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

Citation: *M. M. v. Minister of Employment and Social Development*, 2016 SSTADIS 314

Tribunal File Number: AD-15-372

BETWEEN:

M. M.

Appellant

and

Minister of Employment and Social Development
(formerly known as the Minister of Human Resources and Skills Development)

Respondent

and

J. E.

Added Party

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Janet Lew

HEARD ON: March 30, 2016

DATE OF DECISION: August 13, 2016

Canada

REASONS AND DECISION

IN ATTENDANCE (VIA VIDEOCONFERENCE)

Appellant	M. M., accompanied by J. M.
Respondent	Christine Singh (counsel)
Added Party	J. E. and Todd Brayer (counsel)

OVERVIEW

[1] This is an appeal of the decision of a Canada Pension Plan Review Tribunal dated May 23, 2012. The Review Tribunal determined that a Canada Pension Plan survivor's pension was not payable to the Appellant, as it was not satisfied, on a balance of probabilities, that the deceased contributor and the Appellant "had by their acts and conduct shown a mutual intention to live together in a marriage-like relationship of some permanence".

[2] One of the issues before me involves determining what type of hearing this appeal should take, i.e. whether a *de novo* hearing or not, as it could have some impact on the outcome. A *de novo* hearing is conducted as if no hearing had taken place before the Review Tribunal and is deemed a new hearing altogether. If I determine that the appeal is not *de novo* and is limited by the grounds under subsection 58(1) of the *Department of Employment and Social Development Act* (DESDA), the Appellant must prove that the Review Tribunal erred under subsection 58(1) DESDA, instead of proving her entitlement to a survivor's pension. If so, then the Appellant would have to prove that the Review Tribunal either failed to observe a principle of natural justice, erred in law or 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.

BACKGROUND

[3] The contributor passed away on February 3, 2007. On March 27, 2007, the Appellant applied for a survivor's pension under the *Canada Pension Plan*. She claims that she was the common-law spouse of the contributor. On April 18, 2007, the Added Party also applied for a survivor's pension. She was separated from the contributor at the time of his death.

[4] The Respondent initially denied the Appellant's application and approved the Added Party's application for a survivor's pension. However it subsequently reversed its position, prompting the Added Party to appeal to a Canada Pension Plan Review Tribunal, which ultimately determined that a survivor's pension was payable to the Added Party.

[5] The Appellant sought leave to appeal to the Pension Appeals Board. Leave to appeal was granted on January 14, 2013. Under the *Jobs, Growth and Long-term Prosperity Act,* the appeal was transferred to the Social Security Tribunal. The Appeal Division heard the appeal on May 6, 2014, in the absence of the Added Party, as she had apparently been misinformed about her entitlement to attend the hearing. Significantly, my colleague conducted a *de novo* hearing, as she determined that the Appellant had a "legitimate expectation" when she filed her application for leave to appeal with the Pension Appeals Board that the appeal would be heard on this basis.

[6] The Added Party made an application for judicial review with the Federal Court of Appeal. On May 29, 2015, the Federal Court of Appeal allowed the application for judicial review and, by consent of the parties, ordered that the matter be remitted to the Social Security Tribunal, Appeal Division for redetermination.

[7] On January 18, 2016, the Social Security Tribunal wrote to the Appellant, advising that the Social Security Tribunal was governed by the DESDA and that the legislation did not provide for *de novo* hearings before the Appeal Division. The Social Security Tribunal noted that the only grounds for appeal were those under subsection 58(1) of the DESDA. The Social Security Tribunal referred to *Alves v. Canada (Attorney General)*, 2014 FC 1100, and noted that the Federal Court had confirmed that matters dealt with by the Social

Security Tribunal were subject to new legislation, even if the appeal was in relation to a decision of an administrative tribunal (such as the Review Tribunal) that no longer existed.

[8] The Added Party's counsel provided additional submissions on March 1, 2016, addressing the grounds of appeal under subsection 58(1) of the DESDA (AD7). Neither the Appellant nor the Respondent provided any written submissions regarding the grounds of appeal under subsection 58(1) of the DESDA. The appeal proceeded on March 30, 2016.

