

Citation: *A. A. v. Minister of Employment and Social Development*, 2015 SSTAD 1178

Appeal No. AD-15-401

BETWEEN:

**A. A.**

Appellant

and

**Minister of Employment and Social Development  
(formerly Minister of Human Resources and Skills Development)**

Respondent

and

**C. H.**

Added Party

---

**SOCIAL SECURITY TRIBUNAL DECISION  
Appeal Division**

---

SOCIAL SECURITY TRIBUNAL MEMBER: Janet LEW

DATE OF DECISION: October 1, 2015

## REASONS AND DECISION

### INTRODUCTION

[1] The Appellant appeals a decision dated May 28, 2015 of the General Division, whereby it summarily dismissed her application for a Canada Pension Plan survivor's pension. The General Division summarily dismissed her appeal, given that it was satisfied that it did not have a reasonable chance of success.

[2] The Appellant filed an appeal on June 24, 2015 (the "Notice of Appeal"). No leave is necessary in the case of an appeal brought under subsection 53(3) of the *Department of Employment and Social Development Act* ("DESDA"), as there is an appeal as of right when dealing with a summary dismissal from the General Division. Having determined that no further hearing is required, this appeal before me is proceeding pursuant to subsection 37(a) of the *Social Security Tribunal Regulations*.

### ISSUES

[3] The issues before me are as follows:

1. What is the applicable standard of review when reviewing decisions of the General Division?
2. Did the General Division err in summarily dismissing the Appellant's claim for a survivor's benefit?
3. Did the General Division err in interpreting the *Canada Pension Plan* in determining who was entitled to the survivor's pension?

### FACTUAL OVERVIEW

[4] The Appellant applied for a Canada Pension Plan survivor's pension on April 13, 2010, in respect of her *deceased* spouse (the "Contributor"). The Appellant had been married to the Contributor since August 1979. She was the sole executrix of the estate of the Contributor. In both applications for the survivor's pension, the Appellant noted that the

Contributor had a different home address from her (GT1-24 to GT1-29 and GT1-57 to GT1-62/GT1-88 to GT1-91).

[5] The Appellant also applied for a division of unadjusted pensionable earnings on April 13, 2010 (which she subsequently requested be cancelled). The Appellant swore a declaration that she and the Contributor last resided together on August 25, 2005, and that they had been living separate and apart from August 25, 2005 to March 25, 2010. She also indicated that during the separation, the Contributor resided in a common-law relationship with the Added Party (GT1-95). She provided the sworn declaration in support of her application for a division of unadjusted pensionable earnings.

[6] On June 3, 2010, the Respondent denied the Appellant's application for a Canada Pension Plan survivor's pension, as it considered the pension to be payable to the spouse or common-law partner as defined in the *Canada Pension Plan*. The Respondent advised the Appellant that she had 90 days to seek a reconsideration (GT1-64).

[7] On April 8, 2010, the Added Party applied for a Canada Pension Plan survivor's pension, also in respect of the Contributor. She advised in the application form that she and the Contributor had been residing common-law together since April 1, 2006 and that they were still living together at his death (GT1-47). The Added Party also swore a Statutory Declaration of Common-law Union that they had been residing together continuously for four years from April 1, 2006 to March 25, 2010. She also declared that they did not have any jointly held assets and denied that either she or the Contributor was a named beneficiary on any policies of insurance they might have held (GT1-51).

[8] The Respondent wrote to the Added Party on May 10, 2010, requiring additional documentation from her to substantiate the common-law partnership (GT1-52). The Added Party provided documentation showing that she and the Contributor held a joint account with a credit union. Ultimately, the Respondent determined the Added Party eligible for the Canada Pension Plan survivor's pension and approved her application for the survivor's pension.

[9] The Appellant sought a reconsideration of the decision of the Respondent, denying her application for a survivor's pension. In her letter dated July 23, 2012, the Appellant wrote that the Added Party was the Contributor's girlfriend prior to his death "for no more than 2 years" (GT1-11). On September 17, 2012, the Respondent advised that it could not reconsider her application because she was late in requesting a reconsideration.

[10] The Appellant applied for a Canada Pension Plan survivor's pension a second time on October 1, 2012. The Respondent denied this second application at both the initial and reconsideration levels. In March 2013, the Appellant appealed the Respondent's reconsideration decision of November 2, 2012 to the Office of the Commissioner of Review Tribunals ("OCRT").

