



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *L. M. v Minister of Employment and Social Development*, 2020 SST 512

Tribunal File Number: AD-19-868

BETWEEN:

**L. M.**

Appellant

and

**Minister of Employment and Social Development**

Respondent

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

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DECISION BY: Valerie Hazlett Parker

DATE OF DECISION: June 22, 2020

## DECISION AND REASONS

### DECISION

[1] The appeal is allowed. The General Division failed to provide the Claimant with a fair process.

[2] The appeal is referred back to the General Division for reconsideration.

[3] A copy of the Claimant's Notice of constitutional issue (AD9) is to be filed in the General Division file.

### OVERVIEW

[4] L. M. (Claimant) was widowed in 1998, when she was just under 35 years of age. At that time, the *Canada Pension Plan* (CPP) did not allow a survivor's benefit to be paid to a widow who was less than 35 years old. In 2018, the CPP was changed to remove this age restriction. The Claimant began to receive the survivor's benefit in January 2019.

[5] The Claimant appealed the Minister of Employment and Social Development's decision to refuse to pay the Claimant the survivor's benefit before January 2019 to the Tribunal. The Tribunal's General Division dismissed the appeal. It decided that it had no legal authority to change the legislation.

[6] Leave to appeal this decision to the Tribunal's Appeal Division was granted because the General Division may have failed to consider the Claimant's arguments that the relevant sections of the CPP violate her rights under the *Canadian Charter of Rights and Freedoms* (Charter).

[7] I have read the documents filed with the Tribunal, and listened to the parties' oral submissions and the recording of the General Division hearing. The appeal is allowed because the General Division failed to provide a fair process when it failed to consider the Claimant's Charter arguments. The matter is referred back to the General Division it can decide whether the

Claimant's Notice of constitutional issue meets the requirements in the *Social Security Tribunal Regulations*,<sup>1</sup> and if so, decide whether her Charter rights were breached.

## ISSUE

[8] Did the General Division make fail to provide the Claimant with a fair process when it failed to consider the Claimant's argument that the CPP discriminated against her based on her age?

## ANALYSIS

[9] The General Division must provide a fair process to parties that appear before it. This means that each party must have the opportunity to present their full legal case to the Tribunal, to know and answer the other party's legal case, and to have a decision made by an impartial decision maker based on the law and the facts.

[10] The Claimant argues that the General Division failed to do this because it failed to consider her arguments that the CPP discriminates against her on the basis of age under the Charter.<sup>2</sup>

[11] At the General Division, the Claimant did not specifically argue in her written materials that the relevant sections of the CPP discriminate against her contrary to the Charter. However, at the hearing the Claimant's arguments became clear. She stated the following:

- Requiring that she be 35 years old to receive the survivor benefit was unfair<sup>3</sup>
- The age 35 rule is discriminatory<sup>4</sup>
- Age is irrelevant when one is a widow, and not justifiable<sup>5</sup>

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<sup>1</sup> Social Security Tribunal Regulations s. 20(1)

<sup>2</sup> *Canadian Charter of Rights and Freedoms* s. 15

<sup>3</sup> General Division hearing recording at approximate minute 7:09 although the exact time may vary depending on what device is used to listen to the recording

<sup>4</sup> *Ibid.* at approximate minute 7:47

<sup>5</sup> *Ibid.* at approximate minute 15:30

- The Tribunal does not have authority to override legislation, but it should give claimants the right to address this injustice<sup>6</sup>
- the age rule issue needs to be heard and changed<sup>7</sup>
- she asked the General Division to look at the discrimination issue.<sup>8</sup>

[12] At the Appeal Division hearing, the Minister's lawyer argued that the General Division made no error because it clearly explained the existing law and applied the facts to the law to make its decision. However, when the Claimant's legal arguments are considered as a whole, it is clear that she was trying to present an argument that the CPP survivor benefit provisions<sup>9</sup> discriminated against her based on her age, being under 35. The General Division did not acknowledge this argument.