[9] Following the hearing of the appeal, I granted permission to the Appellant to provide written submissions in respect of the grounds of appeal, and to identify the documents which she alleges the Review Tribunal failed to consider. For the most part, the Appellant did not directly address the issues that arose out of the appeal. She provided copies of documents, some of which had not been before the Review Tribunal.

ISSUES

[10] The issues before me are as follows:

1. As a preliminary matter, how should this appeal proceed, i.e. what type of hearing should there be in this appeal?

2. Can I consider any new evidence which the Appellant filed following the hearing of the appeal?

3. If there is no entitlement to a new hearing, and the appeal is limited by the grounds of subsection 58(1) of the DESDA, did the Review Tribunal fail to observe a principle of natural justice, err in law, or base 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?

4. What is the appropriate disposition of this appeal?

ISSUE 1: TYPE OF APPEAL

[11] In *Alves*, the Federal Court held that it would be an error to proceed with an appeal on the basis of an appellant's expectations at the time of filing an application for leave to appeal. The Federal Court suggested that it would be inappropriate therefore to conduct an appeal *de novo*. This would preclude parties from calling witnesses and adducing any new evidence. It also means that the appeal is limited to the grounds of subsection 58(1) DESDA.

[12] In returning the matter to the Appeal Division, the Federal Court of Appeal did not address the issue of the appropriateness of the type of appeal decided upon by my colleague. Clearly, however, the Appellant continued to expect a *de novo* hearing in the proceedings before me. After all, her appeal had originated with the Pension Appeals Board and the matter proceeded as a *de novo* hearing before the Appeal Division in May 2014. She brought a witness and relies on witness statements and continues to assert that the Appeal Division should be determining whether she is entitled to a survivor's pension.

[13] Counsel for the Respondent shares this position, to the extent that, given its history and the exceptional circumstances by which this appeal has returned to the Appeal Division, a hearing *de novo* is warranted, otherwise a breach of natural justice may arise. She argues that a *de novo* hearing properly should take place before the General Division, as the Appeal Division's jurisdiction is limited in scope under the DESDA. She maintains that the DESDA does not confer any authority on the Appeal Division to conduct *de novo* hearings.

[14] Not surprisingly, the Added Party opposes having the matter proceeding as a *de novo* hearing, whether before the Appeal Division or the General Division. The Added Party's counsel urges me to reject the doctrine of legitimate expectations, particularly as the parties had been provided with some notice by the Social Security Tribunal in early 2016 that the appeal would not be *de novo*.

[15] In *Alves*, the Federal Court clearly expressed that there is no room for the doctrine of legitimate expectations and, pursuant to subsection 58(1) of the DESDA, there are now only three grounds of appeal: one, a breach of natural justice; two, an error of law; and

three, an erroneous finding of fact made in a perverse or capricious manner. Consequently, the hearing of this appeal before me proceeded on the basis that the Appellant was required to prove one of these three grounds.

ISSUE 2: NEW EVIDENCE

[16] The Appellant filed additional evidence following the hearing of the appeal.

[17] As set out by the Federal Court in *Canada (Attorney General) v. O'Keefe,* 2016 FC 503 at para. 28, an appeal to the Appeal Division does not allow for new evidence and is limited to the three grounds of appeal listed in subsection 58(1). There is no basis whereby I can consider any new evidence, unless it specifically addresses the grounds of appeal. I do not find that to be the case with the statements provided by the Appellant.

ISSUE 3: GROUNDS OF APPEAL

[18] The Appellant claims the Review Tribunal erred in several ways: one, it failed to consider some of the evidence; two, it failed to consider the law when it assessed whether she was in a common-law relationship with the contributor; and three, it drew adverse inferences against her in finding that she could not be credible when she was unprepared to explain why she and the contributor held multiple addresses. (She now explains that the contributor had been involved in businesses that required different addresses.) Otherwise, she argues that the evidence overwhelmingly supported a finding that she was in a common-law relationship with the contributor.

i. Consideration of evidence

[19] The Appellant alleges that the Review Tribunal failed to consider the following:

i. Member Benefit Statement from the Boilermakers' National Benefit Funds (Canada);

ii. spousal declaration provided to the Boilermakers' National Benefit Funds, stating that she and the contributor had been residing in a common-law relationship since January 4, 2005; and

iii. Boilermakers' National Benefit Funds (Canada) documents stating that they had been in a common-law relationship.

