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

Citation: *J. C. and S. N. v. Minister of Employment and Social Development*, 2017 SSTADIS 629

Tribunal File Number: AD-16-1187
AD-16-1188

BETWEEN:

J. C. and
S. N.

Appellants

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Neil Nawaz

HEARD ON: October 11, 2017

DATE OF DECISION: November 10, 2017

Canada

DECISION AND REASONS

PERSONS IN ATTENDANCE

Appellants	J. C.
	S. N.
Representative for the Appellants	Christopher Hunt
Representative for the Respondent	Jennifer Hockey, Department of Justice

A. N., the Appellant's daughter, and Nancy Wong and Stéphanie Pilon, both representatives from the Department of Employment and Social Development, observed the hearing.

DECISION

The appeals are allowed and both matters are ordered back to the General Division for a *de novo* hearing before a different General Division member.

OVERVIEW

[1] This appeal addresses what a "common-law" relationship means in the context of the *Canada Pension Plan* (CPP). D. S., a contributor to the Canada Pension Plan, died on April 29, 2010. In June 2010, the Appellant, J. C., applied for the CPP survivor's pension, as well as the orphan's benefit on behalf of her five dependent children, whom she claimed the deceased contributor had effectively adopted. The Respondent approved the application in August 2010.

[2] In April 2013, following an investigation, the Respondent terminated the survivor's pension and children's benefits. Ms. J. C. was informed that she had received an overpayment in the amount of $48,813 for the period of May 2010 to April 2013, and her eldest son, S. N., was advised of an overpayment of $4,484 for the portion of the orphan's benefit he received while attending college after age 18.

[3] In October 2013, the Appellants appealed this determination to the General Division of the Social Security Tribunal (Tribunal). In two separate decisions dated June 29, 2016, the General Division found that Mr. D. S. had separated from Ms. J. C. in December 2009 and was

not her common-law partner at the time of his death, nor did he have custody and control of her children.

[4] The Appellants then filed an application requesting leave to appeal with the Tribunal's Appeal Division alleging that the General Division erred in rendering its decision—specifically, by failing to recognize that common-law relationships are characterized by many more factors than mere cohabitation. In my decision dated May 5, 2017, I allowed leave because I saw at least a reasonable chance of success on appeal.

ISSUES

[5] The issues before me are as follows:

Issue 1: How much deference should the Appeal Division give to General Division decisions?

Issue 2: Did the General Division err in law and fact when it concluded that, for the purpose of determining her entitlement to the survivor's pension, Ms. J. C. was not in a common-law relationship with Mr. D. S.?

Issue 3: Did the General Division err in law and fact when it concluded that, for the purpose of determining his entitlement to the orphan's benefit, Mr. S. N. was not Mr. D. S.'s dependent child?

Issue 4: If the answers to Issues 2 and/or 3 are "yes," what remedies are appropriate?

ANALYSIS

Issue 1: How much deference should the Appeal Division show the General Division?

[6] According to subsection 58(1) of the *Department of Employment and Social Development Act* (DESDA), the only grounds of appeal to the Appeal Division are that the General Division erred in law, failed to observe a principle of natural justice, 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. According to subsection 59(1) of the DESDA, the Appeal Division may dismiss the appeal, give the decision that the General Division should have given, refer the matter back to the General Division for reconsideration, or vary the General Division decision in whole or in part.[1]

[7] Until recently, it was accepted that appeals to the Appeal Division were governed by the standards of review set out by the Supreme Court of Canada in *Dunsmuir v. New Brunswick*.[2] In matters involving alleged errors of law or failure to observe principles of natural justice, the applicable standard was held to be correctness, reflecting a lower threshold of deference deemed to be owed to a first-level administrative tribunal. In matters where erroneous findings of fact were alleged, the standard was held to be reasonableness, reflecting a reluctance to interfere with findings of the body tasked with hearing factual evidence.

