



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *H. H. v Minister of Employment and Social Development and M. P.*, 2020 SST 106

Tribunal File Number: AD-19-200

BETWEEN:

**H. H.**

Appellant

and

**Minister of Employment and Social Development**

Respondent

and

**M. P.**

Added Party

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**SOCIAL SECURITY TRIBUNAL DECISION**  
**Appeal Division**

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DECISION BY: Kate Sellar

DATE OF DECISION: February 14, 2020

## DECISION AND REASONS

### DECISION

[1] The appeal is dismissed. The General Division did not make an error. The Claimant is not entitled to the survivor's pension under the *Canada Pension Plan* (CPP).

### OVERVIEW

[2] H. H. (Claimant) applied for a survivor's pension under the CPP in June 2011. She stated that when J. P. (the Contributor) died, she had been his common-law spouse. She stated that she and the Contributor began living at the same address on September 1, 2001. She said they remained in the same house until shortly before his death.

[3] The Minister initially approved the Claimant's application. Later, the Minister reconsidered. The Minister decided that the Claimant was not entitled to the survivor's pension. Based on new information, the Minister refused to continue paying the survivor's pension to the Claimant in January 2016.

[4] The Claimant appealed the reconsideration decision and the demand for her to repay the benefits she received. The General Division dismissed her appeal. The General Division confirmed that it was the Minister's choice (discretion) to require the repayment. The Claimant appealed the General Division decision to the Appeal Division.

[5] I gave the Claimant permission (leave) to appeal the General Division decision. I found that there was an arguable case (that is a low threshold) that the General Division made an error of law by making a finding of fact that was different from what the Superior Court of Justice found about the Claimant's relationship. I found that it was possible that given how key this issue was, the General Division member may not have explained that part of the decision sufficiently.

[6] I must decide whether it is more likely than not that the General Division made an error under the *Department of Employment and Social Development Act* (DESDA).

[7] Having the benefit of the arguments from all of the parties, I find that the General Division did not make an error. The appeal is dismissed.

## **ISSUES**

[8] The issues are:

1. Did the General Division make an error of law by finding that the Claimant was in a “caregiver/friendship” type of relationship without evidence to support that finding?
2. Did the General Division make an error of fact by ignoring the evidence that the hospital considered her the Contributor’s spouse?
3. Did the General Division make an error of law by reaching a finding of fact about the Claimant’s relationship with the Contributor that was contrary to the findings of court proceedings dealing with the Contributor’s estate?
4. Did the General Division fail to provide a fair process at the hearing by allowing the Added Party to “ambush” the Claimant?
5. Did the General Division fail to provide a fair process by failing to give the Claimant’s paralegal the opportunity to present the case?
6. Did the General Division make an error of law or fail to provide a fair process by considering documents in the appeal file that were protected by privilege?

## **ANALYSIS**

### **Appeal Division Review of General Division Decisions**

[9] The Appeal Division does not give people a chance to re-argue their case in full at a new hearing. Instead, the Appeal Division reviews the General Division’s decision to decide whether there is an error. That review is based on the wording of the DESDA, which sets out the three

possible reasons that can form the basis for an appeal of a General Division decision (these reasons are also so called “grounds of appeal”).<sup>1</sup>

[10] First, the DESDA says that the Appeal Division can review a General Division decision where the appellant says that the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction.<sup>2</sup>

[11] Failing to observe a principle of natural justice is about failing to provide a fair process. What fairness requires depends on the context of each case. The Supreme Court of Canada set out a list of factors to consider when deciding whether a process is fair.<sup>3</sup> At the heart of this question about fairness is whether, considering all the circumstances, the people impacted by the process had a meaningful opportunity to present their case fully and fairly.

[12] Part of the duty to act fairly is allowing people the right to be heard. The right to be heard is also about giving people the chance to make arguments on every fact or factor likely to affect the decision.<sup>4</sup>

[13] Second, the DESDA says that the Appeal Division can review a General Division decision when the appellant says that the General Division “base(d) 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.”<sup>5</sup> This means that for the Appeal Division to find an error of fact, the fact needs to be both important and incorrect. Also, the General Division needs to have found the fact in a way that willfully goes against the evidence, is not guided by steady judgment, or ignores the evidence.<sup>6</sup>

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<sup>1</sup> DESDA, s 58(1).

<sup>2</sup> DESDA, s 58(1)(a).

<sup>3</sup> The factors are in the case called *Baker v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC).

<sup>4</sup> The Federal Court explains this in a case called *Kouama v Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 9008 (FC).

<sup>5</sup> DESDA, s 58(1)(c)

<sup>6</sup> The Federal Court explained this in a case called *Rahal v Canada (Minister of Citizenship and Immigration)*, 2012 FC 319.

