" (Reasons at para. 95).

[40] The applicant says that it was unreasonable for the Appeal Division to depart from the "plain meaning" of an "occupation", which they submit means work that is done for money. I disagree.

[41] While the term "occupation" may be open to various interpretations, I find that it was reasonable for the Appeal Division to conclude that an "occupation", in the context of subparagraph 42(2)(*a*)(i) of the CPP, does not include benevolent employment (i.e., employment arrangements that do not truly measure capacity to work).

[42] With no definition of the term in the CPP and the Regulations, the Appeal Division embarked on a contextual and purposive analysis of the provision and provided reasons for its interpretation of the term. It determined, taking into account that the purpose of subparagraph 42(2)(*a*)(i) is to measure capacity to earn, that a "substantially gainful occupation" must be a "real" occupation, which benevolent employment is not (Reasons at para. 95 and 108).

[43] The Appeal Division observed that an ambiguous term in the CPP must be interpreted consistent with the "benefits-conferring" nature of the legislation (Reasons at para. 71). It relied on *Villani*, where this Court concluded that subparagraph 42(2)(*a*)(i) should be interpreted in a "large and liberal manner" and that any ambiguity in the words should be resolved in favour of a claimant for disability benefits (*Villani* at para. 29).

[44] The Appeal Division also relied on the Framework for its approach. The Appeal Division cited this Court's decision in *Atkinson v. Canada (Attorney General)*, 2014 FCA 187 [*Atkinson*], where the Framework and concept of "benevolent employment" were addressed.

[45] The applicant submits that the Appeal Division treated the Framework concept of "benevolent employment", as discussed in *Atkinson*, as binding law. The applicant argues that this caused the Appeal Division to treat the Framework concepts as unaffected by the enactment of subsection 68.1(1) of the Regulations, which came into force after the relevant periods in *Atkinson*. I disagree.

[46] To the extent that the Appeal Division suggested in certain passages that this Court in *Atkinson* interpreted the concept of "benevolent employment", it erred. In *Atkinson*, this Court upheld an SST Appeal Division decision as reasonable, including its reliance on the Framework concept of "benevolent employment": "Whether an individual's employer is benevolent is but one factor that the SST can consider in determining whether or not an individual is 'incapable regularly of pursuing any substantially gainful occupation'" (*Atkinson* at para. 39).

[47] This Court did not treat the Framework concept as binding law in *Atkinson*, and the Appeal Division acknowledged this at several points in its decision (Reasons at paras. 16-17, 20, 31, and 102). The Appeal Division acknowledged that a failure to follow the Framework is not necessarily an error of law (Reasons at para. 102). The Appeal Division also recognized that in *Atkinson* this Court reviewed the Appeal Division decision for reasonableness, and did not interpret and apply subparagraph 42(2)(*a*)(i) of the CPP *de novo* (Reasons at para. 20).

[48] The Appeal Division's conclusion that the enactment of subsection 68.1(1) of the Regulations did not displace the need to consider whether an individual is benevolently employed was based on its interpretation of the text and purpose of the relevant provisions, not because it treated the Framework as binding law.

[49] For these reasons, I am not persuaded that the Appeal Division's decision relied on a flawed interpretation or application of *Atkinson*. I also conclude, as this Court did in *Atkinson*, that it was reasonable for the Appeal Division to consider the Framework concept of "benevolent employment" in determining whether Mr. Ibrahim was "incapable regularly of pursuing any substantially gainful occupation." As the Supreme Court noted in *Mason*, it is appropriate for a reviewing court to take into account "publicly available policies and guidelines that informed the decision-maker's work" (*Mason* at para. 61, citing *Vavilov* at para. 94).

[50] For the foregoing reasons, I conclude that the Appeal Division's interpretation of subparagraph 42(2)(*a*)(i) of the CPP and subsection 68.1(1) of the Regulations was reasonable.

[51] In this Court, the applicant attempted to make two arguments not raised at the Appeal Division hearing. The applicant argued that the Framework had been superseded by updated guidance at the time of the SST hearings, despite being on the Government of Canada website.

[52] The applicant also argued that the Appeal Division's interpretation was unreasonable because it ignored context, being the parallel legislation in Quebec, *Act respecting the Quebec Pension Plan*, C.Q.L.R. c. R-9 [QPP]. The applicant submits that under the QPP, a pensioner

who earns more than the prescribed “substantially gainful” amount is deemed to be no longer disabled (*Regulations respecting benefits*, C.Q.L.R. c. R-9, r. 5, section 19.1). There is no exception for income earned from benevolent employment.

