



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *DC v Minister of Employment and Social Development and LM*, 2020 SST 1007

Tribunal File Number: AD-20-833

BETWEEN:

D. C.

Applicant

and

Minister of Employment and Social Development

Respondent

and

L. M.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Kate Sellar

Date of Decision: November 30, 2020

DECISION AND REASONS

DECISION

[1] I refuse the application for leave to appeal.

OVERVIEW

[2] D. C. (Applicant) married W. C. in July 1954, and separated in the late 1990's. They did not divorce. W.C. died in January 2016. L. M. (Respondent) claims that she and the deceased were common-law partners from October 1996 until his death. The Applicant does not dispute that the deceased lived at the Respondent's house from 1999 until February 2013, when he moved into a nursing home. However, her position is that the deceased was a boarder in the Respondent's house, and they did not have a common-law relationship.

[3] Both the Applicant and the Respondent applied for the *Canada Pension Plan* (CPP) survivor's benefit. The Minister allowed the Respondent's application and denied the Applicant's application. The Minister denied the Applicant's request for reconsideration, and the Applicant appealed to this Tribunal.

[4] In November 2017, the General Division allowed the Applicant's appeal. The Respondent did not attend the teleconference hearing. The General Division member went ahead and held the hearing without the Respondent. The General Division decided that the Respondent had not shown that it was more likely than not that she and the deceased were common-law partners at the time of his death.

[5] The Respondent appealed to the Appeal Division. In May 2018, the Appeal Division dismissed Respondent's appeal. The Respondent then appealed to the Federal Court of Appeal (FCA). In September 2019, the FCA allowed the Respondent's appeal, and referred this matter back to the Appeal Division for reconsideration. The FCA found that the Respondent was denied natural justice because a staff member at the Tribunal had mistakenly advised her that the Minister would protect her rights at the hearing. Because of this advice, she did not participate in the hearing.

[6] In February 2020, the Appeal Division allowed the Respondent's appeal and referred this matter back to the General Division for a new hearing. The Appeal Division found that the General Division had denied the Respondent her right to be heard at the initial hearing.

[7] After the new hearing, the General Division decided that the Respondent and the deceased were common-law partners at the time of his death.

[8] The Applicant is asking for permission (leave) to appeal that decision. I must decide whether it is arguable that the General Division made an error under the *Department of Employment and Social Development Act* (DESDA) that would justify granting the Applicant leave to appeal.

[9] The Applicant has not raised any arguable case for an error in the General Division decision. I refuse to grant the Applicant permission to appeal.

ISSUE

[10] Is it arguable that the General Division made any error that would justify granting the Applicant permission to appeal?

ANALYSIS

Reviewing General Division decisions

[11] 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 it made an error calling for a review. That review is based on the wording of the DESDA, which sets out the grounds of appeal.¹ The three reasons for an appeal arise when the General Division fails to provide a fair process, makes an error of law, or makes an error of fact.

[12] At the leave to appeal stage, an applicant must show that the appeal has a reasonable chance of success of satisfying the Appeal Division that the General Division made a reviewable

¹ DESDA, s 58(1).

error.² To meet this requirement, an applicant needs to show only that there is some arguable ground on which the appeal might succeed.³ This is a low threshold to meet.

CPP Survivor's Pension

[13] To get a CPP survivor's pension, an applicant must be the survivor of a deceased contributor.⁴ 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).⁵

[14] In 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."⁶

Is there an argument for an error?

[15] The Applicant has not raised an argument that has a reasonable chance of success on appeal.

[16] The Applicant argues that the General Division focussed on the wrong issues during the hearing, deciding essentially who had a sexual relationship with the deceased last (issues that were a "soap opera story"), rather than considering who the deceased shared a life with when he was contributing to the *Canada Pension Plan* (CPP).

[17] The General Division explained what the law in this area is.⁷ To have access to the survivor pension, the Respondent had to show that she was cohabiting with the deceased as his common-law partner at the time of his death, and that they had cohabited like that for a period of

² DESDA, s 58(2).

³ The Federal Court of Appeal explained this in a case called *Fancy v Canada (Attorney General)*, 2010 FCA 63.

⁴ *Canada Pension Plan*, s 44(1)(d).

⁵ CPP, s 42(1).

⁶ CPP, s 2.

⁷ General Division decision, paras 10-11.

at least one year before he died. The General Division considered a list of factors that can show a common-law relationship, including sexual and personal behaviours.

[18] The General Division considered all of the evidence the Respondent had about these factors, and then considered the Applicant's evidence, including

- Her statement that the Respondent and the deceased may have lived common law but that it was an affair and that the Respondent took advantage of the deceased when he was old and sick and unable to make decisions;
- Documents that seemed to support the idea that at least from 1997 to 1999, the Respondent was boarding with the deceased.⁸

[19] The General Division gave more weight to the evidence from the Respondent that supported the notion that she was cohabiting with the deceased as his common law partner at the time of his death and had been living that way for many years.⁹ The General Division also explained that the fact that the deceased moved to a nursing home is an "involuntary separation" and does not mean his common law relationship with the Respondent ended.¹⁰

[20] There is no argument here that the General Division made an error of law or decided anything that was outside its power. The General Division could not decide the case based on the nature of the relationship many years ago when the deceased was contributing to the CPP and married to the Applicant. Further, focusing on aspects of the Respondent and the deceased's relationship that might otherwise be quite personal was not an error of law.

[21] The Applicant argued that the General Division made an error of fact by accepting the Respondent's evidence about having the deceased's ashes under her bed. However, this is not a finding of fact in the General Division's decision, and therefore cannot form the basis for an allegation of an error of fact. In any event, that fact about the deceased ashes (even though it is of course important emotionally to the people involved) is not important to the outcome of the case.

⁸ General Division decision, paras 19-21.

⁹ General Division decision, paras 12-17.

¹⁰ General Division decision, para 23.

[22] The Applicant argued that the General Division failed to provide a fair process, but provided no further information to support that allegation. I see no evidence that the General Division failed to provide the Applicant with a fair process. I reviewed the recording of the hearing. The Applicant had every opportunity to participate in the process.

[23] I have reviewed the file. The General Division did not ignore or misunderstand the evidence.¹¹ The Respondent was able to establish that she met the legal requirements for receiving the survivor's pension.

[24] I understand the Applicant's concern that she is not receiving the survivor's pension even though she was married to the deceased for so many years, particularly years in which there were contributions to the CPP. It appears that the Minister split the pension credits and recalculated the amount the Applicant receives for her retirement pension¹², which seems to be an important way of recognizing her role at that time.

CONCLUSION

[25] I refuse the application for leave to appeal.

Kate Sellar
Member, Appeal Division

REPRESENTATIVE:	D. C., self-represented Applicant
-----------------	-----------------------------------

¹¹ My review of the record is consistent with what the Federal Court talks about in a case called *Karadeolian v Canada (Attorney General)*, 2016 FC 615.

¹² GD2-71.