



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *J. R. v Minister of Employment and Social Development*, 2019 SST 1357

Tribunal File Number: AD-19-436

BETWEEN:

J. R.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Valerie Hazlett Parker

DATE OF DECISION: November 21, 2019

DECISION AND REASONS

DECISION

[1] The appeal is allowed. The decision that the General Division should have given is made. The Claimant is entitled to the survivor benefit.

OVERVIEW

[2] J. R. (Claimant) and A. F. (Deceased) began to live in a common-law relationship in 2012. The Minister of Employment and Social Development and the Claimant disagree about whether the common-law relationship ended in 2016. The Deceased passed away in November 2016. The Claimant applied for a Canada Pension Plan survivor's pension after his death. The Minister refused the application because it decided that the Claimant and Deceased had not cohabited in a common-law relationship for one year preceding the Deceased's death.

[3] The Claimant appealed this decision to the Tribunal. The Tribunal's General Division dismissed the appeal for the same reason. I granted leave to appeal this decision to the Tribunal's Appeal Division because the appeal had a reasonable chance of success on the basis that the General Division made an error in law by requiring that the Claimant be in a common-law relationship with the Deceased for one year immediately preceding his death.

[4] After considering the General Division decision, and the parties written and oral submissions, I am persuaded that the General Division made an error in law in its interpretation of the legal test for determining the existence of a common law relationship. The Claimant resided with the Deceased in a conjugal relationship for over one year and at the time of his death. Therefore, she is entitled to the survivor benefit.

PRELIMINARY MATTER

[5] The Federal Court of Appeal released its decision in the *Perez* case¹ just before this appeal hearing. Counsel for the parties had not had time to consider it and prepare submissions regarding it. Therefore, they were given time after the hearing to make written submissions on

¹ *Perez v. Hull*, 2019 FCA 238

the impact of this decision on this appeal. These submissions were considered when making this decision.

ISSUES

[6] Did the General Division make any of the following errors in law

- a) It considered the wrong the legal test for common-law partner under the *Canada Pension Plan*;
- b) It failed to consider that the parties' separation was only temporary;
- c) It failed to consider that the parties could remain in a common-law relationship despite having different residences; or
- d) It failed to consider how similar provincial legislation has been interpreted?

[7] Did the General Division base its decision on an erroneous finding of fact under the *Department of Employment and Social Development Act* (DESD Act) as follows:

- a) It failed to consider that the parties continued to have sex three times per week;
- b) It failed to consider that the Deceased wished to live in the same residence as the Claimant;
- c) It placed undue weight on evidence that the parties did not have a joint bank account at the time of the Deceased's death when they never had a joint account;
- d) It failed to give weight to the Claimant's witness' evidence, the fact that the Contributor was the Deceased's only beneficiary on his employment benefits or that his CPAP machine was moved to the Claimant's residence in July 2016;

ANALYSIS

[8] The DESD Act governs the Tribunal's operation. It provides rules for appeals to the Appeal Division. An appeal is not a re-hearing of the original claim, but a determination of whether the General Division made an error under the DESD Act. There are only three kinds of

errors that can be considered. They are that the General Division failed to observe a principle of natural justice, made an error 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 before it.² The Claimant asks the Appeal Division to intervene because the General Division made errors in law and based its decision on erroneous findings of fact. Her arguments are considered below.

Issue 1: The General Division erred in law regarding the legal test for common-law partner

[9] The *Canada Pension Plan* (CPP) provides for a survivor pension to be paid to the survivor of a deceased contributor.³ It defines “survivor” as the person who was married to the contributor at the time of death, or a person who was the common-law partner of the contributor at the time of death.⁴

[10] Further, the CPP states that a common-law partner is 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. In the case of a contributor’s death, the relevant time is the time of death.⁵

[11] The parties agree that in order for the Claimant to be the Deceased’s common-law partner, she must have cohabited with him in a conjugal relationship for at least one year, and have been in such a relationship at the time of his death. However, the Claimant says that the one year of continuous cohabitation need not be immediately before the Deceased’s death. She argues that the General Division made an error in law when it imposed the requirement that she be in a conjugal relationship for one year leading up to the Deceased’s death.⁶

[12] The Federal Court decision in *Beaudoin*⁷ states that since the definition of common-law partner does not specifically state that the continuous period of one year must immediately precede the death, that interpretation should not be given to the legislation. In other words, to qualify for a survivor’s pension, a claimant must prove that they were in a conjugal relationship