[20] This evidence was before the Review Tribunal and is referred to in paragraph 16 of its decision.

[21] The Appellant also relied on other documents to substantiate her claims that she was in a common-law relationship with the contributor. Although the Appellant appeared to largely rely on these core documents for her claim, the Review Tribunal did not refer to any of them in its analysis, other than in a general manner, that "some documents [the deceased contributor referred] to the [Appellant] as his common-law spouse or wife".

[22] There is a general presumption in law that a decision-maker is presumed to have considered all of the evidence before it. As the Federal Court indicated in *Singer v. Canada (Attorney General)*, 2010 FC 607 at para. 20, courts will consider setting aside this presumption "only when the probative value of the evidence that is not expressly discussed is such that it should have been discussed". In determining the probative value of the evidence, one needs to assess the strength of the evidence, the extent to which the proposed evidence supports the inference(s) sought to be drawn from it and the extent to which the matters it tends to prove are at issue in the proceedings: *Cammack v. Martins Estate*, 2002 CanLII 11072 (ON SC).

[23] A Member Benefit Statement for the period (in which deposits were received) from February 1, 2005 to July 31, 2005 lists the Appellant as the contributor's spouse (page 6-19 of hearing file). One of the letters from the Boilermakers' National Benefit Funds indicates that although the Appellant was not the designated beneficiary, she was listed as the common-law spouse at the date of the contributor's death (page 6-32). The documents generated by the Boilermakers' National Benefit Funds would have been prepared and based upon the declaration provided by the contributor. On June 9, 2005, the contributor had declared that the Appellant was his common-law spouse and that they had been cohabiting since January 4, 2005. These documents – particularly the declaration signed and dated by the contributor - clearly had some probative value that merited more than a mere passing reference. These documents merited some discussion and analysis by the Review Tribunal.

[24] Despite the apparent probative value of these documents, the Review Tribunal did not undergo any discussion or explanation of them, or any of the documents which named the Appellant as the common-law spouse of the contributor. In this regard, the Review Tribunal erred in law.

ii. Cohabitation under section 2(1) of the *Canada Pension Plan*

[25] The Appellant submits that the Review Tribunal erred in law as ultimately it did not consider whether she and the contributor were in a common-law relationship and instead, concluded that they could not have been cohabiting, given their "tumultuous relationship" and the contributor's "psychiatric problems". The Review Tribunal also had "reservations" about the Appellant's credibility. With these considerations, the Review Tribunal concluded that the Appellant and the contributor had not "by their acts and conduct shown a mutual intention to live together in a marriage-like relationship of some permanence".

[26] In *Hodge v. Canada (Minister of Human Resources Development)*, [2004] 3 SCR 357, the Supreme Court of Canada reviewed the definition of a common-law partner under subsection 2(1) of the *Canada Pension Plan.* It held that cohabitation in the context of a common-law relationship is not synonymous with co-residence, and that two people can cohabit even though they do not live under the same roof. There may be periods of physical separation if there was a mutual intention to continue.

[27] The Review Tribunal recognized that it was not essential that the parties share a common residence for a period of one year. Even so, it found that their relationship was chaotic and they therefore could not have been in a common-law relationship. The Review Tribunal described some of these instances of chaos at paragraph 38. One of these included an incident in May 2006, when the contributor assaulted the Appellant, resulting in him entering into a recognizance to have no contact with her and not to attend within one kilometre of his farm. From this, it is clear to me that the Review Tribunal overlooked the fact that the Appellant must have been cohabiting or residing with the contributor at his farm at that time. Otherwise, it would be entirely without reason or logic for the contributor to be ordered not to attend within one kilometre of his own farm if the Appellant was not also residing there.

[28] The other shortcoming with the Review Tribunal's logic is that it concluded that the Appellant and the contributor could not have been cohabiting in a common-law relationship in large part because of their tumultuous relationship, yet the Review Tribunal accepted that they had been cohabiting at the farm from at least August 2006 until the contributor's death on February 3, 2007, at a time when their relationship was "chaotic".

