Citation: *LH v Minister of Employment and Social Development*, 2023 SST 919

Social Security Tribunal of Canada
General Division – Income Security Section

Decision

Appellant:	L. H.
Representative:	Sean Jordan
Respondent:	Minister of Employment and Social Development

Decision under appeal:	Minister of Employment and Social Development reconsideration decision dated May 20, 2022 (issued by Service Canada)

Tribunal member:	James Beaton
Type of hearing:	Videoconference
Hearing date:	July 12, 2023
Hearing participants:	Appellant's representative Appellant's witnesses
Decision date:	July 17, 2023
File number:	GP-22-1439

Decision

[1] The appeal is dismissed.

[2] The Appellant, L. H., isn't eligible to be paid the Guaranteed Income Supplement (GIS) at the single rate from May 2002 to October 2018. This decision explains why I am dismissing the appeal.

Overview

[3] The Appellant applied for the GIS. The Minister of Employment and Social Development granted her application. She started getting payments in May 2002.

[4] The amount of the GIS is higher if a person is single compared to if they are married or in a common-law relationship. The Minister paid the Appellant the GIS at the single rate until October 2018. At that time, the Minister started paying her at the common-law rate. It found that the Appellant had always been in a common-law relationship. Therefore, she was also required to repay the difference between what she got (based on the single rate) and what she should have gotten (based on the common-law rate) from May 2002 to October 2018.

– What led to the Minister paying the Appellant based on the common-law rate

[5] These are the circumstances that led to the Minister paying the Appellant based on the common-law rate instead of the single rate.

[6] In July 2018, the Minister sent the Appellant a letter saying she was entitled to the GIS for the 2018/2019 benefit period. The letter said: "According to our records, you are currently single, separated, divorced, widowed, or living apart for reasons beyond your control." Beneath this, the Appellant wrote "wrong information," signed her name, and checked the box saying she was "married or living in a common-law relationship." Then she sent the letter back to the Minister.[1]

[1] See GD2-76.

[7] This prompted the Minister to investigate her relationship status. The Minister asked the Appellant to provide a statutory declaration confirming her common-law status, which she did.[2] The statutory declaration names M. G. as her common-law partner. It indicates that they had lived together since September 1, 2000, and that they shared a residence and a bank account.[3]

[8] On October 5, 2018, an employee from Service Canada (which is represented by the Minister) called the Appellant. The Appellant verified that she was in a common-law relationship with M. G., and had been since September 1, 2000.[4]

[9] On November 19, 2018, the Minister sent the Appellant a letter saying she had never been entitled to be paid the GIS at the single rate. This resulted in an overpayment (a debt owed to the Minister) of over $80,000.[5]

[10] In January 2019, the Appellant phoned Service Canada. She said she didn't know what she was doing when she signed the statutory declaration; she and M. G. were just friends who cared for each other.[6]

[11] Following this, the Appellant and M. G. wrote to the Minister multiple times saying they were "best friends" who were "single, divorced and not living in a common law relationship." They said their accountant told them to sign the statutory declaration; they didn't know what a common-law union was. They said they were just friends who lived together for companionship and assistance.[7]

[12] The Minister didn't change its decision. The Appellant appealed the Minister's decision to the Social Security Tribunal's General Division.

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[2] See GD2-75.
[3] See GD2-69.
[4] See GD2-68.
[5] See GD2-42.
[6] See GD2-38.
[7] See GD2-25, 26, 28, 30, 31, 33, and 36.

What the Appellant must prove

[13] To succeed in her appeal, the Appellant must prove that she didn't have a common-law partner from May 2002 to October 2018. She must prove this on a balance of probabilities. This means she must prove it is more likely than not.