[8] The Federal Court of Appeal decision *Canada v. Huruglica*[3] rejected this approach, holding that administrative tribunals should not use standards of review that were designed to be applied by appellate courts. Instead, administrative tribunals must look first to their home statutes for guidance in determining their role. This premise led the Court to determine that the appropriate test flows entirely from an administrative tribunal's governing statute: "The textual, contextual and purposive approach mandated by modern statutory interpretation principles provides us with all the necessary tools to determine the legislative intent […]"

[9] The implication here is that neither the standards of reasonableness or correctness will apply unless those words, or their variants, are specifically contained in the founding

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[1] Subsection 59(1) of the DESDA.
[2] *Dunsmuir v. New Brunswick*, [2008] 1 SCR 190, 2008 SCC 9.
[3] *Canada (Citizenship and Immigration) v. Huruglica*, [2016] 4 FCR 157, 2016 FCA 93.

legislation. Applying this approach to the DESDA, one notes that paragraphs 58(1)(*a*) and (*b*) do not qualify errors of law or breaches of natural justice, which suggests that the Appeal Division should afford no deference to the General Division's interpretations. The word "unreasonable" is not found in paragraph 58(1)(*c*), which deals with erroneous findings of fact. Instead, the test contains the qualifiers "perverse or capricious" and "without regard for the material before it." As suggested in *Huruglica,* those words must be given their own interpretation, but the language suggests that the Appeal Division should intervene when the General Division bases its decision on an error that is clearly egregious or at odds with the record.

Issue 2: Did the General Division err in finding that the Appellant and deceased contributor were not common-law partners?

[10] It is a well-established principle of administrative law that a review tribunal charged with finding fact is presumed to have considered all the evidence before it. However, all presumptions are subject to rebuttal and, having reviewed its two decisions against the available record, I have come to the conclusion that the General Division disregarded material facts without adequately explaining why it did so. In selectively considering the evidence, the General Division effectively misapplied the law governing the CPP survivor's pension and common-law relationships.

Relevant law

[11] The CPP provides for a survivor's pension to be paid to the survivor of a deceased contributor.[4] A "survivor" can include a person who was the common-law partner of the contributor at the time of the latter's death.[5] A "common-law partner" is defined as a person who is cohabiting with the contributor in a conjugal relationship at the relevant time, having done so for a continuous period of at least one year prior to the contributor's death.[6]

[12] The leading case on common-law relationships is *Hodge v. Canada*,[7] in which the Supreme Court of Canada held that cohabitation is not synonymous with co-residence. A key

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[4] Paragraph 44(1)(*d*) of the CPP.
[5] Subsection 42(1) of the CPP.
[6] Subsection 2(1) of the CPP.
[7] *Hodge v. Canada (Minister of Human Resources Development)*, 2004 SCC 65.

element of the test is the intention of the parties, which may be adduced from their words and actions. As the Respondent notes, *Hodge* adopted the reasoning of *Re Sanderson and Russell*,[8] which stated: "… [a common law relationship] has come to an end when either party regards it as being at an end and, by his or her conduct has demonstrated in a convincing manner that the particular state of mind is a settled one." Since *Hodge*, a long line of case cases have held that there is no exhaustive definition for a common-law relationship and that each case must be decided according to its own particular facts. Co-residence is but one factor, as are conjugal, familial, social and economic ties such as financial interdependence, mutual dependency and shared assets and responsibilities.

[13] In this case, the parties agreed that Mr. D. S. and Ms. J. C. had a common-law relationship from July 2007 to December 2009, and they did not dispute that Mr. D. S. moved out of their mutual residence. The question before the General Division was the nature of the relationship in the last four months of the deceased contributor's life.

[14] Ms. J. C. alleges that the General Division improperly applied the test for cohabitation set out in *Hodge*, placing undue value on the question of co-residence and failing to recognize, as the Supreme Court did, that for one reason or another, there can be intervals of separation within a common-law relationship that do not disturb its status.

[15] I am allowing the appeal on this ground. Although it is admittedly odd that the General Division did not mention *Hodge* or any of the leading cases on cohabitation, I find that its decision nevertheless correctly stated the law. At paragraph 28, the General Division wrote, "Cohabitation is not synonymous with co-residence. Two people can cohabit even though they do not live under the same roof. To establish a conjugal relationship, the Appellant must show that the couple continued, while apart, by their acts and conduct, to have shown a mutual intention to be in a marriage-like relationship of some permanence."

[16] However, it is one thing to correctly state the law; it is another to correctly apply it. The Respondent may be correct to note that the General Division was "well aware" that living apart does not necessarily preclude cohabitation, yet its analysis as a whole suggests that it placed overwhelming weight on the fact that Mr. D. S. and Ms. J. C. had stopped residing under the

[8] *Re Sanderson and Russell* (1979) 24 O.R. (2d) 429 (C.A.).

same roof and systematically discounted evidence that pointed to the existence of an ongoing conjugal and mutually dependent relationship. In weighing the evidence, the General Division committed three material errors of fact, which I will now describe in more detail.