[29] The Review Tribunal did not apply the proper considerations in determining whether the Appellant and the contributor cohabited in a common-law relationship, since it largely determined the state of their relationship on the basis of whether it was free from tumult. As the Federal Court determined in *McLaughlin v. Canada (Attorney General)*, 2012 FC 556, a decision-maker should not evaluate the quality of the relationship between two individuals to determine whether or not the relationship should fall within the definition of a "common-law partnership".

[30] The Review Tribunal identified *Canada (Minister of Social Development) v. Pratt*, 2006 CP 22323 (PAB), which sets out the criteria for a conjugal relationship. At paragraph 42, the Pension Appeals Board listed several factors as being indicative of a conjugal relationship. *McLaughlin* notes that the Supreme Court of Canada confirmed these factors in *M. v. H.*, 1999 CanLII 686 at para. 59, albeit in a family law context, that "the generally accepted characteristics of a conjugal relationship … include shared shelter, sexual and personal behavior, services, social activities, economic support and children, as well as the societal perception of the couple". The Review Tribunal did not have some of this information because the Appellant had neglected to respond to its written requests, and because it did not fully endeavour to explore these factors at the hearing before it. Nonetheless, it is apparent from its final conclusion at paragraph 44 that the Review Tribunal focused on the "tumultuous relationship" (and the contributor's psychiatric problems) rather than on whether the Appellant and the contributor met any of the criteria for a conjugal relationship set out by *Pratt* and in *M. v. H.* This constitutes an error of law.

iii. Credibility and adverse inferences

[31] The Appellant argues that the Review Tribunal drew adverse inferences against her in finding that she could not be credible when she was unprepared to explain why she and the contributor held multiple addresses.

[32] However, the Review Tribunal found that the Appellant lacked credibility primarily because it was inconsistent with the evidence of the Added Party's daughter. The Review Tribunal wrote:

> [The Appellant's] evidence that she had lived with the deceased since the end of the 2004, or early 2006 and her denial of a residence at a cabin was inconsistent with the evidence (specifically the evidence of [the Added Party's daughter]) and simply not credible.

[33] I am usually reluctant to interfere with a decision-maker's findings of credibility, but in this instance, I find it disconcerting that the Review Tribunal would readily prefer the evidence of the Added Party's daughter over the Appellant and on that basis in part, conclude that the Appellant was not credible. For one, there was evidence from the contributor's landlord – a disinterested party to the proceedings – corroborating the Appellant's position that she had lived with the contributor approximately one year prior to his death. The evidence was independently obtained by the Added Party. Yet, there was no consideration given to this statement. Secondly, the Added Party's daughter did not testify and her written statement therefore was not subjected to any cross- examination. Finally, and most concerning, is the fact that the Added Party's daughter did not reside with either the contributor or the Appellant for most of 2006. Indeed, she resided in another province altogether, so could not have observed or provided a firsthand account as to whether the Appellant and the contributor might have been cohabiting in a common-law relationship. Any evidence which she had relating to the Appellant's habitation prior to July or August 2006 was purely based on hearsay or drawn from speculation.

[34] The Added Party's daughter witnessed the Appellant moving some of her possessions from her cabin to the farm and speculated that the Appellant and the contributor therefore could not have been cohabiting before August 2006, but there is no evidence

regarding what, if any, of the Appellant's possessions had already been moved to the farm, and what was being moved on a weekly basis to the farm. If the Review Tribunal was going to base the Appellant's credibility on the Added Party's daughter's written statement, it should have at the very least provided the Appellant with an opportunity to respond to its specific concerns which arose from the Added Party's daughter's personal observations. It does not appear that it did so.

[35] Finally, the Appellant may have been less than forthcoming with her evidence than desired by the Review Tribunal but, given the evidence before it, the Review Tribunal should have been alive to the Appellant's legitimate concerns that the risk of disclosure could jeopardize her personal security and that of her family.

ISSUE 4: DISPOSITION

[36] Subsection 59(1) of the DESDA sets out the powers which the Appeal Division may exercise. The General Division, as the primary trier of fact, is best positioned to assess and make findings on the evidence, and determine whether the Appellant cohabited with the contributor in a conjugal relationship for a continuous period of at least one year, up to the contributor's death.

CONCLUSION

[37] Given the errors made by the Review Tribunal, the appeal is allowed and the matter referred to the General Division for a new hearing.

Janet Lew
Member, Appeal Division