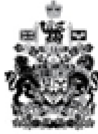

Citation: *Minister of Employment and Social Development v CB*, 2022 SST 390

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant: Minister of Employment and Social Development
Representative: Attila Hadjirezaie

Respondent: C. B.
Representative: Gilbert Nadon

Decision under appeal: General Division decision dated August 22, 2021 (GP-19-1729)

Tribunal member: Jude Samson

Type of hearing: Teleconference
Hearing date: March 30, 2022
Hearing participants: Appellant's representative
Respondent's representative

Decision date: May 13, 2022
File number: AD-21-395

Decision

[1] The appeal is allowed. The Claimant did not qualify for benefits that he received from June 2012 to May 2017.

Overview

[2] C. B. is the Claimant in this case. He applied for the Allowance for the Survivor (Allowance).[1] As part of his application, the Claimant said that J. D. was his common-law partner at the time of her death.

[3] The Minister of Employment and Social Development (Minister) investigated the nature of their relationship.[2] In December 2012, the Minister refused the Claimant's application.[3] The Minister did not accept that the Claimant and J. D. had been common-law partners. Instead, the two simply shared the same address.

[4] The Claimant asked the Minister to reconsider its decision, which it did. In March 2013, the Minister approved the Claimant's application for the Allowance.[4] As part of its decision, the Minister relied heavily on Retraite Québec's decision to recognize the Claimant's common-law partnership with J. D.

[5] In 2016, however, the Minister learned that Retraite Québec had changed its decision about the Claimant's common-law relationship with J. D. So, the Minister started a new investigation into the Claimant's relationship with the deceased.

[6] In October 2018, the Minister reversed its March 2013 decision. Again, it concluded that the Claimant and J. D. had not been common-law partners. As a result, the Claimant never qualified for the Allowance. So, the Minister demanded that the Claimant repay all the benefits that he had received from June 2012 to May 2017, an amount totalling almost $20,500.

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[1] This benefit is established under the *Old Age Security Act* (OAS Act).
[2] Service Canada delivers this program for the Minister.
[3] The Minister's initial decision letter starts on page GD2-101.
[4] The Minister's reconsideration decision starts on page GD2-115.

[7] The Claimant successfully appealed the Minister's decision to the Tribunal's General Division. Briefly, the General Division concluded that the Minister's limited powers did not allow it to reassess the Claimant's case, or to demand the reimbursement of benefits already paid.

[8] Now, the Minister is appealing the General Division decision to the Tribunal's Appeal Division. Its main argument is that the General Division made an error of law by limiting the scope of the Minister's powers.

[9] I agree. As a result, I am allowing the Minister's appeal and giving the decision the General Division should have given: the Claimant didn't qualify for the Allowance benefits that he received from June 2012 to May 2017.

Issues

[10] The issues in this appeal are:

a) Did the General Division make an error of law by interpreting the scope of the Minister's powers too narrowly?

b) If so, how should I fix the General Division's error?

Analysis

[11] I can intervene in this case only if the General Division made at least one relevant error.[5] In this appeal, my focus is on whether the General Division made an error of law.

The General Division made an error of law by interpreting the scope of the Minister's powers too narrowly

[12] As part of its decision, the General Division considered whether the Minister, in October 2018, had the power to change a decision that it had made in March 2013.

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[5] The relevant errors, formally known as "grounds of appeal," are listed under section 58(1) of the *Department of Employment and Social Development Act* (DESD Act).

Specifically, the Minister reversed its own decision about whether the Claimant and J. D. had been common-law partners at the time of her death.

[13] The General Division decided that the Minister was unable to review its past decisions in this way. When reaching its conclusion, the General Division relied on a number of decisions in which the Tribunal found that there were significant limits on the Minister's power to change past decisions.

