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

[TRANSLATION]

Citation: *J. H. v. Minister of Employment and Social Development,* 2016 SSTGDIS 94

Tribunal File Number: GP-15-2173

BETWEEN:

J. H.

Appellant

and

Minister of Employment and Social Development
(formerly known as the Minister of Human Resources and Skills Development)

Respondent

and

P. B.

Added Party

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Income Security Section

DECISION BY: Shane Parker

HEARD ON: October 28, 2016

DATE OF DECISION: November 15, 2016

Canada

REASONS AND DECISION

PERSONS IN ATTENDANCE

Appellant: Mr. J. H.

Added Party: Mrs. P. B.

R. C.: Witness for the Appellant

INTRODUCTION

[1] The Appellant filed an application under the *Old Age Security Act* (OAS Act) on February 22, 1999. The application was approved (GD2-12 to 15).

[2] On April 13, 1999, the Appellant applied for the Guaranteed Income Supplement (GIS), payable as of July 1998. The GIS payment was approved for a single person, because the Appellant indicated that his marital status was separated (GD2-182; see also the OAS pension application, GD2-12). The GIS benefit was renewed each year at the single rate. On September 26, 2013, Mrs. filed an application for an OAS pension, in which the Appellant is described as a spouse or common-law partner (GD2-40).

[3] Following a review of the Appellant's file from October 1, 2013, the Respondent determined that the Appellant had been in a common-law relationship with the Added Party (Mrs.) for many years. On June 10, 2014, the Respondent determined that the Appellant had received a GIS overpayment for the period from July 2000 to January 2014. The Respondent claimed an overpayment of $33,117.34 for this period (initial decision, at GD2-37 to 38; GD5-4).

[4] Following a request for reconsideration received on June 27, 2014 (GD2-16 to 17), and its reconsideration on November 3, 2014, the Respondent upheld the original decision (GD2-8 to 11).

[5] On July 6, 2015, the Appellant submitted the completed documents to file an appeal with the Social Security Tribunal (Tribunal). Following the Tribunal's interlocutory decision on January 26, 2016, the appeal was able to proceed before the Tribunal.

[6] This appeal was heard by videoconference for the reasons set out in the Notice of Hearing dated August 16, 2016, namely:

- More than one party will attend the hearing;
- Videoconferencing is available within a reasonable distance of the area where the Appellant lives;
- The issues under appeal are complex;
- There are gaps in the information on file and/or a need for clarification;
- This form of hearing is the most appropriate to address inconsistencies in the evidence, and it respects the requirement under the *Social Security Tribunal Regulations* (Tribunal Regulations) to proceed as informally and quickly as circumstances, fairness and natural justice permit.

ISSUE

[7] The Tribunal must decide whether the Appellant was in a common-law relationship from July 2000 to January 2014.

THE LAW

[8] Section 12 of the OAS Act states that the GIS amount payable to a common-law partner is lower than the amount paid to a single person:

> **Amount of Supplement**
>
> April 1, 2005
>
> **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,
>
> (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,

> **(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.

[9] Subsection 15(1) of the OAS Act stipulates that every person by whom an application for a supplement in respect of a payment period is made shall, in the application, state whether the person has or had a spouse or common-law partner at any time during the payment period or in the month before the first month of the payment period, and, if so, the name and address of the spouse or common-law partner and whether, to the person's knowledge, the spouse or common-law partner is a pensioner.

[10] Subsection 15(9) of the OAS Act stipulates that 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.

[11] Section 2 of the OAS Act defines "common-law partner" and "Minister" as follows:

> "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.
>
> "Minister" means the Minister of Human Resources and Skills Development.

[12] Subsection 37(1) of the OAS Act concerns the return of an overpayment and reads as follows:

> Return of benefit where recipient not entitled

> **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.

EVIDENCE

[13] The following is a summary of the relevant evidence in this case.

[14] The Appellant's OAS pension application indicates a marital status of separated (GD2-12). His application for OAS benefits signed on April 12, 1999, indicated the same marital status (GD2-182).

[15] A statutory declaration of common-law union submitted by the Added Party and the Appellant on September 25, 2013, states that they have lived together for 25 consecutive years since 1988. Furthermore, they reported that they jointly owned property, bank accounts, trust, credit union or charge card accounts (GD2-93). At the hearing, the Appellant disputed the content of the statutory declaration (GD2-93), indicating that the commissioner completed the declaration with the wrong dates and didn't pay attention to the content when he signed it. The Appellant and the Added Party confirmed that when the Appellant underwent eye surgery somewhere around 1999, the Added Party stayed with him to care for and feed him.

[16] A bank account statement lists the Appellant and the Added Party as joint holders; the statement was sent to them at a common address (GD2-129). The Added Party opened a bank account on April 10, 2000, and listed the Appellant as her spouse (GD2- 179 to 180). According to the documents, the Added Party and the Appellant had opened other joint accounts (GD2-150 to 160).