² DESD Act s. 58(1)

³ *Canada Pension Plan* s. 44(1)(d)

⁴ *Ibid.* s. 42(1)

⁵ *Ibid.* s. 2(1)

⁶ General Division decision at para. 4, 9

⁷ *Beaudoin v. Canada (Minister of National Health and Welfare)*, 1993 CanLII 2961

with the deceased contributor for at least one year, and that they were in such a relationship at the time of the contributor's death, not that the conjugal relationship existed for at least one year immediately before the contributor's death. Although the legislation has changed since this decision was made, it has changed only to include same-sex partners. The requirement to reside in a conjugal relationship has not changed. Therefore, this decision is binding on the Tribunal.

[13] Minister's counsel argues that the General Division did not err when required the one year of cohabitation to be immediately before the Deceased's death. It refers to the *Hodge* decision⁸ to support its argument. In that case, the Claimant applied for a survivor pension, and the application was refused because she was separated from the deceased contributor when he died. The Claimant argued that the CPP, at is read at that time, breached her rights under the *Canadian Charter of Rights and Freedoms*. The Minister argues that the Court in that case did not disturb the interpretation of common-law partner that prior courts had relied on, and therefore, it confirmed that to be a common-law partner the conjugal relationship must exist for one year leading up to the contributor's death.

[14] However, the Court in *Hodge* did not turn its mind to this issue of when the parties had to have cohabited for one year. There was no question that Ms. Hodge and the contributor were not common-law partners when he died. The relationship clearly ended before then. Therefore, this case can be distinguished on its facts from the one before me. In this case, the parties were cohabiting when the Deceased died.

[15] The Minister also relies on the *Perez* decision.⁹ In that case, the contributor's legal spouse and his partner applied for the survivor benefit. The partner argued that she was entitled to the benefit because she was the contributor's common-law partner. The Tribunal found that she was not the common-law partner and dismissed her appeal. The partner applied for judicial review of this decision. The Federal Court of Appeal decided that the Tribunal's decision was reasonable and dismissed the application. The basis for the application for judicial review in that case was that the Tribunal had failed to observe a principle of natural justice - it did not hold an oral hearing before making its decision and it failed to engage an interpreter for the Claimant, and

⁸ *Hodge v. Canada (Minister of Human Resources Development)*, 2004 SCC 65

⁹ 2019 FCA 238

that it failed to consider all of the evidence that was before it. The Court did not specifically turn its mind to whether a common-law partner must be in a conjugal relationship with a contributor for one year leading up to the contributor's death. Therefore, I am not persuaded that the Court endorsed this requirement in order for a claimant to be a common-law partner.

[16] For these reasons, I find that the General Division made an error in law when it required that the Claimant be in a conjugal relationship with the Deceased for a year leading up to his death. The Appeal Division must intervene on this basis.

Issue 2: The General Division did not fail to consider whether the parties' separation was temporary

[17] The Claimant also argues that the General Division made an error in law because it failed to consider that her separation from the Deceased was only from February 2016 to July 2016, and so was temporary. Consequently, she argues, the parties continued to be common-law partners. However, the General Division considered this. The decision states that it considered whether either party regarded the relationship at an end, by their conduct and demonstrated that such a state of mind was a settled one.¹⁰

[18] The decision also states that after February 2016, their continued sexual relationship was kept secret from others, and they did not attend public or family events portraying themselves to be in a relationship.¹¹ It decides that while there is evidence that the Contributor and Deceased were trying to re-establish a relationship after July 2016, it was not a continuous common-law relationship from November 2015 to November 2016 when the Claimant died.¹² Therefore, the General Division made no error in law in this regard.

[19] That the Claimant disagrees with the General Division's conclusion on this does not demonstrate that the General Division erred.