[14] In particular, the General Division relied on *BR v Minister of Employment and Social Development*[6] and *MB v Minister of Employment and Social Development*.[7] But after the General Division finalized its decision in this case, the Federal Court of Appeal concluded that the *MB* decision was unreasonable: *Canada (Attorney General) v Burke*.[8]

[15] In the *Burke* decision, the Court recognized that the law does not expressly give the Minister the power to change earlier decisions.[9] However, it found that the Minister's powers can be implied from other related provisions.[10]

[16] In the end, the Federal Court of Appeal concluded as follows in paragraph 106 of its decision:

> Put simply, the investigative authority under section 23 of the Regulations allows the Minister to reassess an individual's eligibility for benefits where, for example, new information surfaces, or where errors, misrepresentation or even fraud has occurred, ensuring that only those entitled to benefits actually receive them. Section 37 of the Act allows the Minister to recover benefits that were improperly paid to a claimant.

[17] While I recognize the purpose and importance of eligibility criteria, I have reservations about the *Burke* decision. Essentially, this decision means that the

[6] *BR v Minister of Employment and Social Development*, 2018 SST 844
[7] *MB v Minister of Employment and Social Development*, 2021 SST 8.
[8] See *Canada (Attorney General) v Burke*, 2022 FCA 44.
[9] This is described in paragraph 60 of *Canada (Attorney General) v Burke*, 2022 FCA 44.
[10] In particular, the Federal Court of Appeal relied on section 37 of the OAS Act and section 23 of the *Old Age Security Regulations* (OAS Regulations).

Minister's decisions are never final. It also allows the Minister to focus less on the quality of its decisions, since there's a sense that mistakes can be fixed later. I'm unaware of other government decision makers who can change their past decisions, regardless of how much time has passed since the earlier decision was made.

[18] Put somewhat differently, the Claimant argues that there is nothing offensive or unusual about people keeping government benefits to which, it is later determined, they should not have received. For example, the Claimant was able to keep some of the benefits that Retraite Québec overpaid him because its legislation limits the amount of time that the Province can go back to recover benefits that were paid in error.[11]

[19] Regardless of these concerns, I must follow the *Burke* decision if the facts of that case are sufficiently similar to this one.

[20] In *Burke*, the Federal Court of Appeal recognized the Minister's broad powers to change past decisions. However, the Claimant argues that there is an important difference between the *Burke* case and this one. Specifically, he notes that the Minister makes an initial decision and then, if requested, makes a reconsideration decision. The Minister approved Ms. Burke's application at the initial level. In this case; however, the Minister approved the Claimant's application at the reconsideration level.

[21] As a principle of administrative law, the Claimant argues that the reconsideration process must have some significance. Here, the Minister conducted an investigation, and then concluded that the Claimant and J. D. were common-law partners. According to the Claimant, therefore, the Minister should only be able to apply its new decision going forward, not backward.

[22] Accepting the Claimant's argument would allow him to keep most or all of the benefits that he received.

[23] In *Burke*, the Federal Court of Appeal concluded that the Minister's powers to change a past decision come from the *Old Age Security Act* and the *Old Age Security*

[11] The Claimant's decision from the Tribunal Administratif du Québec starts on page GD6-33.

Regulations. It underlined how, together, these instruments are designed to ensure that people do not get to keep benefits unless they are entitled to them.[12]

[24] The *Burke* decision also highlights the Minister's broad powers to investigate and reassess, "at any time before or after approval of an application."[13] The Court did not distinguish between applications that the Minister approves at the initial level instead of at the reconsideration level. And I have trouble seeing why I would make that distinction either.

[25] It is perhaps worth remembering that the relevant question here has always been the same: Were the Claimant and J. D. common-law partners at the time of her death? Obviously, the Minister was not deciding whether the nature of their relationship changed between March 2013 and October 2018.

[26] I have concluded that the *Burke* decision applies in this case. As a result, the General Division made an error of law by interpreting the scope of the Minister's powers too narrowly.