[17] The Appellant's driver's licence (GD2-94) and a home insurance bill for the Added Party (GD2-127) indicate a common address, the same one indicated on the 2007 bank account statement (GD2-153).

[18] In an interview report from September 26, 2013, the Appellant and the Added Party shared their relationship history, and stated that they had been living together since 1999. *(The Appellant has lived with her permanently since he arrived [in Canada in 1999]. In 2000, they opened a joint bank account... they each have a statement naming the other as beneficiary.)* (GD2-88). The Added Party explained to the Tribunal that they opened joint bank accounts to save on banking fees; she also opened a bank account with her boyfriend, Mr. M. R.

[19] In an interview report from May 7, 2014, the Appellant and the Added Party stated *that their situation had not changed in many years. They were still sharing their life; they had spent the last six (6) months in Florida at Mrs.'s condo. They still live together at the same address in the [Added Party's] condo in Quebec City. They don't intend to separate and move but the Appellant clarified that he did not want his GIS cheque to be reduced. He needs that money to live. Therefore, he wanted the best solution for him.* (GD2-55)

[20] In a statement from the Added Party on December 18, 2007, she indicated that she and the Appellant had been in a common-law relationship since 1990 (GD2-138 to 141). The Appellant's statement indicates the same thing (GD2-143). The Added Party told the Tribunal that she wanted to give everything to the Appellant because of his kindness. Despite her statement of a common-law union with him, she had a boyfriend, Mr. M. R. until 2008. Mrs. and Mr. M. R. often travelled to Las Vegas and Puerto Rico during the winter. From 2000 to 2008, Mrs. said she spent more time with Mr. M. R. than with the Appellant. The nature of their relationship was mostly physical; however, with the Appellant, there was a stronger emotional connection. She fell in love with the Appellant around 2005 and asked him to marry her around that time. The Appellant rejected the idea of marriage because he thought it would affect his pension.

[21] Based on the GIS applications for the period from 2009 to 2014, the Appellant and the Added Party mention their common-law union **from 1999** (GD2-43 and 44). Mrs. testified that she did not have an intimate physical relationship with the Appellant before 2009. She added that the GIS applications contained incorrect information, specifically that their common-law relationship began in 1999.

[22] The Added Party told the Canada Revenue Agency (CRA) that her marital status was single between 2000 and 2012 (GD2-104 to 126).

[23] On August 18, 2015, the Appellant indicated that he did not know *before this winter that he was considered to be in a common-law relationship with [the Added Party] before 2009, before the November 2014 response [Respondent's reconsideration]* (GD4-1).

[24] During the hearing, the Appellant and Mrs. responded to a series of questions about their relationship during the period from July 2000 to 2009. They lived under the same roof, but in separate units on different floors. Each unit was managed independently. They helped each other when they had problems or when one of them was sick (for example, after the Appellant's eye surgery) but they did not eat their meals together. They did not buy each other gifts to celebrate special occasions like their birthdays. They were not having sexual relations. Mrs. reminded the Tribunal that she was in an intimate relationship with Mr. M. R. between 1980 and 2008. In fact, the Appellant once went on vacation with Mrs. and Mr. M. R. in the winter of 2005. The Appellant and Mrs. subsequently went on holidays together every winter. The Appellant and Mrs. often went out together, more on religious outings, because she didn't have any friends in Canada apart from the Appellant and didn't have any family in Canada either. Mrs. said she took over responsibility of the Appellant's finances in 2000, when she opened a joint bank account.

[25] Regarding the terms *spouse* and *common-law union*, the Appellant and Mrs. argued that they did not understand these terms, and that they signed their wills, GIS applications, and their statutory declaration without paying attention to the content or importance of the indicated marital status. Mrs. seemed more certain about and attentive to her reports to the CRA; however, she had no explanation for selecting another marital status on other official documents. The Appellant and Mrs., however, let the Tribunal know that the facts established their relationship as simply a friendship, and not a common-law union, despite the (erroneous) content regarding their common-law marital status in the pre-2009 documents.

Testimony of R. C.

[26] Mr. R. C. testified first. He has known the Appellant for decades. Regarding the Appellant's marital status during the period in question, he knew Mrs. as the landlord who lived on the other floor of the house. The Added Party explained to Mr. R. C. in 2009 that the reason why she was selling the house was to live with the Appellant as her spouse. For the period before 2009, the Appellant had not discussed his relationship with the Added Party. Mr. R. C. had seen the Added Party only twice, and all he knew about their relationship was that she was the owner of the house and that the Appellant lived in the basement of the house.