¹⁰ General Division decision at para. 10

¹¹ General Division decision at para. 14

¹² *Ibid.* at para. 15

Issue 3: The General Division considered all relevant factors to decide whether the parties were common-law partners

[20] The Claimant says that the General Division erred because it failed to consider all the relevant factors to decide whether there was a common-law relationship between the Claimant and the Deceased. The Pension Appeals Board sets out a number of factors to consider when deciding this,¹³ including financial interdependence, a sexual relationship, a common residence, a sharing of household responsibilities, shared use of assets, shared vacations, being named as beneficiary in the other's will and health care benefits, where they kept their clothing, and who cared for the one who was ill. The General Division considered these factors.¹⁴

[21] The General Division decision specifically states that the Deceased signed a lease on his own apartment after February 2016, he left personal possessions at the Claimant's home, but may have been "a hoarder" who also kept things at his mother's home,¹⁵ the parties had no joint bank accounts or utilities and they never had joint property.¹⁶ The Claimant was listed as the Deceased's beneficiary on his extended health care plan and continued to receive some of his mail.¹⁷ In addition, the decision states that the parties continued to have a sexual relationship, although it was kept secret.

[22] The General Division made no error in law in this regard because it considered the relevant factors.

Issue 4: The General Division did not err by failing to consider provincial legislation

[23] In argument, the Claimant urges me to consider decisions made under provincial legislation that has similar wording to the CPP. However, this is not necessary. The provincial legislation is not the same as the CPP. Therefore, how it has been interpreted is not relevant to

¹³ *Betts v. Shannon* (October 20, 2001), CP 11654

¹⁴ See General Division decision at para. 10

¹⁵ *Ibid.* at para. 11

¹⁶ *Ibid.* at para. 12

¹⁷ *Ibid.*

the matter before me. Instead, this Tribunal must follow court decisions that have interpreted the CPP.

[24] The General Division made no error when it failed to consider how provincial benefits legislation has been interpreted. The appeal fails on this basis.

Issue 5: The General Division did not base its decision on an erroneous finding of fact

[25] The Claimant also argues that the General Division based its decision on a number of erroneous findings of fact. In order to succeed on this basis, she must establish three things: that a finding of fact was erroneous (in error); that the finding was made perversely, capriciously, or without regard for the material that was before the General Division; and that the decision was based on this finding of fact.¹⁸ For the reasons set out below, the appeal fails on this basis.

[26] First, the Claimant says that the General Division based its decision on an erroneous finding of fact because it failed to consider that she and the Deceased continued to have sexual relations regularly. However, the General Division decision specifically refers to this.¹⁹ It also states that this was kept secret from others, including the parties' families.²⁰

[27] Second, the Claimant argues that the General Division failed to consider that the Deceased wished to live in her residence. However, one party's intention is not relevant to the question of whether two parties were common-law partners. It is their conduct that matters.²¹

[28] Third, the Claimant contends that the General Division placed undue weight on evidence that they did not have a joint bank account at the time of the Deceased's death, when they never had a joint account. The General Division decision states, "there were no shared bank accounts or utilities and there never was any jointly owned property."²² Also, in the concluding paragraph of the decision, the General Division lists the factors that it considered, including that the parties were having sexual relationships with others, the Deceased leased his own apartment and kept

¹⁸ *Rahal v Canada (Citizenship and Immigration)*, 2012 FC 319

¹⁹ General Division decision at para. 13

²⁰ *Ibid.* at para. 14

²¹ *Hodge*, above

²² *Ibid.* at para. 12

most of his personal property there, there was no jointly owned property or finances, and they did not present themselves to others as being in a common-law relationship.²³

[29] It is for the General Division to receive the evidence of the parties, weigh it and make a decision based on the law and the facts. The General Division did so. It is not for the Appeal Division to reweigh the evidence to reach a different decision.²⁴ Therefore, the appeal cannot succeed because the Claimant disagrees with weight given to the evidence.

[30] Finally, the Claimant argues that the General Division based its decision on an erroneous finding of fact because failed to give weight to the Claimant's witness' evidence, the fact that the Contributor was the Deceased's only beneficiary on his employment benefits or that his CPAP machine was moved to the Claimant's residence in July 2016.

[31] However, again it is for the General Division to weigh the parties' evidence. In addition, the General Division does not need to recite every piece of evidence that is presented to it in its decision. It is presumed to have considered all of it.²⁵ Nothing before me rebuts this presumption. The appeal fails on this basis.

REMEDY

[32] The Appeal Division must intervene in this case because the General Division made an error in law when it required the Claimant to have been living in a conjugal relationship with the Deceased for one year leading up to his death.