[14] The *Old Age Security Act* defines a common-law partner as "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."[8]

[15] To determine whether the Appellant and M. G. were common-law partners, I must consider the following factors:[9]

a) **shelter**—including whether they lived together or slept together, or whether anyone else lived with them or shared their accommodations
b) **sexual and personal behaviour**—including whether they had sexual relations, maintained an attitude of fidelity to each other, communicated on a personal level, ate together, assisted each other with problems or during illness, or bought each other gifts
c) **services**—including their roles in preparing meals, doing laundry, shopping, conducting household maintenance, and performing other domestic services
d) **social**—including whether they participated together or separately in neighbourhood and community activities, and their relationship with each other's family members
e) **societal**—including the attitude and conduct of the community toward them as a couple
f) **support**—including their financial arrangements for the provision of their needs and for the acquisition and ownership of property
g) **attitude and conduct concerning any children**

[8] See section 2 of the *Old Age Security Act*.
[9] See *McLaughlin v Canada (Attorney General)*, 2012 FC 556.

[16] This is not a checklist. Two people may be common-law partners even if not all of these factors are present.[10]

Matters I have to consider first

[17] The Appellant's representative is an accountant, but not the same accountant who completed the paperwork described earlier.[11]

[18] The Appellant has three sons—J., D., and R.—and one daughter. J., D., and R. attended the hearing as witnesses. R. was late to the hearing. His brothers and the Appellant's representative weren't sure if he would be attending, so we began without him. When he joined the hearing later, I ensured that he was given the opportunity to provide testimony.

[19] The Appellant didn't attend the hearing. J. explained that the Appellant's memory isn't good and she would not have understood what was going on at the hearing. The Appellant's representative also understood that the Appellant would not be attending the hearing. I believe that the Appellant got notice of the hearing through her representative. So I proceeded without the Appellant.[12]

[20] The Appellant's representative made written submissions.[13] Those submissions included statements of fact that were not found elsewhere in the appeal record. At the hearing, I confirmed that J. was the source of those statements, and I accepted them as J.'s evidence.

Reasons for my decision

[21] Based on the factors I must consider, I find that the Appellant and M. G. were common-law partners from May 2002 to October 2018. I will discuss each factor separately.

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[10] See *M v H*, [1999] 2 SCR 3 at paragraph 59.
[11] See the hearing recording.
[12] Section 58 of the *Social Security Tribunal Rules of Procedure* allows me to do this.
[13] See GD1-2 to 6 and GD3-2.

– **Shelter**

[22] This factor **supports** a common-law relationship.

[23] The Appellants lived together from 1993 until M. G.'s death in October 2021.[14] For a while, they rented a house owned by D. Eventually, they decided to move to a condo in a more urban area so that they would feel safer and have better access to doctors. The condo they bought in 2000 and owned as joint tenants was in a seniors' community. To live there, residents had to be over a certain age. However, this was not a long-term care facility. Residents weren't necessarily in poor health.[15]

– **Sexual and personal behaviour**

[24] This factor **supports** a common-law relationship.

[25] On one hand, the Appellant and M. G. lived in separate bedrooms within the same condo unit. They didn't sleep together. According to the Appellant's sons, there were no sexual or romantic feelings or public displays of affection between the Appellant and M. G. Furthermore, the Appellant wasn't interested in pursuing a romantic relationship because her last relationship was not a happy one.[16]

[26] On the other hand, a letter from Dr. De Klerk (who was the family doctor for both the Appellant and M. G.) says the Appellant dressed, groomed, and bathed M. G. due to his poor health.[17] The Appellant did this because M. G. didn't want to move into a long-term care facility or live with his children.[18]

[27] These are intimate behaviours. They are not the sort of behaviours that typical roommates or friends would exhibit. They demonstrate that the Appellant and M. G.'s relationship was a deeply intimate one, even if it wasn't sexual. It is significant that

[14] See GD2-17 and the representative's written submissions.
[15] See GD2-70 and 71, and the hearing recording.
[16] See the hearing recording.
[17] See GD2-18.
[18] See the representative's written submissions.

M. G. chose to remain in the condo and be cared for by the Appellant rather than by family members.

– **Services**

[28] This factor **supports** a common-law relationship.

[29] The Appellant and M. G. cooked, cleaned, did laundry, and went shopping together. Jamie's evidence was that they did these activities together because it was convenient, not because there was a mutual expectation that the Appellant and M. G. would do them together.[19] This doesn't change the fact that they shared responsibilities and daily activities for decades.

