



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *RL v Minister of Employment and Social Development*, 2020 SST 847

Tribunal File Number: AD-20-658

BETWEEN:

R. L.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Valerie Hazlett Parker

DATE OF DECISION: October 1, 2020

DECISION AND REASONS

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] R. L. (Claimant) applied for and began to receive a Canada Pension Plan retirement pension in 2014. She has never been married or lived in a common-law relationship. She claims that sections 44(1) and 46 of the *Canada Pension Plan* (CPP) discriminate against her contrary to the *Canadian Charter of Rights and Freedoms* (Charter) because she has never married or lived in a common-law relationship.

[3] The Minister of Employment and Social Development rejected the Claimant's Charter claim. She appealed this decision to the Tribunal. The Tribunal's General Division decided that the Claimant may be part of a group that may be worthy of protection against discrimination under the Charter, but that the Claimant had not proven that there was a distinction made against this group. It dismissed the appeal.

[4] Leave to appeal the decision to the Tribunal's Appeal Division was granted. The appeal had a reasonable chance of success because the General Division may have made an error in law when it decided that the CPP does not make a distinction under the Charter on the ground of marital status.

[5] I have now read the parties' written submissions to the Appeal Division and heard their oral arguments. I have also reviewed the written record and the General Division decision. The appeal is dismissed. The General Division did not make any errors of law.

PRELIMINARY MATTERS

[6] At the Appeal Division hearing, I asked the parties whether they would like me to listen to the recording of the General Division hearing before making the decision on the appeal. The Claimant did not want me to listen to the recording. Part of the hearing recording is missing. The

Claimant says that this was her cross-examination of the Minister's expert witness, which was important.

[7] The Minister had no objection to my listening to the hearing recording.

[8] I did not listen to the recording. The parties' written submissions are detailed and address all of the issues on appeal. In addition, the parties made full oral submissions at the Appeal Division hearing. Their submissions, both oral and written, were sufficient for me to decide the issues before me.

ISSUES

[9] Did the General Division make an error when it failed to decide whether the Claimant was a member of a group that may be subject to discrimination?

[10] Did the General Division make an error in law when it decided that sections 44(1)(d) and 46 of the CPP do not make a distinction under the Charter?

[11] Did the General Division make an error by failing to consider the totality of benefits to the Claimant before and after death?

[12] Did the General Division make an error when it failed to consider whether there was discrimination?

ANALYSIS

An appeal to the Tribunal's Appeal Division is not a re-hearing of the original claim. Instead, the Appeal Division can only decide whether the General Division:

- a) failed to provide a fair process;
- b) failed to decide an issue that it should have, or decided an issue that it should not have;
- c) made an error in law; or

d) based its decision on an important factual error.¹

Never-married or common-law is a group that can be subject to discrimination

[13] The Supreme Court of Canada sets out a two-step process that is to be followed to decide whether a person is part of a group that is discriminated against under the Charter.² This is correctly set out in the General Division decision:

1. Does the law create a distinction based on an enumerated or analogous ground?
2. If so, does the distinction create a disadvantage by perpetuating prejudice or stereotyping?³

[14] The General Division decision then considers whether never-married or never-common-law people can be a group that is protected from discrimination under the Charter. The Charter specifically lists a number of grounds of discrimination that are protected.⁴ An accepted analogous ground of appeal is marital status.⁵ The decision states that persons who have never married or lived common-law are potentially members of an analogous group that is worthy of protection against discrimination under the Charter.⁶

[15] This statement does not clearly state that those who never married or lived common-law are members of a group that is worthy of Charter protection. However, the decision should be read as a whole and in context.⁷ When the entire decision is read as a whole I am satisfied that the General Division decided that this is a group that is entitled to Charter protection. The decision states that this marital status can be a defining choice to such individuals and should not

¹This paraphrases the grounds of appeal set out in s. 58(1) of the Department of Employment and Social Development Act

² *Withler v. Canada (Attorney General)*, 2011 SCC 12

³ General Division decision at para. 8

⁴ Charter s. 15

⁵ *Miron v. Trudel* [1995] 2 S.C.R. 418

⁶ General Division decision at para. 18

⁷ *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65

be excluded from Charter consideration.⁸ The General Division then goes on to consider whether the Claimant had established that because she is a member of this group she has been subject to differential treatment because of it.⁹ It would not have analyzed this issue if the Claimant had not been deemed to be part of a group that is worthy of Charter protection.

[16] The General Division made no error in this regard.

No distinction under the Charter

[17] The next part of the test is whether the challenged legislation creates a distinction between groups based on a protected ground. The Claimant says that the General Division made an error in law when it decided that there was no distinction. She argues that never married and never common-law claimants receive less in retirement pension because there is no benefit payable to a survivor when they die. Therefore, she argues, she should receive a larger retirement pension while she is alive to account for what would be paid to a married or common-law claimant's spouse when they die.