Dismissal of reason deceased contributor moved out

[17] Ms. J. C. alleges that the General Division failed to give due weight to the evidence that Mr. D. S.'s time outside the house was motivated by their mutual interest in the welfare of the children and did not reflect an intention to end the relationship.

[18] It is clear that Ms. J. C. was aware that a significant weakness in her case was the fact that Mr. D. S. had moved out of her house in December 2009. In response, she claimed that the move was chiefly motivated, not by problems in her relationship with Mr. D. S., but by strife and conflict among the children of their comingled families. Unfortunately, as the audio recording of the hearing before the General Division is unavailable due to a technical malfunction, I have no way to be sure how much the Appellants' testimony concerned this question, but I do note that Ms. J. C. cited bullying of her daughter by Mr. D. S.'s son several times in her written submissions.[9]

[19] Although this rationale for the move was independently corroborated elsewhere in the record (for example, Brenda Grey's contemporaneous office notes), the General Division gave it minimal weight and, more importantly, offered no reasons for doing so. In paragraph 18 of its decision, the General Division relayed Ms. J. C.'s testimony on this point, as follows:

> In June 2009, the deceased's son started living with them. Their relationship became strained. Due to the difficulties that had arose among the children (bullying), the Appellant stated that she and the deceased could no longer physically be together therefore the deceased decided to lease an apartment to have a place to go with his son.

[20] In its analysis proper, the General Division simply repeated the passage above and flatly concluded that that evidence nevertheless showed Mr. D. S. had an intention to separate from Ms. J. C. in December 2009. I saw no indication that the General Division made a genuine attempt to reconcile the conflicting evidence surrounding Mr. D. S.'s and Ms. J. C.'s intentions,

[9] See Appellant's letter date-stamped June 24, 2013 (GD2-21); notice of appeal to the General Division received October 10, 2013 (GD1-8); and written submission to the Appeal Division dated March 18, 2016 (GD10-5).

focusing instead on the fact that they had physically separated. In doing so, the General Division also ignored jurisprudence[10] that permits common-law partners to take "cooling-off periods" without jeopardizing the legal status of their relationship.

Finding that Brenda Grey's notes were not reliable

[21] Ms. J. C. alleges that the General Division discounted, without cause, Brenda Grey's April 2010 counselling notes, which documented Mr. D. S.'s state of mind at the time of his death, in particular, his intention to continue the relationship.

[22] I see considerable merit in this argument. The General Division addressed this significant item of evidence by summarizing the contents of Ms. Grey's notes in paragraph 11 of its decision and later listing purported discrepancies in the notes uncovered by the Respondent's investigator:

> [16] Further, the investigation reports add that Ms. Grey confirmed that she signed the receipts for counselling but the top portion of the receipts were completed by the Appellant. Ms. Grey's [*sic*] has records of the deceased attending counselling on April 14, 2010, but he attended alone. The receipt for April 28, 2010 posed a concern for Ms. Grey as she had the appointment crossed off in her appointment book as it was cancelled, however a receipt was provided. The deceased also had an appointment April 21, 2010 and no receipt was supplied for that appointment. Ms. Grey's records did not indicate that the deceased ever returned to the Appellant's home or had an expected date to return. Ms. Grey's original notes indicate "[the Appellant] attained these notes in April 2011." Ms. Grey stated the Appellant had taken the notes she was searching for. There are no documents that indicate the deceased ever resumed their common- law relationship.

[23] As it did in other instances, the General Division then essentially replicated, in its analysis, the paragraphs summarizing evidence without adding anything further. Paragraphs 11 and 16 are identical to paragraphs 30 and 31, and I note that paragraphs 16 and 31 themselves are taken almost verbatim, including a typographical error, from the Respondent's written

[10] *MHRSD v. S.S.* (October 6, 2011), CP 27386 (PAB).

submissions.[11] All of this suggests that the General Division was less than diligent in carrying out its responsibility to independently consider the evidence.

