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

Citation: *A. Z. v. Minister of Employment and Social Development and J. L.*, 2018 SST 828

Tribunal File Number: AD-18-242

BETWEEN:

A. Z.

Appellant

and

Minister of Employment and Social Development

Respondent

and

J. L.

Added Party

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Neil Nawaz

DATE OF DECISION: August 22, 2018

DECISION AND REASONS

DECISION

[1] The appeal is allowed.

OVERVIEW

[2] This case involves competing claims for a Canada Pension Plan (CPP) death benefit.

[3] L. D., a contributor to the CPP, passed away on January 19, 2015, without a will. On January 30, 2015, the Added Party, J. L., applied for the CPP death benefit, claiming to be the late L. D.'s common-law partner and fiancé. On March 2, 2015, the Appellant, A. Z. (L. D.'s sister), also applied for the death benefit. In her application, she declared that she was next of kin and responsible for her sister's funeral expenses. She also submitted a statement from the X funeral home, addressed to her, showing $9,225.20 owing for services rendered.

[4] In a letter dated June 19, 2015, the Respondent, the Minister of Employment and Social Development (Minister), informed J. L. that it could not approve his application for the death benefit because someone else had met the eligibility requirements.

[5] J. L. asked the Minister to reconsider its decision and submitted a certified copy of a receipt, dated February 24, 2015, indicating that he had paid $9,255.20 regarding L. D.'s funeral expenses. In a letter dated April 4, 2016, the Minister maintained its decision to pay A. Z. the death benefit, noting that J. L. had not indicated in his application that he was responsible for funeral expenses.

[6] J. L. appealed the Minister's decision to the General Division of the Social Security Tribunal. With his notice of appeal, he furnished further evidence that he had paid for L. D.'s funeral, in addition to a burial plot and monument. In November 2017, the General Division held a hearing by teleconference. J. L. testified that he and L. D. had been living together for close to a year ("give or take") at the time of her death. He said that he was the beneficiary of L. D.'s life insurance policy, and he paid for her funeral expenses from the proceeds. In her testimony, A. Z. denied that her sister was in a common-law relationship with J. L. but acknowledged that he had

paid for her funeral expenses. After the hearing, she provided the General Division with a copy of a certificate appointing her trustee of L. D.'s estate, issued to her by the Ontario Superior Court of Justice on April 12, 2015.

[7] On January 16, 2018, the General Division issued a decision allowing the appeal. The General Division examined the applicable provisions of the *Canada Pension Plan* (CPP) and its regulations and found that A. Z. did not apply for the death benefit in her capacity as the trustee for her sister's estate. It determined that, in the absence of an estate, the person who actually paid for the funeral—in this case, J. L.—should have taken precedence over the individual who had responsibility for that expense. The General Division also found that it did not matter whether J. L. was L. D.'s common-law partner because his entitlement to the death benefit flowed from his position as payer of the funeral expenses.

[8] On April 12, 2018, A. Z.'s legal representative submitted an application requesting leave to appeal to the Appeal Division, alleging various errors on the part of the General Division. As many of these allegations overlap one another, I will summarize them as follows:

- The General Division arbitrarily determined that J. L.'s additional evidence regarding his payment of funeral expenses was an extension of his application. At the same time, it refused to recognize A. Z.'s additional information regarding her appointment as estate trustee as an extension of **her** application. The Appellant submits that she had no opportunity to know or answer the case against her.
- The General Division misapplied the provisions of the CPP that govern payment of the death benefit. The General Division also erred in determining that it was irrelevant whether J. L. and L. D. were in a common-law relationship, according to the definition in s. 2(1) of the CPP, at the time of her death.
- The General Division erred in finding that A. Z. "was not completely forthcoming when she applied for the death benefit" because she said that she was "responsible" for funeral expenses without disclosing that they had been paid for by someone else. This characterization was unfair because such information was not requested on the death benefit application.

[9] In my decision dated May 29, 2018, I granted leave to appeal because I saw a reasonable chance of success on appeal for the Appellant's submissions. I also invited the parties to make additional written submissions. The Appellant and the Minister did so; the Added Party did not.

[10] I have decided that an oral hearing is unnecessary and that the appeal will proceed on the basis of the documentary record for the following reasons:

- There are no gaps in the file and there is no need for clarification.
- This form of hearing respects the requirement under the *Social Security Tribunal Regulations* to proceed as informally and as quickly as circumstances, fairness, and natural justice permit.

