Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

Citation: *M. T. v. Minister of Employment and Social Development*, 2016 SSTGDIS 75

Tribunal File Number: GP-15-939

BETWEEN:

M. T.

Appellant

and

Minister of Employment and Social Development

Respondent

and

Z. T.

Added Party

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Income Security Section

DECISION BY: Shane Parker

HEARD ON: September 14, 2016

DATE OF DECISION: September 27, 2016

Canada

REASONS AND DECISION

PERSONS IN ATTENDANCE

The Appellant, Mr. M. T.

The Added Party, Mrs. Z. T.

Kristina Anguelakieva, Appellant's representative

INTRODUCTION

[1] The Appellant was a pensioner receiving the Old Age Security (OAS) pension. This appeal pertains to the Appellant's Guaranteed Income Supplement (GIS). In an application dated April 26, 2004 the Appellant applied for the GIS.

[2] The Respondent initiated a review of the Appellant's OAS account on August 22, 2011. Further to this review, the Respondent advised on January 15, 2014 that the Appellant was overpaid GIS benefits because he was paid at the single rate when he should have been paid at the common-law rate.

[3] The Appellant requested a reconsideration of this decision on February 14, 2014. Further to reviewing additional information, on December 4, 2014 the Respondent maintained the initial decision of January 15, 2014 that it overpaid the Appellant's GIS. However, it reduced the overpayment by 25%, and reduced it further after reviewing his spouse's income, leaving the overpayment at a balance of $27,829.32. The Appellant appealed the December 4, 2014 reconsideration decision to the Tribunal's General Division on March 11, 2015.

[4] The hearing of this appeal was by teleconference for the following reasons:

- The issues under appeal are complex.
- There are gaps in the information in the file and/or a need for clarification.

THE LAW

[5] The *Old Age Security Act* (OASA) treats single pensioners and pensioners with spouses differently when it comes to the GIS amount. Section 12 of the OASA reads:

> **12.** (1) The amount of the supplement that may be paid to a pensioner for any month in the payment quarter commencing on April 1, 2005 is,
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> (a) in the case of a person other than a person described in paragraph (*b*), five hundred and sixty-two dollars and ninety-three cents, and
>
> (b) in the case of a person who, on the day immediately before that payment quarter, had a spouse or common-law partner to whom a pension may be paid for any month in that payment quarter,
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> (i) in respect of any month in that payment quarter before the first month for which a pension may be paid to the spouse or common-law partner, five hundred and sixty-two dollars and ninety-three cents, and
>
> (ii) in respect of any month in that payment quarter commencing with the first month for which a pension may be paid to the spouse or common-law partner, three hundred and sixty-six dollars and sixty-seven cents, minus one dollar for each full two dollars of the pensioner's monthly base income.

[6] Subsection 15(9) of the OASA obligates GIS recipients to immediately notify the Respondent of a change in marital status. The provision reads:

> **Notification of change**
>
> (9) Every applicant shall inform the Minister without delay if they separate from, or cease to have, a spouse or common-law partner, or if they had a spouse or common-law partner at the beginning of a month, not having had a spouse or common-law partner at the beginning of the previous month.

[7] Section 2 of the OASA defines "Minister" as the Respondent:

> "Minister" means the Minister of Employment and Social Development.

[8] Section 2 of the OASA also defines “common-law partner”:

> "common-law partner", in relation to an individual, means a person who is cohabiting with the individual in a conjugal relationship at the relevant time, having so cohabited with the individual for a continuous period of at least one year. For greater certainty, in the case of an individual's death, the "relevant time" means the time of the individual's death.