SUBMISSIONS

[27] In August 2015, the Appellant stated that his relationship with the Added Party had been one of roommates between 1990 and 2009. He added that the common-law union with the Added Party began in 2009 (GD4-1). At the hearing, the Appellant argued that the facts of their relationship between 2000 and 2009 prevailed, and that the Tribunal must place less emphasis on the (erroneous) content of the documents they signed indicating their common-law status.

[28] The Respondent submitted that preponderance of the evidence establishes that the Appellant and the Added Party had been in a common-law relationship at least since the Added Party's arrival in Canada in 1999.

ANALYSIS

[29] In this case, for the period of July 2000 to August 2009, the Tribunal must look at whether the Appellant was in a common-law relationship according to the OAS Act and the relevant case law. The Appellant and the Added Party submit that they have been in a common-law relationship since 2009.

[30] In *McLaughlin v. Canada (Attorney General)*, 2012 FC 556 (paragraph 15), the Federal Court listed the following factors as being indicative of a conjugal relationship:

> 1) Shelter, including considerations of whether the parties lived under the same roof, slept together, and whether anyone else occupied or shared the available accommodation;
>
> 2) Sexual and personal behaviour, including whether the parties have sexual relations, maintain an attitude of fidelity to each other;

3) Services, including the roles they played in preparation of meals, doing laundry, shopping, conducting household maintenance and other domestic services;

4) Social, including whether they participated together or separately in neighbourhood and community activities and their relationship with respect to each other's family members;

5) Societal, including the attitude and conduct of the community towards each of them as a couple;

6) Support, including the financial arrangements between the parties for provision of necessaries and acquisition and ownership of property; and

7) Attitude and conduct concerning any children.

[31] The Supreme Court of Canada confirmed, in the family law context, that these factors should be taken into account to determine whether the common-law partners are living in a conjugal relationship. It stated in *M v. H*, 1999 CanLII 686 (SCC), [1999] 2 SCR 3, [1999] ACS no 23, in paragraph 59, that "the generally accepted characteristics of a conjugal relationship [include] shared shelter, sexual and personal behaviour, services, social activities, economic support and children, as well as the societal perception of the couple."

[32] In this case, the balance of probabilities has established that the Appellant was in a common-law relationship from July 2000 to 2009. Although the Appellant and Mrs. lived on different floors of the house, the fact remains that Mrs. moved to Canada in 1999, where she had no friends or family. She thus became close with the Appellant. She took charge of their common finances. In fact, she took responsibility of all their money as of 2000. Furthermore, she cared for and fed the Appellant after his operation in 1999. They shared the same roof during the entire period in question.

[33] Although Mrs. confessed to a relationship with Mr. M. R., this is only one factor in the analysis. She had an intimate physical relationship with Mr. M. R., while her relationship with the Appellant was more emotionally intense. Mrs. says she fell in love with the Appellant around 2005 (notwithstanding her physical relationship and holidays with Mr. M. R.). This suggests a stronger connection with the Appellant during the period approaching and certainly in 2005. In fact, the connection between the Appellant and Mrs. was so strong, according to Mrs., that she proposed marriage to him. After 2005, the Appellant and Mrs. travelled together

without Mr. M. R. Furthermore, there is no evidence to suggest that Mrs. lived with Mr. M. R., nor that she had total control of his finances, like she did with the Appellant. The emotional connection between the Appellant and Mrs. became greater than the connection between Mrs. and Mr. M. R., given that she left all her property to the Appellant in her will in 2007 and the relationship with Mr. M. R. ended in 2008.

[34] Regarding the societal perception of the couple, the Tribunal acknowledges the testimony of Mr. R. C., and that he knew Mrs. only as a landlady. That said, Mr. R. C. had seen her only twice and the Appellant did not discuss his relationship with him. The statements contained in the wills, statutory declaration, and GIS applications express an official and objective image of a common-law relationship. The Appellant and Mrs. are asking the Tribunal to ignore their statements. According to the Tribunal, this would establish a bad precedent. Rejecting statements made repeatedly on official documents would have the effect of ignoring the importance of these documents and the process of applying for OAS benefits. This process is founded on good faith and the accuracy of applicants' statements. The parties are intelligent and capable of reviewing and acknowledging the importance of the indicated statements before signing them. Mrs. demonstrated this by being attentive to her single status on her reports to the CRA; and the Appellant regarding his OAS pension application. Clearly, they are capable of distinguishing between *single* and *common-law*. The Tribunal does not accept their ignorance of the common-law status that they had declared.

[35] In summary, the Tribunal determines that the Appellant was in a common-law relationship with the Added Party for the period from July 2000 to January 2014. As a result, any GIS overpayment during this period, due to the single status, must be repaid to the Respondent under section 37 of the OAS Act.

CONCLUSION

[36] The appeal is dismissed.

Shane Parker
Member, General Division - Income Security