[11] Having reviewed the parties' submissions against the underlying record, I have concluded that the Appellant's case has sufficient merit to warrant overturning the General Division's decision.

[12] On July 10, 2018, the Minister conceded that the General Division had erred in rendering its decision and recommended that the matter be returned to the General Division for a rehearing.

ISSUES

[13] According to s. 58 of the *Department of Employment and Social Development Act* (DESDA), there are only three grounds of appeal to the Appeal Division: the General Division (i) failed to observe a principle of natural justice; (ii) erred in law; or (iii) based its decision on an erroneous finding of fact made in a perverse or capricious manner or without regard for the material.

[14] The issues before me are as follows:

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

Issue 2: Did the General Division err in law in applying the provisions of the CPP that govern payment of the death benefit?

Issue 3: Did the General Division breach a principle of natural justice by recognizing J. L.'s payment of the funeral expenses as an extension of his death benefit

application without extending similar recognition to A. Z.'s appointment as estate trustee?

Issue 4: Did the General Division base its decision on an erroneous finding that A. Z. "was not completely forthcoming" when she applied for the death benefit?

ANALYSIS

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

[15] In *Canada v. Huruglica*,[1] the Federal Court of Appeal held that administrative tribunals must look first to their home statutes for guidance in determining their role: "The textual, contextual and purposive approach mandated by modern statutory interpretation principles provides us with all the necessary tools to determine the legislative intent…."

[16] Applying this approach to the DESDA, one notes that ss. 58(1)(*a*) and (*b*) do not define what constitutes errors of law or breaches of natural justice, which suggests that the Appeal Division should hold the General Division to a strict standard on matters of legal interpretation. In contrast, the wording of s. 58(1)(*c*) suggests that the General Division is to be afforded a measure of deference on its factual findings. The decision must be **based** on the allegedly erroneous finding, which itself must be made in a "perverse or capricious manner" or "without regard for the material before [the General Division]." As suggested by *Huruglica*, those words must be given their own interpretation, but the language suggests that the Appeal Division should intervene when the General Division commits a material factual error that is not merely unreasonable, but clearly egregious or at odds with the record.

Issue 2: Did the General Division err in law in applying the provisions of the CPP that govern payment of the death benefit?

[17] Having reviewed the record in detail, I am convinced that the General Division erred in law. In my view, the error comes from minimizing the degree of discretion available to the Minister in directing payment of the death benefit.

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[1] *Canada (Citizenship and Immigration) v. Huruglica*, 2016 FCA 93.

[18] Section 71 of the CPP makes it clear that the estate of the deceased contributor has priority, subject to certain exceptions, over all other potential claimants:

> 71 (1) **Where payment of a death benefit is approved, the Minister shall, except as provided in subsections (2) and (3), pay the death benefit to the estate of the contributor.**
>
> (2) The Minister **may** direct payment of a death benefit in whole or in part to such person or body as is prescribed where
>
> (a) he is satisfied, after making reasonable inquiries, that there is no estate;
>
> (b) the estate has not applied for the death benefit within the prescribed time interval following the contributor's death; or
>
> (c) the amount of the death benefit is less than the prescribed amount [my emphasis].

[19] The "prescribed time interval" is set out in s. 64(1) of the *Canada Pension Plan Regulations* (Regulations):

> 64 (1) When paragraph 71(2)(a) of the Act applies or **when the estate of a deceased contributor has not applied for the death benefit within the interval of 60 days after the contributor's death**, or when the amount of the death benefit is less than two thirds of 10% of the Year's Maximum Pensionable Earnings for the year in which the contributor died, in the case of a death that occurred before January 1, 1998, or less than $2,387, in the case of a death that occurred after December 31, 1997, **a direction under subsection 71(2) of the Act may, subject to subsections (2) and (3), be given** for payment of the death benefit
>
> (a) **to the individual or institution who has paid or is responsible for the payment of the deceased contributor's funeral expenses;**
>
> (b) in the absence of an individual or institution described in paragraph (a), to the survivor of the deceased contributor; or
>
> (c) in the absence of an individual or institution referred to in paragraph (a) and a survivor referred to in paragraph (b), to the next of kin of the deceased contributor [my emphasis].