[13] It is not uncommon for parties that appear before this Tribunal to do so without legal representation, and without any legal training of their own. As a result, Tribunal Members must be attuned to the parties' situation, and take an active role in ensuring that those who appear before them understand and meaningfully present their legal case.<sup>10</sup> What exactly is required to do this will depend on the facts and circumstances of each case.

[14] For example, the Ontario Court of Appeal stated in a wrongful dismissal case that the trial judge had made insufficient inquiries of a party before it concluded that she had abandoned one aspect of her claim. The decision states

Where the evidence of a self-represented party raises a question in the [decision maker's] mind about the specific relief the party is seeking, a [decision maker] must make the appropriate inquiries of the party to clarify the matter. Those inquiries must be made in a clear, unambiguous, and comprehensive way so that several results occur: (i) the [decision maker] is left in no doubt about the party's position; (ii) the self-represented person clearly understands the legal implications of the critical choice she faces about whether to pursue or abandon a claim; and (iii) the self-represented

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<sup>6</sup> *Ibid.* at approximate minute 22:30

<sup>7</sup> *Ibid.* at approximate minute 23:17

<sup>8</sup> *Ibid.* at approximate minute 24:47

<sup>9</sup> CPP s. 44(1) and 58(1)

<sup>10</sup> See the Statement of Principles on Self-represented Litigants and Accused Persons (2006), Canadian Judicial Council, <https://cjc-ccm.ca/sites/default/files/documents/2020/Final-Statement-of-Principles-SRL.pdf>

person clearly understands from the [decision maker] which of her claims he will adjudicate.<sup>11</sup>

[15] The same principles apply to this Tribunal. Tribunal Members must be alive to the arguments that claimants try to present. They must give claimants the opportunity to explain or “flesh out” legally complex arguments such as those involving a claim of discrimination under the Charter. This can be done by asking appropriate questions and/or making referrals to agencies that may assist a claimant.

[16] The General Division failed to do so in this case. Although it is clear that the Claimant was trying to present an argument that the CPP provisions discriminate against her on the basis of age (being under 35), the General Division made no inquiries of the Claimant to try to identify or clarify her argument. It did not permit her to “flesh out” the legal arguments she was trying to present by explaining the process under the *Social Security Tribunal Regulations* to pursue this.<sup>12</sup> The General Division therefore failed to provide a fair process.

[17] The appeal is allowed.

## **REMEDY**

[18] When an appeal is allowed, the Appeal Division can give different remedies.<sup>13</sup> It is appropriate that this appeal be referred back to the General Division for reconsideration. The reasons for this are as follows.

[19] The General Division is the trier of fact. It is to hear the parties’ evidence and arguments initially and to make a decision based on the law and the facts. The Claimant did not present her entire legal case to the General Division. She did not know that she should file a Notice of constitutional issue. The General Division did not consider whether any such notice met the requirements under the Regulations.

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<sup>11</sup> *Moore v. Apollo Health & Beauty Care*, 2017 ONCA 383

<sup>12</sup> Social Security Tribunal Regulations s. 20(1) requires that a party who wishes to make a Charter claim must file a Notice of Constitutional Issue that sets out fact and argument in support of the claim. The General Division must decide that this notice is sufficient before it can rule on the Charter claim.

<sup>13</sup> *Department of Employment and Social Development Act* s. 59(1)

[20] In addition, the Minister argues that the appropriate remedy is to refer this appeal back to the General Division for reconsideration.

**CONCLUSION**

[21] The appeal is allowed.

[22] The appeal is referred back to the General Division for reconsideration.

[23] The General Division should consider, first, whether the Claimant's Notice of Constitutional issue is sufficient for the Charter claim to be decided. A copy of the Claimant's Notice of constitutional issue (AD9) is to be filed with the General Division so this can be done.

[24] This decision does not presume the outcome of the appeal when it is reconsidered.

Valerie Hazlett Parker  
Member, Appeal Division

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| HEARD ON:             | June 12, 2020  |
| METHOD OF PROCEEDING: | Teleconference   |
| APPEARANCES:          | L. M., Appellant<br>Tiffany Glover, Counsel for the Respondent |