[9] Section 37 of the OASA and section 27 of the OAS Regulations authorize the recovery of benefits to which an individual is not entitled. These provisions stipulate:

> **37.** (1) A person who has received or obtained by cheque or otherwise a benefit payment to which the person is not entitled, or a benefit payment in excess of the amount of the benefit payment to which the person is entitled, shall forthwith return the cheque or the amount of the benefit payment, or the excess amount, as the case may be.
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> **Recovery of amount of payment**
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> (2) If a person has received or obtained a benefit payment to which the person is not entitled, or a benefit payment in excess of the amount of the benefit payment to which the person is entitled, the amount of the benefit payment or the excess amount, as the case may be, constitutes a debt due to Her Majesty and is recoverable at any time in the Federal Court or any other court of competent jurisdiction or in any other manner provided by this Act.
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> […]
>
> **Set-off**
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> (2.1) If any amount is or becomes payable to the person or to the person’s estate or succession under this Act or any other Act or program administered by the Minister, the amount of the debt may be deducted and retained out of the amount payable in the prescribed manner.
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> **27.** For the purpose of subsection 37(2.1) of the Act, an amount of indebtedness that is owing may be deducted and retained out of the whole or any portion of a benefit that is payable to the person or the person’s estate or succession, under this Act or any other Act or program administered by the Minister, that will recover the overpayment in a single payment or in instalments, in any amount that does not cause undue hardship to the person or the person’s estate or succession.

[10] If an overpayment is caused by erroneous advice or administrative error by the Respondent, or if repayment of an overpayment would cause undue hardship, such matters are to be addressed at the Respondent's discretion. The Tribunal does not have jurisdiction over such matters (see: *Tucker* 2003 FCA 278). Subsection 37(4) of the OASA provides:

> (4) Notwithstanding subsections (1), (2) and (3), where a person has received or obtained a benefit payment to which that person is not entitled or a benefit payment in excess of the amount of the benefit payment to which that person is entitled and the Minister is satisfied that
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> > (a) the amount or excess of the benefit payment cannot be collected within the reasonably foreseeable future,
> >
> > (b) the administrative costs of collecting the amount or excess of the benefit payment are likely to equal or exceed the amount to be collected,
> >
> > **(c) repayment of the amount or excess of the benefit payment would cause undue hardship to the debtor, or**
> >
> > (d) **the amount or excess of the benefit payment is the result of erroneous advice or administrative error in the administration of this Act**, **the Minister may**, unless that person has been convicted of an offence under any provision of this Act or of the *Criminal Code* in connection with the obtaining of the benefit payment**, remit all or any portion of the amount or excess of the benefit payment** [emphasis added].

[11] Subsection 33.1(a) of the OASA relates to the sharing of information between the Canada Revenue Agency (CRA) and the Respondent:

> **Information obtained under other Acts**
>
> **33.1** Despite any other Act or law,
>
> > **(a)** the Minister of National Revenue or any person that he or she designates **may** make available to the Minister, or to a public officer of the Department of Employment and Social Development that is designated by the Minister, a report providing information that is available to the Minister of National Revenue, if the information is necessary for the administration of this Act [emphasis added].

ISSUE

[12] The Tribunal must decide if the Appellant was entitled to receive his GIS as a single pensioner for the period of February 2005 to September 2013.

EVIDENCE

[13] The following documents establish that the Appellant began co-habiting and considered himself common-law with the Added Party (Mrs. Z. T.) as of January 2004:

a) The Appellant's GIS application dated April 26, 2004 (GD2-7);

b) Statutory Declaration of July 4, 2004 (GD2-17);

c) Declaration of September 21, 2011 (GD2-100 to 101);

d) CRA income tax information dated August 22, 2012: the Appellant's spouse indicated to the CRA that she was living common-law with the Appellant;

e) Application for GIS dated November 30, 2012 (GD2-20);

f) Statutory declaration of common-law union dated November 30, 2012 (GD2-88);

g) Answers to questionnaire of November 7, 2012 dated November 30, 2012 (GD2-92).

[14] The Appellant received the GIS at the single rate from February 2005 to September 2013 inclusive.