[30] In addition, the Appellant and M. G. shared a vehicle. When they bought the condo, they each had separate vehicles. When M. G.'s health began to decline, M. G. sold his vehicle. It was more cost-effective for them to share a vehicle. After M. G. could no longer drive, the Appellant drove M. G. where he needed to go.[20]

– **Social**

[31] This factor **does not support** a common-law relationship. However, it doesn't necessarily support that the Appellant was single either.

[32] M. G. had two daughters and one son.[21] When M. G. visited his family on the East Coast, the Appellant stayed home. But this was because she was in poor health and had generally lost interest in social activities. She hasn't visited her daughter in Victoria, BC, for 10 to 15 years.[22] So I don't consider it significant that she didn't visit M. G.'s family either.

[33] It is unclear how well the Appellant's children knew M. G. Dan testified that he knew M. G. for 25 years, but I don't know what their relationship looked like.

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[19] See the representative's written submissions.
[20] See the representative's written submissions and the hearing recording.
[21] See the unredacted copy of M. G.'s will at GD7.
[22] See the representative's written submissions and the hearing recording.

[34] It seems that the Appellant's children and M. G.'s children didn't meet until M. G. was hospitalized shortly before his death.[23]

– **Societal**

[35] This factor **supports** a common-law relationship.

[36] First, Dr. De Klerk wrote a letter on September 17, 2021, saying the Appellant and M. G. had been his patients since 2006. He was aware that they lived together and that the Appellant dressed, groomed, and bathed M. G..[24] Dr. De Klerk doesn't use the words "common-law" in his letter, but he wrote the letter specifically to support their statutory declaration of common-law union.[25]

[37] Dr. De Klerk wrote a second letter on July 25, 2022, saying they lived at the same address as friends.[26] I give more weight to his first letter. His second letter was written to support the Appellant's position on appeal.[27] It doesn't deny that the Appellant dressed, groomed, and bathed M. G., as stated in the first letter.

[38] Second, when M. G. passed away, the public obituary said: "He leaves behind his best friend [the Appellant] and her family, as well as his family."[28] Although the obituary uses the words "best friend" rather than "partner," I consider it significant that the Appellant and her family are mentioned as survivors of M. G., even before M. G.'s children.

– **Support**

[39] This factor **supports** a common-law relationship.

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[23] See the hearing recording.
[24] See GD2-18.
[25] See GD2-17.
[26] See GD1-24.
[27] See GD1-5.
[28] See GD1-22.

[40] First, the Appellant and M. G. shared a joint bank account before M. G. died. Jamie's evidence is that they used the account to pay condo fees, while they kept the rest of their finances separate.[29]

[41] However, in a phone call with Service Canada in January 2019, the Appellant said she closed all of her joint bank accounts in November 2018 except the one they used for condo fees.[30] November 2018 is when the Minister sent its letter about the overpayment.[31] This suggests that the Appellant and M. G. shared financial arrangements to a greater extent before November 2018, and that they changed those arrangements when Service Canada advised the Appellant of the overpayment.

[42] Second, M. G.'s will demonstrates a level of support for the Appellant that might reasonably be expected between common-law partners.[32] It appoints the Appellant (referred to as his "friend") and one of M. G.'s sons as joint executors and trustees of his estate. Under the will, the Appellant was to inherit M. G.'s household furniture and effects, and his legal interest in their condo. The residue of the estate was to be split in equal shares to M. G.'s children and the Appellant's children. The substance of the will—which supports a common-law relationship—is more important than the use of the word "friend."

– **Attitude and conduct concerning any children**

[43] This factor **supports** a common-law relationship.

[44] Although the Appellant and M. G. didn't have any shared children, M. G.'s will shows a high degree of concern for the Appellant's children. His children and the Appellant's children were to inherit the residue of his estate in equal shares.