[11] Under section 257 of the Jobs, Growth and Long-term Prosperity Act, any appeal filed before April 1, 2013 under subsection 82(1) of the *Canada Pension Plan*, as it read immediately before the coming into force of section 229, is deemed to have been filed with the General Division of the Social Security Tribunal on April 1, 2013. On April 1, 2013, the OCRT transferred the Appellant's appeal of the reconsideration decision to the Social Security Tribunal.

[12] On March 23, 2015, the General Division gave notice in writing to the Appellant, advising that it was considering summarily dismissing the appeal because:

The *Canada Pension Plan (CPP)* sets out the requirements for eligibility for a survivor's pension. The relevant sections of the CPP follow:

Section 2. Definitions - (1) In this Act,

"common-law partner", in relation to a contributor, means a person who is cohabiting with the contributor in a conjugal relationship at the relevant time, having so cohabited with the contributor for a continuous period of at least one year. For greater certainty, in the case of a contributor's death, the "relevant time" means the time of the contributor's death. (S.C. 2000, c. 12, s. 42(2).)

Section 42. *Definitions* - (1) In this Part,

"survivor" in relation to a deceased contributor, means

(a) if there is no person described in paragraph (b), a person who was married to the contributor at the time of the contributor's death, or

(b) a person who was the common-law partner of the contributor at the time of the contributor's death;

(S.C. 2000, C. 12, s. 44(3).)

In your case, although you remained legally married to the contributor, he was in a common law relationship with another for a period of more than one year up until the time of his death. The legislation specifically contemplated your situation and the result is that the common law partner takes precedence over the separated but still legally married spouse.

The evidence you have provided does not contradict the relationship between the contributor and the common law partner. As such, your appeal has no reasonable chance of success.

[13] The General Division invited the Appellant to provide detailed written submissions by no later than April 24, 2015, explaining why her appeal had a reasonable chance of success.

[14] On April 22, 2015, the Appellant filed a letter dated April 16, 2015 with the Social Security Tribunal. She wrote:

. . . You cannot dispute the legal status of the marriage between [the Contributor] and I, reinforced that there was never any legal separation in place, either. I am the one that spent decades with [the Contributor] while he contributed to his CPP. I was his legal wife until his death and still continue to deal with his estate, as per will from April 1985. Since when was our social security system designed to benefit girlfriends?

I have included the following information to support my claim.

The case of [I.A.M.] (... , BC):

- [I.A.M.] had a legal separation from his wife but was not divorced
- Lived with common law ([G.M.W.]) for 13 year (*sic*) Upon [I.A.M.'s] death his wife went to court to contest the pension
- The court went in favour of his wife and granted her the greater percentage
- (75%) of his pension (RCMP)
- Common law ([G.M.W.]) received 25% and upon her death (two years later), her share of the pension went back to the wife
- The court had a specific reasoning for their decision (I am still gathering info and will need more time)

This is precedent setting as the courts went in favour of the wife over the common law.

[15] On May 28, 2015, the General Division rendered its decision. The General Division relied upon the following provisions, in coming to its decision:

- i. Subsection 53(1) of the *Department of Employment and Social Development Act*, which states that the General Division must summarily dismiss an appeal if it is satisfied that it has no reasonable chance of success.
- ii. Section 22 of the *Social Security Tribunal Regulations*, which states that before summarily dismissing an appeal, the General Division must give notice in writing to the appellant and allow the appellant a reasonable amount of time to make submissions.
- iii. Section 2 of the *Canada Pension Plan*, which defines “common-law partner”; and
- iv. Section 42 of the *Canada Pension Plan*, which defines a “survivor” in relation to a deceased contributor.

[16] The General Division found that although the Appellant remained legally married to the Contributor, he was in a common-law relationship with another individual for a period of more than one year up until the time of his death. The General Division also found that the *Canada Pension Plan* specifically contemplated such a situation, with the result being that the interests of the common-law partner take precedence over the separated but still legally married spouse. The General Division found that the provisions under the *Canada Pension Plan* setting out entitlement to the survivor pension were “clear and unequivocal”, and that the spouse in this case would only become entitled to receive the survivor pension if there was no common-law partner, as defined by the *Canada Pension Plan*. The General Division found “no evidence of any kind provided to contradict the relationship between the contributor and the common law partner”. The General Division found that, in fact, the Appellant did not dispute that a common-law relationship existed at the time of the Contributor’s death. Accordingly, the General Division found that the appeal had no reasonable chance of success.

[17] On June 24, 2015, the Appellant filed an appeal from the decision of the General Division.