I will fix the General Division's error by giving the decision it should have given

[27] In the circumstances of this case, I have decided to give the decision the General Division should have given.[14] Neither of the parties opposed this remedy. This means that I can decide on the nature of the relationship between the Claimant and J. D. and whether the Claimant qualifies for the Allowance.

[28] The Claimant had a full opportunity to present evidence at the General Division level. It was the Claimant's choice not to testify at the General Division hearing. Instead, the Claimant's arguments — at both the General and Appeal Division levels — have focused more on the Minister's limited powers to review past decisions.

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[12] See, for example, paragraph 107 in *Canada (Attorney General) v Burke*, 2022 FCA 44.
[13] See section 23(1) of the OAS Regulations.
[14] Sections 59(1) and 64(1) of the DESD Act give me the power to fix the General Division's errors in this way. Also, see *Nelson v Canada (Attorney General)*, 2019 FCA 222 at paragraphs 16 to 18.

[29] For the reasons described above, the Minister had the power to revisit its March 2013 decision and reassess whether the Claimant and J. D. were common-law partners at the time of her death.

[30] The next step is to discuss the nature of the relationship between the Claimant and J. D. Since the General Division found the Minister's powers to be so narrow, it did not consider this part of the appeal in much detail.[15]

– **The Claimant and J. D. were not common-law partners at the time of her death**

[31] To qualify for the Allowance, the Claimant and J. D. needed to be common-law partners at the time of her death.[16] In other words, when J. D. died, had the two been living together in a marriage-like relationship for at least a year?[17]

[32] When deciding whether a couple are in a marriage-like relationship, the Tribunal considers different factors, including the following:[18]

- financial interdependence;
- a commitment to the relationship and its future;
- shared assets, including a common home and divided responsibilities around the home;
- shared vacations;
- a sexual relationship;
- shared parenting responsibilities (if applicable);

[15] See paragraph 43 of the General Division decision.
[16] See section 21 of the OAS Act and the definition of "survivor" under section 2 of the OAS Act.
[17] See the definition of "common-law partner" under section 2 of the OAS Act.
[18] See, for example, *Tanouye v Tanouye*, 1993 CanLII 8998 (SK QB) at paragraphs 32 to 38 and *Betts v Shannon*, (September 17, 2001) CP 11654 (PAB).

- how the two present themselves to the community and on official documents, including on wills, insurance policies, medical records, and tax returns; and

- recognition of the relationship among family and friends.

[33] The Claimant recognizes the challenge of proving that he was in a conjugal relationship with J. D. The two did not share finances or legal obligations. Nor did they declare being in a common-law relationship on any official documents.[19] Instead, the documents the Claimant provided do little more than to show that he and J. D. shared the same address.[20]

[34] The Claimant's lawyer noted that this Tribunal does not have to follow decisions from the Tribunal Administratif du Québec (TAQ). However, he acknowledged that the TAQ has already decided that the Claimant and J. D. were not in a common-law relationship.[21] In addition, he essentially conceded the following:

- although the relevant periods are somewhat different, both tribunals are considering very similar issues;

- the Claimant had a full opportunity to present his case to the TAQ and it considered his evidence along with the relevant factors; and

- it would be curious if the two tribunals came to opposite conclusions.

[35] The TAQ's decision is persuasive. Overall, the Claimant has not shown that he and J. D. were common-law partners at the time of her death. As a result, he is not entitled to the Allowance that he received from June 2012 to May 2017.

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[19] See page GD2-26. Also, see page GD2-63, in which the Claimant explains why their finances were kept separate.
[20] See pages GD2-64 to 85.
[21] The TAQ's decision starts on page GD6-33. See especially paragraphs 20 to 26.

Conclusion

[36] I am allowing the Minister's appeal.

[37] The General Division made an error of law by interpreting the scope of the Minister's powers too narrowly. This allows me to give the decision the General Division should have given: the Claimant and J. D. were not common-law partners at the time of her death. As a result, the Claimant doesn't qualify for the Allowance benefits that he received.

Jude Samson
Member, Appeal Division