



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *R. S. v Minister of Employment and Social Development*, 2019 SST 1043

Tribunal File Number: AD-19-336

BETWEEN:

R. S.

Appellant

and

Minister of Employment and Social Development

Respondent

and

Z. T.

Added Party

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Neil Nawaz

DATE OF DECISION: October 17, 2019

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] J. S., a contributor to the CPP, passed away on June 8, 2017 without a will. On June 13, 2017, the Added Party, Z. T., applied for the CPP death benefit, claiming to be the late J. S.'s common-law partner. In her application, she also declared that she was responsible for his funeral expenses and submitted a bill indicating that they had been paid in full. On July 10, 2017, the Respondent, the Minister of Employment and Social Development (Minister) approved the application and subsequently paid the Added Party the maximum death benefit of \$2,500.

[4] On November 10, 2017, the Appellant, R. S. (the deceased contributor's brother), also applied for the death benefit. In his application, he declared that he was the court-appointed administrator of his late brother's estate (Estate). In an enclosed letter, the Appellant alleged that the Added Party had somehow used the deceased contributor's credit card to pay for the funeral. Therefore, he argued, the death benefit should have gone toward reimbursing the Estate, rather than the Added Party.

[5] In a letter dated November 27, 2017, the Minister informed the Appellant that it could not approve his death benefit application, since he had not applied within 60 days of the date of death and, in the meantime, someone else had applied first. The Minister upheld this decision on reconsideration.

[6] The Appellant appealed the Minister's decision to the General Division of the Social Security Tribunal. The General Division determined that an oral hearing was unnecessary and, in a decision dated April 1, 2019, dismissed the appeal. The General Division examined the applicable provisions of the *Canada Pension Plan* and its regulations and found that, since the

Estate had not applied within 60 days of the deceased contributor's death, the Minister had the discretion to pay the death benefit to the person who, in its view, had paid for the funeral.

[7] On May 9, 2019, the Appellant submitted an application requesting leave to appeal to the Appeal Division, alleging that the General Division based its decision on important factual errors. In particular, the Appellant argued that the Added Party was not entitled to the CPP death benefit and, to get it, made the following misrepresentations on her application:

- She did not pay for the deceased contributor's funeral; the Estate did. She used the deceased contributor's credit card, and the funeral home erroneously placed the Added Party's name on the statement. She then took advantage of this error to apply for the death benefit.
- She was never the deceased contributor's common-law spouse; she was merely his girlfriend. As indicated by his most recent income tax, return, the deceased contributor regarded himself as single.

[8] In a decision dated May 28, 2019, I granted leave to appeal because I saw an arguable case that the General Division had ignored relevant factors, including the possibility that the Added Party had not, in fact, paid for his funeral and was not, as she claimed, the deceased contributor's common-law spouse.

[9] In a letter dated July 8, 2019, the Minister conceded that the General Division based its decision on an erroneous finding of fact. The Minister agreed that the General Division ignored relevant information on file pointing to the Estate as the party who had paid the deceased contributor's funeral expenses.

[10] At that point, I called a hearing. I decided to proceed by teleconference because, in my view, the format 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 record and considered the parties' written submissions, I have concluded that the General Division erred in rendering its decision. I have decided that the appropriate remedy in this case is to make my own assessment of its merits and give the decision

that the General Division should have given. As a result, I am overturning the General Division's decision and substituting it with my own decision to grant the Appellant the CPP death benefit.

ISSUE

[12] According to section 58(1) of the *Department of Employment and Social Development Act* (DESDA), there are only three grounds of appeal to the Appeal Division: the General Division failed to observe a principle of natural justice; erred in law; or based its decision on an erroneous finding of fact made in a perverse or capricious manner or without regard for the material.

[13] The Minister has conceded that the General Division ignored information suggesting that the Estate paid for the deceased contributor's funeral. I will limit my remarks to whether that oversight amounted to an error under one or more of the grounds of section 58(1) of the DESDA.

