



Citation: *MM v Minister of Employment and Social Development and DM*, 2022 SST 100

Social Security Tribunal of Canada Appeal Division

Leave to Appeal Decision

Applicant: M. M.

Respondent: Minister of Employment and Social Development
Representative:

Added Party: D. M.
Representative:

Decision under appeal: General Division decision dated December 14, 2021
(GP-18-2375)

Tribunal member: Kate Sellar

Decision date: February 25, 2022

File number: AD-22-58

Decision

[1] I am refusing the Claimant's request for leave (permission) to appeal. The appeal will not proceed. These reasons explain why.

Overview

[2] This appeal was about a division of unadjusted pensionable earnings (sometimes called a DUPE or credit split) under the *Canada Pension Plan*. Specifically, the appeal was about the period of cohabitation between D. M. (Claimant) and M. M. (Added Party).¹ The parties disputed the date they began living together and they disputed the date of their separation.

[3] The General Division of this Tribunal scheduled a teleconference hearing of the Claimant's appeal on November 15, 2021 at 1:00pm EST. The Claimant did not attend the hearing. The Added Party was prepared and ready to go ahead. The Minister of Employment and Social Development Canada (Respondent) also did not attend the hearing. The General Division member asked Tribunal staff to contact the Claimant. Tribunal staff were not able to reach the Claimant.

[4] The General Division member decided to go ahead with the hearing. She was satisfied that the Claimant had the required notice of the hearing.

[5] After the hearing was over, staff uploaded a new document to the Claimant's Tribunal appeal file. The Claimant sent the email before the hearing started.² In the email, the Claimant said that he was withdrawing his appeal.

[6] The General Division decided that the Claimant filed his withdrawal before the hearing so it was his right to withdraw the appeal. The Tribunal closed the file.

¹ I will refer to the parties this way throughout this decision although now that the Added Party is asking for leave to appeal, at this level she is the person applying for leave to appeal and is therefore the Applicant and the Respondents to that application are the Minister and D. M. (who was the Claimant at the General Division).

² See GD29.

[7] The Added Party asks for permission to appeal. She wanted the General Division to make a decision in the case rather than closing the file.

[8] I must decide whether the General Division might have made an error that would justify granting the Claimant leave to appeal. I find that the Added Party does not have an argument for an error by the General Division that would justify granting the Claimant leave to appeal. The Added Party's appeal will not go ahead.

Issue

[9] The issue in the appeal is:

- Could the General Division have made an error that would justify granting leave to appeal?

Analysis

[10] First, I will describe my role at the Appeal Division in terms of reviewing General Division decisions. Second, I will explain how I have reached the conclusion that the Claimant has not raised a possible error by the General Division would justify granting permission to appeal.

Reviewing General Division decisions

[11] The Appeal Division does not provide an opportunity for the parties to re-argue their case in full. Instead, I reviewed the Claimant's arguments and the General Division's decision to decide whether the General Division may have made any errors. That review is based on the wording of the *Department of Employment and Social Development Act*, which sets out the "grounds of appeal."

[12] The grounds of appeal are the reasons for the appeal. To grant leave to appeal, I must find that it is arguable that the General Division made at least one of the following errors:

- It acted unfairly.

- It failed to decide an issue that it should have, or decided an issue that it should not have.
- It based its decision on an important error regarding the facts in the file.
- It misinterpreted or misapplied the law.³

[13] At the leave to appeal stage, a claimant must show that the appeal has a reasonable chance of success.⁴ To do this, a claimant needs to show only that there is some arguable ground on which the appeal might succeed.⁵

No possible error

[14] The Added Party has not raised an argument that the General Division possibly made an error that would justify granting leave to appeal.

[15] The Added Party explains that she presented information at the General Division hearing that was important. She says her evidence might have changed the original decision that the Minister made about the DUPE.⁶ Given the choice, she would rather that the General Division make a decision about the DUPE.

[16] In my view, the Claimant has not raised any argument that might show that the General Division made an error that I can review. The General Division explained in its decision that:

...section 14 of the *Social Security Tribunal Regulations* does not require an appellant to obtain the consent of other parties before withdrawing the appeal. Section 14 also does not require an appellant to obtain leave (or permission) from the Tribunal to withdraw an appeal. Once a withdrawal is received, the file is closed.⁷

³ See section 58(1) of the *Department of Employment and Social Development Act* (Act).

⁴ See section 58(2) of the Act.

⁵ The Federal Court of Appeal explained this idea in a case called *Fancy v Canada (Attorney General)*, 2010 FCA 63.

⁶ See AD1-4.

⁷ See paragraph 19 of the General Division decision.

– **No possible error of law**

[17] The *Social Security Tribunal Regulations* state that Claimants can withdraw anytime before the end of the teleconference hearing. The Tribunal closes the file. The General Division does not issue a decision about the main issue on appeal (in this case, the DUPE) in that circumstance. There is no argument that the General Division did not follow the rules or the law about withdrawing an appeal.

– **No possible error of fact**

[18] The Claimant emailed the Tribunal before the hearing, withdrawing the appeal.⁸ That fact is important because it means that the Claimant met the requirement for a withdrawal.

[19] The Added Party does not dispute when the Claimant emailed the Tribunal.

[20] I am satisfied that the General Division did not misunderstand or ignore the evidence about when the Claimant made his request to appeal.⁹ There is no argument that the General Division misunderstood the facts surrounding the withdrawal.

– **No possible error about fair process or what the General Division decided**

[21] There is no argument here that the General Division failed to give the Added Party a fair process, or that the General Division refused to decide the main issue even though it should have.

[22] What fair process requires will depend on the circumstances.¹⁰

[23] In this case, it was the Claimant's appeal at the General Division, not the Added Party's appeal. The Added Party could be affected by any decision the General Division might have reached about the DUPE. As a result, she had the option to participate in

⁸ See paragraphs 9 and 12 of the General Division decision.

⁹ This kind of review is consistent with what the Federal Court discussed for the Appeal Division in *Karadeolian v Canada (Attorney General)*, 2016 FC 615.

¹⁰ The Supreme Court of Canada explained this in a case called *Baker v Canada (Minister of Citizenship and Immigration)*, 1999 2CanLII 699.

the Claimant's appeal, including providing evidence and argument in support of her position. That is what fairness required. However, the Claimant withdrew, so there is no longer any appeal for the Added Party to participate in further and no decision about the DUPE for the General Division to make.

[24] The General Division could not decide the main issue in this case, even though that's what the Added Party wanted. The General Division explained how the rules for withdrawal operated and explained the Claimant did not require consent or permission to withdraw.¹¹ There is no argument here for an error about failing to decide the main issue.

[25] It is unfortunate that the withdrawal arrived via email so close to the time for the teleconference hearing. The General Division member did not have it when she was holding the hearing. However, fair process for the Added Party does not require the General Division to make a decision about the DUPE when the Claimant, who is in the driver's seat in the appeal, withdraws.

[26] Ultimately, this was the Claimant's appeal of the Minister's decision, and he has the right to withdraw that appeal at any time up until the conclusion of the teleconference hearing at the General Division.

Conclusion

[27] I am refusing permission to appeal. This means that the appeal will not proceed.

Kate Sellar
Member, Appeal Division

¹¹ See paragraph 19 of the General Division decision.