### **SUBMISSIONS**

[18] In the Notice of Appeal, the Appellant submitted that:

Precedent setting cases have gone through the courts and have ruled in favour of the legally married spouse over the common law partner. Canada Pension was not set up to benefit girlfriends but rather the wife (legal) that spent decades of her life with her husband while contributing to CPP. If I have to take this to court, I will.

[19] Counsel for the Respondent filed written submissions on September 18, 2015.

[20] Counsel for the Respondent submits that the General Division accurately stated the test for a summary dismissal under subsection 53(1) of the DESDA and that the General Division also precisely referred to the law in regards to the survivor benefit when there is a common-law partner. Counsel for the Respondent submits that the General Division found that there was no evidence to contradict the four-year relationship between the contributor and his common-law partner. (The Appellant states that the Added Party and the Contributor were involved in a relationship for only two years, but it is irrelevant for the purposes of the *Canada Pension Plan* whether the common-law relationship endured for two or four years, as the *Canada Pension Plan* requires only one year to establish a common-law relationship.) Counsel for the Respondent submits that the Appellant acknowledged the fact that there was a common-law relationship at the time of the deceased contributor's death. Counsel for the Respondent submits that, given these considerations, the decision of the General Division to summarily dismiss the Appellant's appeal contains no reviewable error which would permit the intervention of the Appeal Division and that as such, the appeal should therefore be dismissed.

### **ISSUE 1: STANDARD OF REVIEW**

[21] The Appellant did not address the issue of the standard of review.

[22] Subsection 58(1) of the DESDA sets out the grounds of appeal as follows:

- (a) The General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;
- (b) The General Division erred in law in making its decision, whether or not the error appears on the face of the record; or
- (c) The General Division 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.

[23] Counsel for the Respondent submits that the standard of review is reasonableness for questions of fact and for questions of mixed fact and law. Counsel for the Respondent submits that for questions of law, the Appeal Division should not show deference to the General Division's decision and should apply a correctness standard.

[24] Counsel for the Respondent submits that the main issue in this appeal, whether the General Division erred in summarily dismissing the appeal on the basis that it has no reasonable chance of success, involves a question of mixed fact and law and that the decision of the General Division should therefore be reviewed on a reasonableness standard.

[25] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, the Supreme Court of Canada determined that there are only two standards of review at common law in Canada: reasonableness and correctness. Questions of law generally are determined on the correctness standard. The correctness standard is generally reserved for jurisdictional or constitutional questions, or questions which are of central importance to the legal system as a whole and outside the expertise of an administrative tribunal. When applying the correctness standard, a reviewing court will not show deference to the decision-maker's reasoning process and instead, will conduct its own analysis. Ultimately, if it disagrees with the decision of the decision-maker, the court must substitute its own view as to the correct outcome. The correctness standard is vital as it promotes and ensures just decisions, consistency and predictability in the law.

[26] Questions of fact and mixed questions of fact and law are decided on the reasonableness standard. Such a review necessarily attracts a deferential standard.



[27] I accept the submissions of counsel for the Respondent that the applicable standard of review will depend upon the nature of the alleged errors involved.

[28] From what I can determine, the Appellant does not dispute any of the factual findings made by the General Division. Rather, she alleges that the General Division erred in law in its interpretation of the *Canada Pension Plan*, as it was “not set up to benefit girlfriends but rather the wife (legal)...”. Although the Appellant did not cite any particular legal authorities, she also alleges that the General Division failed to follow the common law. As such, I find that a correctness standard applies where the General Division is alleged to have erred in law.

**ISSUE 2 – DID THE GENERAL DIVISION ERR IN CHOOSING TO  
SUMMARILY DISMISS THE APPELLANT'S CLAIM TO A SURVIVOR'S  
PENSION?**

[29] The Appellant did not question the appropriateness of the summary dismissal procedure. I will nonetheless address that issue before I assess the decision of the General Division.

[30] Counsel for the Respondent submits that the first task for the General Division was to identify the law with respect to summary dismissals under section 53 of the DESDA. Counsel for the Respondent submits that the General Division did not err in this regard, as it correctly stated that under section 53 of the DESDA, it must summarily dismiss an appeal if it is satisfied that it has no reasonable chance of success. Counsel for the Respondent submits that as long as the General Division correctly identifies the appropriate test, its decision to summarily decision is the correct one.