ANALYSIS

[14] I am satisfied that the General Division erred in law by failing to consider whether the Minister judicially exercised its discretionary authority to select a death benefit beneficiary.

[15] The law governing the CPP death benefit is surprisingly complex. Section 71 of the *Canada Pension Plan* makes it clear that the estate of a deceased contributor has priority, subject to certain exceptions, over 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 [emphasis added].

The “prescribed time interval” is important, and it is set out in section 64(1) of the *Canada Pension Plan Regulations* (CPP 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 [emphasis added].

[16] In this case, it was not possible for the Estate to apply for the death benefit within the 60-day deadline set out in section 64(1) of the CPP Regulations for the simple reason that it did not yet legally exist and would not do so until October 11, 2017, when Ontario’s Superior Court of Justice appointed the Appellant trustee of his brother’s estate.¹

[17] *Cormier v Canada*² is the leading case on how the CPP death benefit provisions are to be applied. Although *Cormier*’s facts differ from the present case, the Federal Court of Appeal set down several broad principles:

[...] subsection 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

¹ See Certificate of Appointment of Estate Trustee without a Will dated October 11, 2017, GD2-31.

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

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.

Cormier also makes it clear that “the 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 used of the word “may” in section 71(2) and again in section 64(1) of the CPP Regulations.

[18] The General Division determined that, since the Estate did not apply within 60 days of the deceased contributor's death, the Minister had the discretionary authority to direct the death benefit to the person who it found had paid for funeral expenses. However, that does not end the matter. *Canada v Uppal*³ requires the Minister has a duty to exercise its discretion in a “judicial manner.” In *Canada v Purcell*,⁴ the Federal Court, citing *Canada v Smith*,⁵ was clear that a decision-maker must act in good faith when exercising discretionary power and that discretionary decisions are reviewable if a decision-maker has acted in bad faith, erred in law, or relied on a misapprehension of the facts:

I take that term to mean that if it can be established that the decision-maker acted in bad faith or for an improper purpose or motive, took into account an irrelevant factor or ignored a relevant factor or acted in a discriminatory manner, then any decision which flows from the exercise of a discretionary power will be set aside.

In my view, the General Division erred in law by failing to direct its mind to whether the Minister exercised its discretion judicially. In doing so, the General Division ignored relevant factors in coming to its decision, including clear evidence that it was the Estate, and not the Added Party, who paid for the deceased contributor's funeral.

REMEDY

³ *Canada (Attorney General) v Uppal*, 2008 FCA 388.

⁴ *Canada (Attorney General) v Purcell*, [1996] 1 FCR 644.

⁵ *Canada (Attorney General) v Smith* (1994), 167 N.R.105 (FCA).

[19] Having found an error in the General Division's decision, I must now decide what to do about it. Under the DESDA, the Appeal Division may give the decision that the General Division should have given, refer the matter back to the General Division for reconsideration, or confirm, rescind, or vary the General Division's decision.⁶ The Appeal Division also has the power to decide any question of law or fact that is necessary for the disposition of any application made under the DESDA.⁷

The record is sufficiently complete

[20] During the Appeal Division hearing, I asked the parties about what they believed would be an appropriate remedy if I were to find one or more errors in the General Division's decision. The Appellant thought that the record was complete enough to enable me to decide the merits of his claim in his favour. The Added Party insisted that she had done nothing wrong in using the deceased contributor's credit card to pay for his funeral, but she also seemed resigned to losing her case: "You do what you have to do." The Minister, echoing its letter of July 8, 2019, conceded that the General Division had erred and urged me to give the decision that the General Division should have given and award the Appellant the death benefit.

[21] In the end, I have decided that there is enough information on the record to allow me to make an informed decision about who, in substance, has the stronger claim to the death benefit. All of the parties have been given an adequate opportunity to submit written evidence and arguments, and I have considerable material before me about what parties did in the months following the deceased contributor's death and when they did it. However, there is one difficulty: the General Division chose not to hold an oral hearing earlier this year. As a result, the Added Party never had a chance to testify about either her relationship to the deceased contributor or the circumstances under which she arranged for his funeral.