[14] Third, the DESDA says that the Appeal Division can review a General Division decision where the appellant says that the General Division made an error of law.<sup>7</sup>

### **CPP Survivor's Pension**

[15] To receive a CPP survivor's pension, a claimant must be the survivor of a deceased contributor.<sup>8</sup> A survivor is a person who was living in a common-law relationship with the deceased contributor for at least 12 consecutive months before death, or was legally married to the deceased at the time of death, if the deceased contributor was not in a common-law relationship at the time of death.<sup>9</sup>

[16] According to the CPP, a common-law partner means "a person who is cohabiting with the contributor in a conjugal relationship" at the time of the contributor's death, "having so cohabited with the contributor for a continuous period of at least one year."<sup>10</sup> To decide whether a survivor meets that definition of being in a common-law relationship, the General Division considers facts about the lives of the parties and their relationship.<sup>11</sup>

### **Did the General Division make an error of law by making a finding without evidence?**

[17] The General Division did not make an error of law. The General Division had a basis in evidence for the finding that the Claimant was in a relationship that was more consistent with a caregiver/friendship type of relationship.

[18] Making a finding of fact without any evidentiary basis can be an error of law under the DESDA.<sup>12</sup>

[19] The General Division member found that there was no common-law relationship between the Claimant and the contributor at the time of his death. The member stated, "the nature of this

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<sup>7</sup> DESDA, s 58(1)(b).

<sup>8</sup> *Canada Pension Plan*, s 44(1)(d).

<sup>9</sup> *Canada Pension Plan*, s 42(1).

<sup>10</sup> *Canada Pension Plan*, s 2.

<sup>11</sup> The case that explains that is called *Beaudoin v Canada (Minister of National Health and Welfare)*, 1993 CanLII 2961 FCA.

<sup>12</sup> *R v JMH*, 2011 SCC 45, at para 25; *Murphy v Canada (Attorney General)*, 2016 FC 1208, at para 36.

type of relationship is unclear but is more consistent with a caregiver/friendship in lieu of rent arrangement.”<sup>13</sup>

[20] The Claimant argues that there was no evidence that the Contributor had a disability, and so there could be no caregiver relationship between them. Without evidence of a caregiving relationship, the Claimant argues the General Division made an error.

[21] The Minister argues that the existence of a caregiver-type relationship is not important here. Eligibility for the survivor’s pension under the CPP depends on there being a common-law relationship, and that relationship is conjugal. Since there is no proof that the Claimant was in a conjugal relationship with the Contributor, there is no error.<sup>14</sup>

[22] In my view, the General Division did not make an error here. The General Division relied on a wide range of evidence to decide that although the Claimant and the Contributor were cohabiting, they did not meet the definition of a common-law relationship. To decide that the Claimant was not in a common-law relationship with the Contributor, the General Division considered evidence from:

- the court file,
- the Claimant’s own testimony,
- the Added Party’s testimony,
- the Service Canada review of the case, and
- the information provided by family members and neighbours.<sup>15</sup>

[23] The General Division did go a step further to characterize the relationship as more consistent with a caregiver/friendship in lieu of rent arrangement. In my view, the General

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<sup>13</sup> General Division decision, para 28.

<sup>14</sup> AD8-19 to 20.

<sup>15</sup> General Division decision, paras 19-29.

Division based that finding on the cross-examination of the Added Party about the initial arrangements to rent a room to the Claimant.<sup>16</sup>

[24] As a result, the finding about a friendship/caregiver relationship is not a finding without evidence. The General Division based its finding on the references to paying rent for a room when the Claimant first met the Contributor and his family. Whether the relationship was similar to that of a caregiver more specifically is a bit of a red herring. Even if the General Division was wrong about the Contributor receiving some kind of care from the Claimant, that finding is not material. The General Division considered many other factors before reaching the conclusion that the Claimant was not in a common-law relationship.

**Did the General Division make an error of fact by ignoring evidence?**

[25] The General Division did not make an error of fact by ignoring evidence that the hospital considered the Claimant to be the Contributor's spouse.

[26] The General Division does not have to refer to every piece of evidence in its decision; however, the Appeal Division can infer an error of fact when the General Division fails to mention some relevant evidence in its reasons.<sup>17</sup> The more important the evidence is that the General Division is silent about (or fails to mention), the more likely it is that the silence will lead the Appeal Division to infer that the General Division actually ignored the evidence.<sup>18</sup>

[27] The Claimant argues that the General Division made an error of fact by ignoring the fact that the hospital considered her the Contributor's spouse. She says this fact was important enough that the General Division should have discussed it.

[28] The Minister notes that although the General Division member did not refer to the evidence about the hospital, the General Division is presumed to have considered and weighed the evidence. Assigning weight to evidence is the General Division's job.<sup>19</sup>

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<sup>16</sup> General Division decision, para 23.

<sup>17</sup> The Federal Court of Appeal explains this in a case called *Simpson v Canada (Attorney General)*, 2012 FCA 82.