[31] Subsection 53(1) of the DESDA requires the General Division to summarily dismiss an appeal if it is satisfied that it has no reasonable chance of success. If the General Division either failed to identify the test or misstated the test altogether, this would qualify as an error of law which, under the correctness standard, would require me to conduct my own analysis and substitute my own view as to the correct outcome: *Dunsmuir and Housen v. Nikolaisen*, [2002] S.C.R. 235, 2002 SCC 33 (CanLII) at para. 8.

[32] Here, the General Division correctly stated the test by citing subsection 53(1) of the DESDA at paragraphs 4 and 17 of its decision.

[33] It is insufficient to simply recite the test for a summary dismissal set out in subsection 53(1) of the DESDA, without properly applying it. Having correctly identified the test, the second step required the General Division to apply the law to the facts. If the correct law is applied, the decision to summarily dismiss must be reasonable. This requires an assessment on a reasonableness standard, as it involves a question of mixed fact and law.

[34] In determining the appropriateness of the summary dismissal procedure and deciding whether an appeal has a reasonable chance of success, a decision-maker must determine whether there is a “triable issue” and whether there is any merit to the claim. In *A.P. v. Minister of Employment and Social Development and P.P.*, (August 12, 2015), SSTAD-15-297 (currently unreported), I used the language of “utterly hopeless” and “weak” case, in distinguishing whether an appeal was appropriate for a summary dismissal. As long as there was an adequate factual foundation to support the appeal and the outcome was not “manifestly clear”, then the matter would not be appropriate for a summary dismissal. I determined that a weak case would not be appropriate for a summary disposition, as it necessarily involves assessing the merits of the case and examining the evidence and assigning weight to it.

[35] The General Division understood this distinction and recognized when a summary dismissal is appropriate. The General Division used the language “clear and unequivocal” in describing the requirements under the *Canada Pension Plan*. The General Division wrote, “Only if no common-law partner exists is a survivor pension payable to a separated spouse”. There was a very defined and limited set of circumstances whereby a survivor pension would be payable. The General Division considered whether, on the facts before it, the appeal met the high threshold set out under subsection 53(1) of the DESDA.

[36] The General Division made reference to a “separated spouse”. I recognize the Appellant’s submissions that she and the Contributor did not have a “legal separation in place”, [referred to in the Appellant’s letter of July 23, 2012], but it is immaterial as to whether there were any legal or formal separation agreements or arrangements in place.

Paragraph 42(1)(a) of the *Canada Pension Plan* simply refers to the survivor as “a person who was married”, if there is no common-law partner at the time of the contributor’s death.

[37] The General Division found the Added Party to have fulfilled the definition of a common-law partner under the *Canada Pension Plan*. The General Division wrote that there was “no evidence of any kind to contradict the relationship between the contributor and the common law partner”. The General Division found that the Appellant did not dispute the fact that a common-law relationship had existed for more than one year between the Added Party and the Contributor at the time of his death. The General Division was unable to find an adequate or factual foundation to support the appeal.

[38] As the General Division was satisfied that the appeal was without any merit, it rightly concluded that the appeal had no reasonable chance of success, and properly summarily dismissed it on that basis.

**ISSUE 3: DID THE GENERAL DIVISION ERR IN INTERPRETING THE  
CANADA PENSION PLAN IN DETERMINING WHO WAS ENTITLED TO THE  
SURVIVOR’S PENSION?**

[39] The Appellant submits that the General Division erred in interpreting the *Canada Pension Plan* in determining entitlement to the survivor’s pension. The Appellant submits that as the legally married wife to the Contributor, she, and not the “girlfriend”, was entitled to the survivor’s pension. The Appellant also submits that the General Division failed to follow legal precedent in awarding the survivor’s pension to the Added Party.

[40] Counsel for the Respondent relied upon subsection 42(1) of the *Canada Pension Plan* and upon *Farrell v. Canada (Attorney General)*, 2010 FC 34, a decision of the Federal Court of Canada, in submitting that there can only be one recipient of Canada Pension Plan survivor benefits. Counsel for the Respondent submits that the Federal Court stated that it is not a question of whether the person living with the deceased at the time of death is a good person, or whether she behaved in an appropriate manner. It is also not a question of whether a legally married spouse is more deserving than the common law spouse. The only

relevant question is whether the deceased and the person living with them at the time of death were in a common law relationship for at least one year prior to death.

[41] Counsel for the Respondent submits that the Appellant did not contest the fact that the common-law partner and deceased contributor were in a common-law relationship with another for more than one year, and that the General Division therefore was reasonable in applying the definition of survivor in accordance with subsection 42(1) of the *Canada Pension Plan*.