[33] The DESD Act sets out what remedies the Appeal Division can give when it intervenes. This includes referring the matter back to the General Division or giving the decision that the General Division should have given.²⁶ In addition, the Tribunal can decide any questions of law or fact necessary to dispose of an appeal,²⁷ and the *Social Security Tribunal Regulations* require

²³ Ibid. at para. 17

²⁴ *Simpson v. Canada (Attorney General)*, 2012 FCA 82

²⁵ *Canada v. South Yukon Forest Corporation*, 2012 FCA 165

²⁶ DESD Act s. 59(1)

²⁷ DESD Act s. 64(1)

that appeals be concluded as quickly as the circumstances and considerations of fairness and natural justice permit.²⁸

[34] It is appropriate that the Appeal Division give the decision that the General Division should have given in this case. The written record is complete. This matter has been ongoing for some time, and further delay would be incurred if the appeal was referred back to the General Division. The facts are not in dispute.

[35] The facts are summarized as follows:

- the Claimant began to be the Deceased's common-law partner in 2012
- the parties separated in February 2016 after an argument over the Deceased's infidelity
- In February 2016 the Claimant presented the Deceased with an informal restraining order and he had to move out
- The Deceased rented his own apartment in 2016
- The Deceased moved most of his belongings to his apartment, although some were left at the Claimant's home and his mother's home
- The parties never had joint bank accounts or any jointly owned property
- The Deceased named the Claimant as his beneficiary on his health benefits
- The Claimant and Deceased continued to have sexual relations regularly after February 2016, and this was kept secret from family and friends until they reconciled
- The parties attended two social events after February 2016, but they did not portray themselves as being in a relationship until they reconciled
- The Deceased moved back to the Claimant's home in July 2016

²⁸ *Social Security Tribunal Regulations* s. 3(1)

- The Claimant was not involved in any end-of-life decision-making, or funeral planning
- The Deceased's children took possession of his personal property including vehicles after his death

[36] The Court has set out a number of factors that are to be considered when deciding whether a claimant was a common-law partner of a deceased contributor.²⁹ They include:

- a) Financial interdependence – the parties were financially independent;
- b) Sexual relationship – this continued between the parties;
- c) Common residence – the parties resided together from 2012 until February 2016. The Deceased did not stay overnight with the Claimant after February 2016, and he had his own apartment. He moved back into the Claimant's home in July 2016 and they resided together until the Deceased's death;
- d) Gifts for one another – there was no evidence on this;
- e) Sharing of household responsibilities – there was no evidence that this was done;
- f) Shared assets – none;
- g) Shared vacations, responsibilities for children – the parties took one day vacation together in 2016³⁰; they had no children;
- h) Expectation each day of mutual dependency – there was no evidence on this.
- i) Named as beneficiary – the Deceased named the Claimant as beneficiary on his health benefits;
- j) Where clothing was kept – the Deceased did not keep his clothing and personal items mostly or exclusively at the Claimant's home. He had belongings in a number of

²⁹ *Betts v. Shannon*, above

³⁰ General Division hearing recording approximate minute 24:00 although the exact time may be different depending on what device is used to listen to the recording

places. The Claimant testified that when they resided together his CPAP machine was at her home (he had to use this when sleeping or risk losing his driver's license);

- k) Care when ill – The parties were healthy before the Deceased passed away;
- l) Communication between the parties – they communicated frequently and regularly;
- m) Public recognition – during the 2016 separation the parties kept their sexual relationship secret and did not portray themselves to others as a couple;
- n) Funeral arrangements – the Deceased's children attended to all end-of-life matters.

[37] I have considered the parties written submissions, the General Division decision and listened to the recording of the General Division hearing. After considering all of this, I find that the parties were common-law partners from 2012 until February 2016. At that time the Claimant insisted on a separation from the Deceased because of his involvement with another woman. However, the parties continued to have regular and frequent contact and sexual relations. The evidence is undisputed that the parties reconciled in July 2016, and the Deceased moved back into the Claimant's home. Their conjugal relationship continued until the Deceased passed away in November 2016.

[38] Therefore, the Claimant was the Deceased's common-law partner for at least one year and at the time of death. This year of cohabitation need not be immediately before the Deceased's passing. She is entitled to the survivor benefit.

CONCLUSION

[39] The appeal is allowed.

[40] The Claimant is entitled to the survivor benefit.

Valerie Hazlett Parker
Member, Appeal Division

HEARD ON:	October 18, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	J. R., Appellant Stanley Mayes, Counsel for the Appellant Tiffany Glover, Counsel for the Respondent