[18] The General Division decision concludes that the Claimant had failed to establish a distinction under s. 15(1) of the Charter.¹⁰ It provided the following reasons for this decision

- a) The Claimant receives the same amount of retirement pension as any other contributor who has the same CPP contribution history and started to receive the retirement pension at the same age as she did;¹¹
- b) The Claimant will not receive a survivor pension. This benefit is paid to a contributor's estate. An estate does not have Charter rights;¹²
- c) The CPP is not a non-subsidized pension plan. It is a social insurance plan, designed to provide partial earnings replacement in certain circumstances.¹³

⁸ General Division decision at para. 20

⁹ See General Division decision para. 22 and following

¹⁰ General Division decision at para. 28

¹¹ General Division decision at para. 24

¹² General Division decision at para. 25, relying on *Canada v. Hislop* 2007 1 SCR 429

¹³ General Division decision at paras. 26, 27

[19] The Claimant argues that the General Division made an error in law when it made its decision on this issue. She argues that if the Federal Court of Appeal in the *Runchey*¹⁴ decision found that there was a distinction based on the interaction of two CPP benefits, there must be a distinction in her case. However, unlike the parties in *Runchey*, the Claimant has not been denied any CPP benefit. She receives a retirement pension. The amount she receives is the same as any other contributor who made the same contributions and began to receive the pension at the same age as the Claimant.

[20] It is true that the Claimant's estate will not be paid a survivor benefit unless she is married or in a common-law relationship when she dies. However, the General Division decision correctly states that it is not the Claimant who is entitled to this benefit. It is her estate. Estates do not have any Charter rights.¹⁵ The General Division made no error in law when it made this decision.

[21] In addition, the Claimant presented this argument to the General Division. It is not for the Appeal Division to rehear the parties' arguments and substitute its own decision for that of the General Division. The Appeal Division cannot intervene unless the General Division made one of the errors set out in its governing legislation, the *Department of Employment and Social Development Act*. The General Division made no such error. The appeal therefore fails on this basis.

Totality of benefits

[22] The Claimant also argues that the General Division made an error in law because it failed to consider the totality of benefits that are available to her under the CPP. She says that she receives a lower retirement pension amount than married or common-law spouses because in addition to retirement pension benefits, they receive a survivor benefit upon death. At the General Division the Claimant's expert witness calculated how much this additional benefit would be in a non-subsidized pension. The Claimant argues that her retirement pension payments

¹⁴ *Runchey v. Canada (Attorney General)*, 2013 FCA 16

¹⁵ General Division decision at para. 25

should be increased so that she receives the same total amount in her retirement pension that a married or common-law spouse would receive as retirement and survivor benefits.

[23] However, the General Division made no error in this regard. The CPP is not a non-subsidized pension. The decision states that the CPP is a social insurance plan that is not designed to meet everyone's possible needs. Rather, it is to provide partial earnings replacement in certain circumstances. Contributions during a claimant's working life do not always translate into benefits.¹⁶

[24] The survivor benefit is payable on the happening of particular events at a specific time. For this benefit to be payable, the contributor must be in a married or common-law relationship, and they must die while in such a relationship. If a contributor was married for many years, but not at the moment of death, no survivor benefit is payable. Even if a contributor is married today, one cannot predict whether they will still be married at the moment of death. Therefore, adjusting payment of the retirement pension amount today to account for any possible future circumstances does not make sense. A retirement pension amount cannot be paid based on possible future circumstances.

[25] In addition, it is a contributor's estate, not the contributor, who is entitled to the survivor benefit. The Claimant is not entitled to receive it.

[26] For these reasons, clearly set out in its decision, the General Division made no error of failing to consider the survivor benefit as part of the totality of benefits payable.

Failure to consider discrimination

[27] Finally, the Claimant argues that the General Division made an error because it failed to consider whether there was any discrimination. However, it made no error in this regard. The Supreme Court of Canada states that if a distinction based on an enumerated or analogous ground is found, only then must the decision maker decide whether there has been discrimination.

¹⁶ General Division decision at para. 27

[28] The General Division decided that there was no distinction.¹⁷ Therefore, it made no error in failing to consider whether there was discrimination.

[29] The appeal also fails on this basis.

CONCLUSION

[30] The appeal is dismissed for these reasons.

Valerie Hazlett Parker
Member, Appeal Division

HEARD ON:	September 15, 2020
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	R. L., Appellant Tiffany Glover, Counsel for the Respondent

¹⁷ General Division decision at para. 29