[42] The *Canada Pension Plan* is very specific as to who is entitled to a survivor's pension. Briefly, paragraph 44(1)(d) of the *Canada Pension Plan* provides that a survivor's pension is to be paid to the survivor of a deceased contributor. The paragraph states:

44. *Benefits payable* – (1) Subject to this Part,

...

- (d) subject to subsection (1.1), a survivor's pension shall be paid to the survivor of a deceased contributor who has made contributions for not less than the minimum qualifying period, if the survivor
  - (i) has reached sixty-five years of age, or
  - (ii) in the case of a survivor who has not reached sixty-five years of age,
    - (A) had at the time of the death of the contributor reached thirty-five years of age,
    - (B) was at the time of the death of the contributor a survivor with dependent children, or
    - (C) is disabled;

...

\*1.1) In the case of a common-law partner who was not, immediately before the coming into force of this subsection, a person described in subparagraph (a)(ii) of the definition "spouse" in subsection 2(1) as that definition read at that time, no survivor's pension shall be paid under paragraph (1)(d) unless the common-law partner became a survivor on or after January 1, 1998.

[43] This then raises the question as to who qualifies as the survivor of a deceased contributor. This too is defined by the *Canada Pension Plan*. The General Division

reproduced subsection 42(1) of the *Canada Pension Plan*, which sets out the definition of “survivor” in relation to a deceased contributor. The subsection bears repeating.

“survivor”, in relation to a deceased contributor, means

(a) if there is no person described in paragraph (b), a person who was married to the contributor at the time of the contributor’s death, or

(b) a person who was the common-law partner of the contributor at the time of the contributor’s death

[44] If, at the time of the contributor’s death, he did not have a common-law partner, then the person who was married to the contributor at the time of his death would qualify as his survivor. This then raises the question as to who is a common-law partner. This too is defined by the *Canada Pension Plan*, at subsection 2(1). That subsection reads:

“common-law partner”, in relation to a contributor, means a person who is cohabiting with the contributor in a conjugal relationship at the relevant time, having so cohabited with the contributor for a continuous period of at least one year. For greater certainty, in the case of a contributor’s death, the “relevant time” means the time of the contributor’s death.

[45] The General Division referred to both subsections 42(1) and 2(1) in determining who is defined as a survivor and common-law partner at the time of the contributor’s death.

[46] The Appellant suggests that she was entitled to the survivor’s pension under the *Canada Pension Plan*, as she remained legally married to the Contributor at the time of his death. There is no dispute that the Appellant was legally married to the Contributor at the time of his death, but the *Canada Pension Plan* specifically provides for a survivor’s pension to the common-law partner of the contributor at the time of the contributor’s death. There is no other interpretation afforded under the *Canada Pension Plan*. In this case, had the Contributor not had a common-law partner at the time of his death, the Appellant would have been entitled to the survivor’s pension. The General Division properly set this out in its analysis and applied the law to the facts.

[47] The Appellant further submits that as she was the sole executrix of the estate of the Contributor, she is entitled to the survivor’s pension. The fact that the Appellant is the sole

executrix of the estate is of no relevance where the requisite common-law status is established, for the purposes of determining entitlement to the survivor's pension under the *Canada Pension Plan*, as the statute determines entitlement.

[48] The Appellant submits that the General Division failed to follow legal precedent in awarding the survivor's pension to the Added Party, but she did not cite any legal authorities in support of this proposition. She gave anecdotal evidence of a spouse's entitlement where a Royal Canadian Mounted Police pension was concerned, but any rights that might arise under a RCMP pension is of no relevance and of no precedential value, as it is the *Canada Pension Plan* which determines entitlement to any benefits conferred by it. The example cited by the Appellant involving a RCMP pension is not applicable to the interpretation of the *Canada Pension Plan*. While there are numerous legal authorities that provide for a married spouse in a division of assets between spouses, or upon dissolution of an estate, where a common-law relationship exists, those authorities have no applicability to the *Canada Pension Plan*, as the *Canada Pension Plan* governs how benefits under the *Canada Pension Plan* are to be conferred.

[49] The General Division identified the applicable provisions of the *Canada Pension Plan* and appropriately applied them to the facts, which were not in dispute between the parties. There is no evidence before me that the General Division erred in its interpretation of the *Canada Pension Plan* or that it failed to follow any legal precedents.

## **CONCLUSION**

[50] Given the considerations above, the Appeal is dismissed.

*Janet Lew*

Member, Appeal Division