[20] In this case, the Minister had received two applications for the death benefit by the time the 60-deadline elapsed, although neither one was from the estate, strictly defined. *Cormier v. Canada*[2] is the leading case on how the CPP death benefit provisions are to be applied. Although *Cormier*'s facts differ somewhat from the present case, the Federal Court of Appeal set down several broad principles:

> [S]ubsection 71(1) does not provide that the Minister's duty to pay a death benefit to the estate of the contributor ceases if the estate does not apply for it within 60 days of the contributor's death. The only effect of a failure by the estate to apply within 60 days of the death is to trigger the discretion exercisable by the Minister under subsection 71(2) to pay the benefit to statutorily prescribed persons, who do not include the estate of the contributor. The Minister's obligation to pay to the estate under subsection 71(1) continues, even if representatives of the estate do not apply for death benefit within the 60 days.

[21] A plain reading of this passage suggests that the estate's rights were not extinguished by the expiry of the 60-day deadline. *Cormier* also makes it clear that "[t]he only statutory liability of the Minister to pay a death benefit is owed to the estate." By implication, everything else is left to the Minister's discretion, as indicated by use of the word "may" in s. 71(2) of the CPP and again in s. 64(1) of the Regulations.

[22] In paragraph 52 of its decision, the General Division appeared to find an obligation to favour the payer of the funeral expenses where none existed:

> While the [Appellant] provided the Tribunal with evidence showing that she was issued a Certificate of Appointment of Estate Trustee Without a Will, she did not apply for the death benefit in her capacity as Estate Trustee and, as a practical matter, there would have been no need for her to do so as she had already been awarded the death benefit. It was therefore open to the Respondent, in July 2015 when it received proof that the [Added Party] had paid for the funeral expenses, to make a discretionary payment under subsection 71(2) of the CPP.

In its own words, the General Division acknowledged that it was open to the Minister to make a discretionary payment once the 60-day period had passed. What was the extent of this

[2] *Cormier v. Canada (Minister of Human Resources Development*), 2002 FCA 514.

discretion? It permitted the Minister to choose between the estate and the sequence of parties listed in s. 64(1) of the Regulations. Despite this, the General Division found that, since the Appellant did not apply for a death benefit as the estate trustee, it did not matter that a court later appointed her to that position. In fact, it did matter: the appointment placed the Appellant in the pool of parties who were eligible to benefit from the Minister's exercise of its discretionary power. When the Minister chose to grant the estate the death benefit, it became irrelevant who had paid for the funeral expenses.

[23] The General Division may have wanted to recognize that J. L. was out of pocket by nearly $10,000, but it had no authority to ignore the letter of the law and simply order what it considered a fair result. Case law, led by *Canada v. Tucker* and *Pincombe v. Canada*,[3] has held that administrative tribunals are bound by their enabling statutes and do not have the jurisdiction to review a discretionary decision of the Minister. In ordering the death benefit to be paid to J. L., the General Division overstepped its powers.

[24] Again, the Minister's only obligation was to pay a death benefit to the estate, but, once the estate failed to apply within the 60-day deadline, the Minister's powers then assumed a discretionary character. Contrary to the General Division's decision, there was nothing in law that required the Minister to follow the chain of priority set out in s. 64(1) of the Regulations. In light of *Cormier* and the wording of the applicable statutory provisions, I am satisfied that the Minister was within its authority to wait for the duly authorized representative of L. D.'s estate to come forward. It was immaterial that the representative happened to be the same individual—A. Z.—who had earlier applied for the death benefit as the deceased's next of kin and as the person responsible for her funeral expenses.

Issue 3: Did the General Division breach a principle of natural justice by recognizing J. L.'s payment of the funeral expenses as an extension of his death benefit application without extending similar recognition to A. Z.'s appointment as estate trustee?

[25] This appeal succeeds because the General Division erred in law, as explained above. As a result, I do not need to make a determinative finding on this issue. However, it highlights a

[3] *Canada (Minister of Human Resources Development) v. Tucker*, 2003 FCA 278; *Pincombe v. Attorney General of Canada*, [1995] F.C.J. No. 1320.

contradiction that arose as soon as the General Division departed from a strict reading of the statute.

[26] Although the General Division did not explicitly say so in its decision, in directing the death benefit to the individual who paid the funeral expenses, it, in effect, made a finding that there was no estate or, if there was, that the estate did not apply for the death benefit within the prescribed time. The CPP does not define "estate." The term is commonly held to mean the sum of an individual's assets and rights less their debts and obligations. However, the CPP's use of the word seems to refer to an entity—whether an individual or institution—that has legal authorization to administer a deceased contributor's remaining interests: an executor, administrator, or trustee.