<sup>18</sup> The Federal Court explained that idea in *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 8667 (FC), para 17.

<sup>19</sup> AD8-22. These ideas come from a case called *Simpson v Canada (Attorney General)*, 2012 FCA 82.

[29] In my view, the General Division did not make an error of fact. The General Division did not mention the Claimant's evidence about what the hospital thought of the Claimant's relationship with the Contributor. However, that evidence was not important enough to lead me to infer that the General Division ignored it. The General Division does not need to discuss every piece of evidence. In light of the elements of a common-law relationship that the General Division looked for and considered<sup>20</sup>, the impression that hospital staff may or may not have had was not important enough to discuss.

**Did the General Division make an error of law in relation to the estate proceedings?**

[30] The General Division did not make an error of law by making a finding of fact about the Claimant's relationship with the Contributor that was contrary to the findings from the Superior Court of Justice in a case about the Claimant's rights under the *Succession Law Reform Act* (SLRA).

[31] In my decision on leave to appeal, I found that it was arguable that the General Division made an error by failing to provide reasons that addressed a key issue that required explanation.<sup>21</sup> I found that it was arguable that the General Division did not explain how the Court's findings did not suggest (or were not sufficient to show) the existence of a common-law relationship under the CPP. The Court had concluded, by a "thin margin", that the Contributor and the Claimant were spouses under the SLRA.<sup>22</sup> It was arguable that the reasons from the General Division did not directly explain how, in light of the Court's conclusions under the SLRA, the Claimant was also not a common-law spouse under the CPP.

[32] The Minister argues<sup>23</sup> that the General Division did give reasons why its decision was different from that of the Court, and as a result, there is no error. The Minister notes that the General Division reviewed the evidence in the Court file and the Claimant's testimony and weighed that evidence. The General Division member explained why he did not consider the

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<sup>20</sup> These factors are listed in a Pension Appeals Board decision and the General Division referenced them in the decision at para 30. They include key signs of a common-law relationship like financial interdependence, a sexual relationship, a common residence, shared assets, etc.

<sup>21</sup> The failure to give reasons on a key issue, in circumstances that require an explanation, can be an error of law. See *Doucette v Canada (Minister of Human Resources Development)*, 2002 FCA 292, at para 6, citing *R v Sheppard*, 2002 SCC 26.

<sup>22</sup> General Division decision, para 29. GD2-381, under s 57 of the SLRA.

<sup>23</sup> AD8-12 to 14.



Claimant the common-law spouse of the Contributor. More specifically, the General Division member explained why he gave little weight to the Claimant's evidence in the Court file and in her testimony. The General Division stated that the Claimant's credibility was suspect because of the conflicting dates she gave about when she was resident at the home of the Contributor, and on important issues such as who paid for the funeral expenses. The Claimant wrote "please see Court order" in response to questions which the General Division stated was not helpful. The General Division endorsed the Court's conclusion that "unanswered questions abound." Like the Court, the General Division preferred the evidence of the Added Party over the evidence of the Claimant.

[33] The Claimant argues that the General Division reached the wrong conclusion and that the Claimant was in a common-law relationship with the Contributor. The Claimant argues that regardless of the differences in the legal tests that the Court and the General Division were applying, the Claimant was in a relationship with the Contributor that entitled her to the CPP survivor's pension. The Claimant focussed on the time that the Claimant and the Contributor lived together as evidence of a common-law relationship under the CPP.

[34] At the leave to appeal stage, I found there was an arguable case that that General Division made an error here. That is a low threshold.

[35] However, at this stage to find an error, the threshold is higher. I must find that it is more likely than not that the General Division made an error of law.

[36] I find that the Claimant's case does not meet that higher standard. The Minister has pointed to the General Division member's efforts to explain in the decision how it was reaching a decision about the relationship between the Claimant and the Contributor that seemed to contradict the finding of the Court in some way. The General Division member explained:

- the limited role or relevance of the Court's decision to the decision that the General Division had to make;<sup>24</sup>

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<sup>24</sup> General Division decision, para 13.

- how the legal tests were different between the SLRA and the CPP;<sup>25</sup>
- how and why he preferred the evidence of the Added Party over that of the Claimant;<sup>26</sup> and
- how the unanswered questions or gaps in the Claimant's evidence led him to conclude that the Claimant and the Contributor were not in a common-law relationship within the meaning of the CPP.<sup>27</sup>

[37] On a first look (and particularly from the perspective of people without legal training), it is hard to understand how a person can be considered a spouse under a particular part of the SLRA and not be considered to be in a common-law relationship under the CPP. In this type of circumstance, the General Division's explanation on the key issue needs to be clear. I granted leave because there was an arguable that the General Division's decision was not clear on this point, which was central to the decision.