[24] In its wholesale endorsement of the Respondent's effort to discredit the Grey notes, the General Division gave little, if any, weight to objective information that the deceased contributor was attending couples therapy and had described his separation from Ms. J. C. as "temporary." Ms. J. C. claims that any discrepancies in the notes were immaterial and were fully explained at the hearing. If so, there is no indication of this in the General Division's decision, which failed to offer a comprehensible reason for discounting the notes, repeating instead the Respondent's vague allegations of after-the-fact alternations of appointment dates and intimating that Ms. J. C. had somehow appropriated the notes. The Respondent maintains that the General Division had a rational basis on which to assign the notes minimal weight, but it is unclear how the discrepancies, if that is what they were, affected the fundamental reliability of their contents, and I see nothing in the record[12] to suggest that they were in any way falsified. Indeed, as Ms. J. C. notes, the Respondent itself has not disputed that they reflected Ms. Grey's genuine observations of the relationship between Mr. D. S. and Ms. J. C. at the critical moment immediately prior to the deceased contributor's death.

Treatment of texts

[25] Finally, I am convinced that the General Division in effect ignored or misconstrued texts that Mr. D. S. and Ms. J. C. exchanged on the last day of his life. As already noted, the General Division is entitled to weigh evidence as it sees fit, but it must do so without committing a material error of fact while arriving at a defensible conclusion. Ms. J. C. intended the texts to show that she and the deceased contributor maintained an intimate relationship to the end, but the General Division addressed them only perfunctorily**:**

> Finally, the Tribunal also considered the text messages the Appellant exchanged with the deceased the day of his passing. However, based on this evidence, the Tribunal is skeptical of the Appellant's claim that she and the deceased were in a conjugal relationship as defined by section 2 of the CPP and the case law, after he moved out in December 2009. The evidence is more consistent with the

[11] See paragraph 21 of the Respondent's written submission to the General Division dated July 22, 2015 (GD5).

[12] As an aside, I was unable to locate the investigation report on Ms. Grey's notes in the documentary record, although I trust its substance was faithfully relayed in the Respondent's written submissions. However, its apparent absence does raise a question of whether the General Division reviewed the source document first-hand and, if not, whether it relied on a second-hand account prepared by an interested party.

> intention of the deceased, in December 2009, to separate from the Appellant given the issues they had encountered with the children.

[26] As noted, there are many factors that go into an assessment of whether a couple is "cohabiting in a conjugal relationship," but one of them is inevitably the existence of a sexual, or at least romantic, bond. The texts produced by Ms. J. C. strongly suggested that she and Mr. D. S. continued to have sexual relations, and they also indicated ongoing involvement with each other's children, yet the General Division dismissed them in a single declaratory sentence without elaborating on the reasons for its "skepticism."

[27] Where there are two versions of the truth, it is the General Division's role not just to determine which of them is actually true, but to explain *why* it preferred one version over the other. In dwelling on those items of evidence that favoured the Respondent's position and stinting on others that favoured Ms. J. C.'s, the General Division fell short of its obligation to actively consider the material before it.

Issue 3: Did the General Division err in concluding that Mr. S. N. was not Mr. D. S.'s dependent child?

[28] Ms. J. C. had been receiving orphan's benefits[13] on behalf of her five biological children, all of whom were under 18 at the time of Mr. D. S.'s death. The question of whether they met the definition of "dependent child" under subsection 42(1) of the CPP is, in my view, intimately bound up with whether their mother was the deceased contributor's common-law partner when he passed away. A factor to consider in both questions is the extent to which Mr. D. S. was "maintaining" Ms. J. C.'s children in accordance with section 65.1 of the CPP Regulations.

[29] It appears that Mr. S. N. is an independent party to this proceeding only because he, alone among Ms. J. C.'s children, reached the age of majority before the Respondent terminated the family's benefits. The disposition of his appeal depends on his relationship, for CPP purposes, with Mr. D. S. at the time of the latter's death. Since that question is, in turn, inseparable from the nature of Ms. J. C.'s relationship with Mr. D. S., I think it best that Mr. S. N.'s appeal be allowed in tandem with his mother's.

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[13] Pursuant to paragraph 44(1)(*f*) of the CPP.

Issue 4: What remedy is appropriate?

[30] Although subsection 59(1) of the DESDA permits me to give the decision that the General Division should have given, the errors of law and fact that I have identified are not so stark that they point to obvious findings in favour of the Appellants on the merits of their claims. As such, it is appropriate, in this case, that the matter be referred back to the General Division for a *de novo* hearing before a different General Division member.

CONCLUSION

[31] The appeals are allowed.

Member, Appeal Division