[53] The applicant did not make these arguments at the Appeal Division hearing and, accordingly, this Court will not entertain them. They go to the interpretation and application of the relevant statutory provisions and should not be made for the first time to a reviewing court (*Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61 at para. 23; *Brown v. Canada (Attorney General)*, 2022 FCA 104 at para. 16).

D. *The Appeal Division’s Finding of Benevolent Employment was Reasonable*

[54] The Appeal Division concluded that the General Division had erred in law by failing to adequately consider whether Mr. Ibrahim was benevolently employed. This included a failure to consider particular aspects of Mr. Ibrahim’s work: performance, productivity, whether the job expectations were considerably less than expected in the competitive workforce, and whether his son experienced financial hardship for accommodating him. These factors are in the Framework, and this Court in *Atkinson* upheld as reasonable the Appeal Division’s consideration of them in that case (*Atkinson* at paras. 40-41).

[55] Having determined that the General Division had erred, the Appeal Division made various findings of fact, described below, as permitted under subsection 64(1) of the DESDA. These findings of fact are not disputed by the applicant.

[56] When Mr. Ibrahim's son became an authorized dealer for a cellphone company in 2011, Mr. Ibrahim provided advice without pay. In 2016, when Mr. Ibrahim's income became insufficient to pay his bills, he was "hired" to work in his son's business. He was paid a salary. His son employed him out of a sense of obligation, rather than due to a need for his services. The job was created for Mr. Ibrahim. His son stopped drawing a salary in 2017 to ensure there was sufficient operational cash to pay his father.

[57] Mr. Ibrahim worked "from the couch", providing advice to his son on bookkeeping, human resources (resume review), and inventory management. He did some light paperwork, organizing mail and receipts. The precise number of hours worked is unclear. The Appeal Division determined that Mr. Ibrahim had testified that he could work 2-3 hours per day, but found that the hours varied based on his pain. The salary paid did not depend on the hours worked, but rather on the amount necessary to pay Mr. Ibrahim's bills.

[58] Based on these findings, the Appeal Division concluded that Mr. Ibrahim's employment was benevolent, and not an "occupation". His working arrangement was not "anything like a job in the competitive workforce" (Reasons at para. 60). Mr. Ibrahim was salaried and worked when he was able. The job was tailored to his disabilities and there were no performance reviews. Accordingly, despite "substantially gainful" earnings, Mr. Ibrahim was not engaged in a "substantially gainful occupation".

[59] The Appeal Division's determination that the employment was benevolent is not disputed by the applicant. The applicant's position is that the "substantially gainful" threshold in

subsection 68.1(1) of the Regulations precludes the need to consider this. As explained above, I disagree.

[60] Based on the undisputed findings of fact, it was reasonable for the Appeal Division to conclude that Mr. Ibrahim's employment was benevolent and was therefore not an "occupation".

VI. Conclusion

[61] The Appeal Division's decision was reasonable. It was open to the Appeal Division to conclude that Mr. Ibrahim continued to have a "severe" disability despite earning amounts exceeding the "substantially gainful" threshold. The conclusion was justified in relation to the relevant factual and legal constraints, and the reasons reflect a rational chain of analysis.

[62] For these reasons, I would dismiss the application for judicial review. The Minister did not seek costs, so none shall be awarded.

"Monica Biringer"
J.A.

"I agree
Anne L. Mactavish J.A."

"I agree
K. A. Siobhan Monaghan J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

APPLICATION FOR JUDICIAL REVIEW FROM A DECISION OF THE SOCIAL SECURITY TRIBUNAL'S APPEAL DIVISION DATED NOVEMBER 14, 2022, NO. AD-22-228

DOCKET:	A-269-22
STYLE OF CAUSE:	ATTORNEY GENERAL OF CANADA v. SABET IBRAHIM
PLACE OF HEARING:	HEARD BY ONLINE VIDEO CONFERENCE HOSTED BY THE REGISTRY
DATE OF HEARING:	SEPTEMBER 18, 2023
REASONS FOR JUDGMENT BY:	BIRINGER J.A.
CONCURRED IN BY:	MACTAVISH J.A. MONAGHAN J.A.
DATED:	OCTOBER 5, 2023

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