[38] However, reviewing the General Division decision in detail, I am satisfied that the General Division did not make an error of law. I accept the Minister's arguments about the efforts the General Division made to make the relationship between the Court's decision and the decision the General Division had to make clear from the outset. I accept that the General Division decision then also assess the evidence relevant to the legal test for a survivor's pension specifically. I am also satisfied that the General Division explained how the Claimant's evidence came up short in proving she was in a common-law relationship under the CPP specifically.

**Did the General Division make an error by allowing an “ambush” at hearing?**

[39] The General Division did not fail to provide a fair process. The General Division did not allow the Added Party to ambush the Claimant.

[40] The Claimant argues that the General Division member allowed the Added Party to ambush her at the hearing. The Claimant did not expect that the Added Party would attend the hearing. The Added Party asked the General Division to reschedule the hearing (an

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<sup>25</sup> General Division decision, para 10.

<sup>26</sup> General Division decision, para 24.

<sup>27</sup> General Division decision, paras 29 and 32.

adjournment), but the General Division did not grant that request. As a result, the Claimant assumed that the Added Party would not attend the hearing.

[41] The Minister notes that the Claimant's representative was a licensed paralegal. The paralegal knew or ought to have known that the Added Party could attend the hearing. The Claimant is deemed to know what her paralegal knew. In this case, the Added Party:

- Knew about the appeal;
- Was a party in the case;
- Knew about the hearing date;
- Asked for the hearing to be rescheduled; and
- Knew that the hearing was not rescheduled.<sup>28</sup>

[42] In my view, the General Division provided the Claimant with a fair process. The Added Party is a party to the proceeding. Although she requested that the General Division reschedule the hearing, the General Division did not reschedule. All parties enjoyed the same notice that the hearing would go ahead. The Claimant's assumption that the Added Party would not attend proved incorrect. However, there is no action or inaction on the General Division's part that put the fairness of the process in jeopardy simply because, in the end, the Added Party did attend the hearing.

**Did the General Division fail to give the Claimant's paralegal a fair process at the hearing?**

[43] The General Division did not fail to give the Claimant's paralegal a fair process. The General Division member gave the Claimant's paralegal the opportunity to present his case.

[44] The Claimant notes that the paralegal she had at the General Division was "cut off" multiple times during the hearing.

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<sup>28</sup> AD8-23.

[45] The Minister argues that the General Division gave the Claimant's paralegal lots of opportunity to present his case. The Minister provided over a dozen examples of the way the General Division member took steps to be sure that the Claimant's paralegal had every opportunity to participate.<sup>29</sup>

[46] In my view, the General Division gave the Claimant's paralegal appropriate opportunity to present his case. The General Division member did interject at times during the hearing to clarify issues or confirm that he had located a document the Claimant's paralegal was looking for. I accept the Minister's submission -- the General Division member took active steps to ensure that the Claimant's paralegal had every opportunity to participate. The General Division member took an opening statement from the Claimant's paralegal. The General Division member interrupted once, but only to clarify the paralegal's plan for his presentation. The paralegal made his own decisions about opening and closing statements, and about presenting evidence and cross-examining the Added Party. The General Division did not fail to provide the Claimant's paralegal with a fair process.

**Did the General Division make an error by considering privileged documents?**

[47] The General Division did not make error by considering privileged documents.

[48] The Claimant argues that there were emails in the record before the General Division that were "personal" that Mr. P. got from her lawyers. She asks how he got the emails and takes the position that the law was broken in exposing her private information to the public.<sup>30</sup>

[49] The Minister argues<sup>31</sup> that the solicitor/client privilege here belongs to the Claimant. The Minister argues that the Claimant did not raise an objection to the documents being before the General Division until the matter got to the Appeal Division, and therefore she gave up (or waived) her right to object.

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<sup>29</sup> AD8-24 to 27.

<sup>30</sup> The emails are at GD2-325. The Claimant's argument is at AD1-137.

<sup>31</sup> AD8-27.

[50] In addition, the Minister notes the General Division did not actually refer to the documents the Claimant is concerned about in the decision. It does not appear on the face of the decision that any of those documents affected the General Division's decision in any way.

[51] In my view, the parties did not rely on the privileged document to establish or disprove any key fact in dispute. There is no evidence from the decision that the General Division relied on the privileged document in its analysis of the legal issues. I cannot find that there is an error of law or a failure to provide a fair process here.

### CONCLUSION

[52] The General Division did not make any errors under the DESDA. The Claimant is not entitled to a survivor's pension. The General Division's finding that it is the Minister's discretion to require the repayment also remains unchanged. The appeal is dismissed.

Kate Sellar  
Member, Appeal Division

HEARD ON:	October 30, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	H. H., Appellant  L. B., Representative for the Appellant  Viola Herbert, Representative for the Respondent  M. P., Added Party  C. P., Representative for the Added Party