[15] Beginning in 2003, the Respondent sent entitlement/marital status letters to GIS recipients advising them to notify the Respondent of any change in marital status (notice letters). The notice letters are also intended to prompt recipients to notify the Respondent to correct any inaccuracies. The Appellant received these letters and notified the Respondent on two occasions that his marital status changed to common-law: first in his April 2004 GIS application and next in his July 2004 declaration. Nevertheless the Respondent did not update

the Appellant's file accordingly, stating there was no proof filed of the change in marital status. The Respondent stated it first learned of the common-law status in August 2011, but continued to pay the GIS at the single rate until September 2013. In recognition of the delay (administrative error) in updating the Appellant's account after receiving the Appellant's common-law status declarations in 2004, the Respondent reduced its GIS overpayment claim by 25%. Its overpayment remission and write-off decision and supporting documents are found at pages GD2-55 to 57 (see also: Respondent's initial decision of January 15, 2014 at GD2-58). The Respondent pursues the balance of the overpayment on the basis that the Appellant was at fault for not proactively informing the Respondent of the marital status inaccuracy in his file from 2005 to 2011, despite receiving the notice letters in each of those years. The Respondent later assessed a GIS underpayment of $8,026.32 owed to the Appellant which it set-off against the 75% overpayment claimed.

[16] The Appellant stated that he visited Service Canada offices many times between 2005 and 2011, where he informed the Respondent's staff of his common-law status. Respondent staff allegedly assured him that he remained entitled to the GIS at the single rate, and that if this was not the case he would be so advised (GD1-5 to 7). After repeated questions about these visits during the hearing, neither the Appellant's representative nor the Appellant could inform the Tribunal of any documentation confirming such visits: the Appellant had no calendar or journal of these visits, and he visited the Service Canada Centres alone.

[17] The Respondent stated that it has no record of the Appellant informing it of a change in marital status to common-law anytime between July 4, 2004 and August 22, 2011. In August 2011, the Respondent learned from the CRA that the Appellant was common-law (GD6-9; GD2- 66). The Service Canada file notes on the Appellant also contain no record of his visits to their offices between 2005 and 2011 (GD2-62 to 65).

SUBMISSIONS

[18] The Appellant's submissions are summarized as follows:

a) He informed the Respondent of his change in marital status to common-law in April and July 2004 and other times in writing. In addition he personally advised

the Respondent numerous times of his common-law status between 2005 and 2011 by verbally informing its agents at Service Canada offices. He therefore met his legal obligations;

b) Both he and the Added Party informed the CRA of their common-law status from 2004 onward;

c) It is unfair to hold him responsible for repaying the alleged overpayment. Rather, the Respondent should assume full responsibility and absorb any and all overpayment because of its organizational shortcomings and the mismanagement of his file;

d) The Appellant was deprived (underpaid) GIS benefits in the amount of $8,026.32. By withholding this amount and instead applying it to an alleged overpayment, he suffered financial hardship.

(GD1-5 to 8)

[19] The Respondent made the following arguments in its July 20, 2016 submission (GD6):

a) Section 15 of the OASA shifts the onus to the Appellant to notify the Respondent immediately of a change in marital status. The Appellant is also required to report any inconsistencies or inaccuracies in his file to the Respondent. The Appellant failed to notify the Respondent of his common-law marital status after he became aware that the Respondent had incorrect information between 2005 and 2011;

b) The Appellant was not entitled to receive the GIS at the single rate as of February 2005, the day following the one year cohabitation period; therefore, he is required to pay back the amounts that he was not entitled to for the period of February 2005 to September 2013, to the Minister;

c) According to the OASA subsections 37(1) and 37(2), a person is required to return or repay benefit amounts in excess of their entitlement. Since the amount

of supplement paid to the Appellant was in excess of the Appellant's entitlement, he is required to reimburse the excess portion to the Minister.

ANALYSIS

[20] The general principle in OAS claims is that an applicant for benefits bears the onus of proving on a balance of probabilities that he is entitled to benefits (*De Carolis v. Canada (Attorney General)*, 2013 FC 366).