[27] In this context, it was not possible for L. D.'s estate to apply for the death benefit within the 60-day deadline set out in s. 64(1) of the Regulations for the simple reason that it did not yet exist and would not do so until April 12, 2015, when the court appointed A. Z. trustee.

[28] Until that point, J. L. and A. Z. were on an equal footing; both had applied for the death benefit on the grounds that they were the deceased's next of kin and that they were responsible for her funeral expenses. In denying A. Z.'s claim because she was not, at the time of application, the estate's trustee, the General Division felt the need to address the fact that neither had J. L., at the time of his application, claimed responsibility for the funeral. In paragraph 48 of its decision, the General Division wrote:

> The Tribunal sees no reason why the information the [Added Party] provided to the Respondent in June or July 2015 (i.e. proof he had paid for the funeral expenses) cannot be treated as an extension of his application. He was adding to the reasons why he felt the death benefit should be paid to him. The fact that this information was not in existence at the time that he applied should not preclude it from consideration.

A similar logic could have been used to ratify A. Z.'s application. She was not the official representative of her sister's estate when she applied on March 2, 2015, although a court appointed her to that position the following month. The General Division could have similarly

treated information of her appointment as an extension of her application, but for unexplained reasons, it chose not to do so.

[29] In my view, the General Division applied one standard to J. L. and another to A. Z. As mentioned, whether this inequity amounted to a breach of natural justice, as A. Z.'s counsel claims, is moot because this appeal has been decided on an issue of legal error.

Issue 4: Did the General Division base its decision on an erroneous finding that A. Z. "was not completely forthcoming" when she applied for the death benefit?

[30] A. Z. objects to the General Division's finding that she withheld information by failing to disclose that she was aware J. L. had paid for the funeral.

[31] Again, I do not find it necessary to fully address this issue. I do not know whether the General Division intended to suggest that A. Z. was dishonest or lacking in credibility, but it appears to have assigned her supposed omission great significance, characterizing it as an "important consideration that cannot be overlooked." However, as A. Z.'s counsel notes, the application form was designed only to elicit information on who was "responsible" for the funeral expenses and not who actually paid for them. In any event, as discussed above, given the discretion that was available to the Minister once the 60-day deadline had passed, it was irrelevant who was responsible—or who in fact paid—for the deceased contributor's funeral expenses.

DISPOSITION

[32] Having found an error in the General Division's decision, I must now decide what to do about it. The DESDA sets out the Appeal Division's remedial powers. Under s. 59(1), I may give the decision that the General Division should have given; refer the matter back to the General Division for reconsideration in accordance with directions; or confirm, rescind, or vary the General Division's decision.

[33] I am satisfied that this is an appropriate case for the Appeal Division to give the decision that the General Division should have given. The General Division's error was purely the result

of a misinterpretation of the law, and no material finding of fact was at issue. The record before me is sufficiently complete to allow me to make an informed decision on the merits.

[34] Moreover, the Federal Court of Appeal has held that a decision-maker should consider the length of time an application for CPP benefits has taken, as well as the additional delay that would be incurred if the matter were referred back for a new hearing.[4] The Appellant applied for the death benefit in 2015, more than three years ago. If this matter were referred back to the General Division, there would be further delay, leading to an outcome that is easily foreseen, if the law is correctly applied to these facts. There is also the Tribunal's mandate, which requires it to conduct proceedings as quickly as the circumstances and the interests of fairness and natural justice permit.

[35] Here, it is undisputed that A. Z. was the court-appointed representative of her late sister's estate. Although she did not apply for the CPP death benefit in her capacity as representative within the prescribed 60-day period, the Minister nevertheless had the discretionary authority to bypass J. L.'s claim and favour the estate. Neither the General Division nor the Appeal Division has the jurisdiction to interfere with that discretion.

[4] *D'Errico v. Canada (Attorney General)*, 2014 FCA 95.

CONCLUSION

[36] Since the General Division erred in law, the appeal is allowed. The Minister's decision to pay the CPP death benefit to A. Z. stands.

Member, Appeal Division

METHOD OF PROCEEDING:	On the record
REPRESENTATIVES:	Jacqueline Strybos, for the Appellant Christian Malciw, for the Respondent J. L., self-represented