– **Weighing the factors together**

[45] The Appellant's representative and sons want me to find that the Appellant and M. G. were friends, not common-law partners. Jamie testified that their living situation

[29] See the representative's written submissions.
[30] See GD2-38.
[31] See GD2-42.
[32] M. G.'s will is at GD7.

was an "arrangement of convenience" so that they could share finances and responsibilities. The Appellant and M. G. wrote substantially the same thing to the Minister, adding that they also benefitted from each other's companionship.[33] The Appellant's representative argues that it is "not uncommon for friends to co-own a residence and live together."[34]

[46] When I weigh all of the factors together, I can't agree with the Appellant's position. The evidence shows on a balance of probabilities that the Appellant and M. G. were common-law partners, not merely roommates or friends. I put considerable weight on:

- their sharing of shelter, services, and at least some finances for decades
- their deep level of personal care for each other, demonstrated by the Appellant taking care of M. G. during his illness, and M. G. providing for the Appellant and her children in his will

[47] I recognize that the Appellant and M. G. were not in a sexual or romantic relationship, and that the relationship between their extended families wasn't strong. However, these factors need not be present for a relationship to be common-law in nature.[35]

Addressing the Appellant's other arguments

[48] In their testimony and submissions, the Appellant's sons and representative emphasized the circumstances leading up to the Minister's decision.

[49] They said the Appellant went to an accountant in her condo building in 2018 for help filling out her taxes. For some reason, that accountant told her to say she was common-law on the paperwork, which she did. They believe the accountant didn't know what he was doing. They encouraged her to have the accountant send an amendment to the Canada Revenue Agency, but he refused. The Appellant then went to a lawyer,

[33] See GD2-36.
[34] See GD1-4.
[35] See *M v H*, [1999] 2 SCR 3 at paragraph 60.

also in her condo building, to complete a statutory declaration of common-law union in an apparent effort to solve the problem.

[50] This series of events doesn't make sense. It is unclear how a statutory declaration **affirming** the Appellant's common-law status might be used to support that she was **not** common-law. In addition, the Appellant completed a second statutory declaration of common-law union in October 2021, naming M. G. as her partner, to support her application for Canada Pension Plan survivor's benefits. She gave her status as common-law in that application, too.[36]

[51] The Appellant's sons attribute these issues to the Appellant's declining mental state. They questioned the mental state of the accountant and the lawyer as well. They view this appeal as the unfortunate result of a paperwork mistake made by people who didn't know what they were doing. The representative pointed out that the Appellant had completed a lot of other paperwork in which she gave her status as single.[37] In his view, the Minister put too much weight on the relatively few pieces of paperwork that say she is common-law.

[52] Ultimately, my decision isn't based strictly on paperwork, statutory declarations, or anyone's mental state. It is based on the factors that I considered earlier in this decision. Those factors clearly show that the Appellant and M. G. were in a common-law relationship years before May 2002, and remained so until M. G.'s death.

Closing comments

[53] Some of the comments made by the witnesses at the hearing suggested to me that they are confused about the Tribunal's relationship to other entities. As I mentioned at the outset of the hearing, the Tribunal is independent from the Minister and from Service Canada. The Tribunal, the Minister, and Service Canada are all separate from the Canada Revenue Agency. It isn't the Canada Revenue Agency who decided to change the Appellant's benefit rate.

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[36] See GD2-11 to 17.
[37] He didn't reference any specific documents in the appeal record.

[54] It is partly because of the Tribunal's independence that I can't ensure Veterans Affairs Canada makes a "coordinated and corresponding decision" regarding the Appellant's relationship status and eligibility for other benefits, as requested by the Appellant's representative.[38]

[55] Finally, I note that the Appellant might be able to enter into a repayment plan with the Minister. The Minister may also forgive some of the debt if full repayment would cause undue hardship to the Appellant.[39] However, the Tribunal doesn't have this power. The Appellant would need to contact the Minister (that is, Service Canada) to pursue this.

Conclusion

[56] The Appellant isn't eligible to be paid the GIS at the single rate from May 2002 to October 2018. The Appellant must pay the resulting overpayment to the Minister.

[57] This means the appeal is dismissed.

James Beaton
Member, General Division – Income Security Section

[38] See GD1-6.
[39] See section 37(4) of the *Old Age Security Act*.