[22] Although I would have been interested to hear a recording of such testimony, had it been available, I find that it is not necessary to decide this matter, so clear and compelling is the documentary evidence already on the record. Furthermore, the Federal Court of Appeal has held

⁶ DESDA, section 59(1).

⁷ DESDA, section 64.

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.⁸ The deceased contributor died two 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 the established 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.

The evidence indicates that the Appellant is entitled to the death benefit

[23] If the General Division had not erred, it would have had no choice but to award the Appellant the death benefit. One of the General Division's errors resulted from a misinterpretation of the law; the other arose from its disregard of the material before it, and that material unambiguously indicated that the Estate paid the deceased contributor's funeral expenses.

[24] In this case, section 71(1) of the *Canada Pension Plan* requires the Minister to pay the death benefit to the estate of a deceased contributor. Exceptions to this requirement arise if: (i) the Minister is satisfied that there is no estate; (ii) 60 days have elapsed after the death of the deceased contributor and the estate has not applied for the death benefit; or (iii) the amount of the death benefit is below a prescribed amount. Only when one of these exceptions applies is the Minister free to use its discretion to award the death benefit to a party other than the deceased contributor's estate.

[25] The rules also require the Minister make "reasonable inquiries" as required by section 71(2)(a) of the *Canada Pension Plan*, about the existence of an estate. I saw nothing in the record to indicate that the Minister fulfilled this obligation. Indeed, the Minister did not even wait for the 60-day timeline to pass before accepting the Added Party's death benefit application. The record shows that the Minister paid the death benefit to the Added Party only 32 days after

⁸ *D'Errico v Canada (Attorney General)*, 2014 FCA 95.

the death of the deceased contributor—well before the time in which one might reasonably expect an individual to obtain court certification to act as an administrator in an intestacy.

[26] The obligation to pay the death benefit to a deceased contributor's estate does not necessarily end because the 60-day timeline has passed or another party has submitted a competing application. The Minister's discretion to pay another party must be exercised judicially. In this case, not only did the Minister pay the Added Party prematurely, it took her claims of entitlement at face value. I see no indication that the Minister took reasonable steps to satisfy itself that the Added Party was the deceased contributor's common-law spouse or that she had, in fact, paid for his funeral out of her own pocket.

[27] In fact, there is compelling evidence on the record that it was not the Added Party who incurred the funeral expense, but the Estate. In December 2017, the Appellant submitted a Scotiabank statement indicating that a credit card in his late brother's name had been used to pay the \$13,350 cost of the funeral.⁹ It may well be true, as the Added Party claimed, that the deceased contributor directed her to pay for the funeral using his credit card, but that is ultimately irrelevant to the question of entitlement. In the absence of evidence that the Added Party was the deceased contributor's common-law spouse or that she paid, or was responsible, for his funeral expenses, I find that the Estate should have received the death benefit.

[28] By all appearances, the Minister favoured the Added Party merely because her application happened to arrive before the Appellant's. In my view, the rules governing the death benefit should not be interpreted to mean "first come, first served."

CONCLUSION

[29] Since the General Division committed factual and legal errors, the appeal is allowed. I am satisfied that, if the General Division had properly assessed the evidence and applied the law, it would have arrived at a different result than the one it did. My own assessment of the record satisfies me that since the Estate paid for the deceased contributor's funeral, it is properly owed

⁹ GD2-11.

the CPP death benefit under section 71(2) of the *Canada Pension Plan* and section 64(1) of the CPP Regulations.



Member, Appeal Division

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| HEARING DATE: | October 11, 2019 |
| METHOD OF PROCEEDING: | Teleconference |
| APPEARANCES: | R. S., the Appellant T. H., representative for the Appellant Susan Johnstone, representative for the Respondent Z. T., the Added Party |