Duty to report a change in marital status

[21] In the present appeal, the Appellant was up front about his common-law status from the time he applied for the GIS. He started co-habiting with the Added Party in January 2004 and informed the Respondent of this twice later that year: in his April GIS application and July declaration. According to the definition in section 2 of the OASA, his common-law status became effective in January 2005, after one year of continuous cohabitation.

[22] The Appellant was paid the GIS at the single rate for the period of February 2005 to September 2013. This was the Respondent’s error.

[23] In *Barry v. Canada (Attorney General)*, 2010 FC 1307, the Federal Court stated that under subsection 15(9) of the OASA, the onus is on a claimant to report his or her marital status not only to the CRA but also to the Minister. This requirement exists even without the annual notice letter from the Minister, whom an applicant has to provide with the information. The notice letter was considered a reminder and not a precondition to the application of subsection 15(9).

[24] Turning to the present appeal, subsection 15(9) does not apply, contrary to the Respondent’s submission. This provision requires an applicant to notify the Minister (Respondent) of a “change” in marital status. In this case, there was no such “change”. The Appellant applied for the GIS as a common-law partner and he continued to be in a common-law relationship thereafter. This is distinguishable from *Barry*, wherein the applicant’s marital status changed after the GIS application was made. The Respondent also argues that the Appellant was obligated to notify it of a change in marital status if he observed his file to reflect

the incorrect marital status. The notice letters, which the Respondent argues underlie this obligation, have no legal force, as determined in *Barry*. In summary, the Appellant did not violate the OASA: he informed the Respondent of his common-law status from the beginning, when he applied for the GIS; and his status did not change so he had no legal obligation or onus to inform the Respondent of a change.

[25] Since the Tribunal found that the Appellant met his legal obligation to inform the Respondent of his common-law status, the Appellant's argument that both he and the Added Party informed the CRA of their status is immaterial. That being said, it cannot be assumed that the CRA automatically informs the Respondent of such information. Subsection 33.1(a) of the OASA provides that the CRA may share information with the Respondent; it does not impose a duty to share information.

The overpayment

[26] Section 12 of the OASA makes it clear that single pensioners are paid differently than pensioners with spouses. As the Appellant was not single for the period of February 2005 to September 2013, he was not entitled to receive the GIS as a single pensioner. The Respondent is entitled to recover the overpayment for that period pursuant to section 37 of the OASA and section 27 of the OAS Regulations.

[27] Section 37 of the OASA gives the Respondent the authority to recover an overpayment and, in some cases, remit an amount owing; however, the discretion in this respect falls outside the Tribunal's jurisdiction (*Tucker* 2003, FCA 278). In this case, the Respondent carried out an internal investigation and rendered a partial remission decision on the basis of administrative error (GD2-55). The Appellant made a passionate argument to the Tribunal that the Respondent instead remit all of the overpayment because of its particular handling of his file. The Appellant argues that the Respondent made an internal administrative error by continuing to pay him at the single rate despite being repeatedly informed that he was in a common-law relationship. The Tribunal acknowledges the Appellant's view; however, the Tribunal has no jurisdiction to consider an appeal from the Respondent's decision made under subsection 37(4) of the OASA not to remit all of the overpayment. An appeal to the Social Security Tribunal of Canada is not

the appropriate forum in which to challenge a decision made by the Respondent under subsection 37(4).

[28] The Appellant claims that the Respondent withheld the GIS underpayment of $8,026.32 when his family “needed it most”. By this, he essentially argues that he suffered financial hardship when the underpayment (a “*benefit that is payable*”) was used to repay the overpayment (GD1-7 to 8). The Tribunal cannot consider the Appellant’s argument relating to hardship caused by repaying the overpayment, as this falls outside the Tribunal’s jurisdiction. Again, it is up to the Respondent’s discretion to remit all or any portion of the amount or excess of the benefit payment under subsection 37(4).

CONCLUSION

[29] The Tribunal finds that the Appellant was not entitled to the GIS at the single rate from February 2005 to September 2013.

[30] The appeal is dismissed.

Shane Parker
Member, General Division - Income Security