Citation: *CL v Minister of Employment and Social Development*, 2024 SST 390

Social Security Tribunal of Canada
General Division – Income Security Section

Decision

Appellant:	C. L.
Respondent:	Minister of Employment and Social Development
Decision under appeal:	Minister of Employment and Social Development reconsideration decision dated July 28, 2023 (issued by Service Canada)

Tribunal member:	Virginia Saunders
Type of hearing:	Teleconference
Hearing date:	March 28, 2024
Hearing participants:	Appellant
Decision date:	April 15, 2024
File number:	GP-23-1447

Decision

[1] I am dismissing this appeal. The Appellant, C. L., separated from his spouse on October 21, 2021. This means he wasn't eligible to be paid a Guaranteed Income Supplement (GIS) at the rate for a married person as of February 2022. He must be paid GIS as a single person.

[2] This decision explains why I am dismissing the appeal.

Overview

[3] The GIS is paid to people who are receiving an Old Age Security (OAS) pension if they have little or no other income. The amount of GIS they receive depends on their income and whether they are single, married, or have a common law partner.

[4] If a pensioner is separated from their spouse or common law partner for a continuous period of at least three months, their GIS eligibility is calculated as if they were single.[1]

[5] The Appellant turned 65 in August 2015. He began receiving an OAS pension and the GIS. He was paid at the rate for a single person, because he had declared in his application that he was divorced.[2]

[6] The Appellant married HW on February 18, 2019.[3] The Minister of Employment and Social Development (Minister) started paying him GIS at the married rate as of March 2019.[4]

[7] In April 2023, the Appellant submitted a new GIS application. He said that his marital status was now "separated" and that he and HW separated on October 24, 2022.[5]

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[1] See sections 15(4.1) and 15(14.2) of the *Old Age Security Act* (OAS Act).
[2] See GD5-5.
[3] See GD5-17.
[4] See GD5-23. The Minister manages the Old Age Security programs through Service Canada.
[5] See GD5-34.

[8] The following month, the Appellant submitted a statutory declaration and a questionnaire. In these documents, he said:

- He and HW lived separate and apart from October 24, 2021, to October 24, 2022.
- They signed divorce papers on October 24, 2022.
- They had been living together in a common law relationship since January 1, 2023.[6]

[9] As a result, the Minister decided the Appellant's GIS should be calculated at the rate for a single person as of February 2022 (three months after he and HW separated). The Minister told the Appellant he had to repay the $6,182.92 in excess GIS he had received between February 2022 and June 2023, when the Minister stopped paying him the benefit.[7]

[10] The Appellant asked the Minister to reconsider its decision. He said the divorce had not yet been officially approved. He said he has lived with HW since they got married. He had misunderstood the meaning of separation. He thought that, because they disagreed about things, they were separated.[8]

[11] The Minister refused to change its decision, so the Appellant appealed to the Social Security Tribunal's General Division.

What the Appellant must prove

[12] For the Appellant to succeed in this appeal, he must prove that he and HW were not separated during the period in question—that is, from October 24, 2021, to the hearing date.

[13] The Appellant must prove this on a balance of probabilities. This means he has to show it is more likely than not that he was not separated under the OAS Act.

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[6] See GD5-37-39.
[7] See GD5-40.
[8] See GD5-43.

Reasons for my decision

[14] I find that the Appellant and HW separated on October 21, 2022. They were still separated when their divorce order was made on September 19, 2023. They did not reconcile after the divorce. Although they live together, they are not common law partners as defined in the OAS Act.

[15] Here are the reasons for my decision.

What "separated" means

[16] The Minister argued that spouses are separated when

- they live separate and apart by mutual agreement
- there is a legal separation, or
- one has deserted the other according to the law of the province where they last resided together[9]

[17] However, the OAS Act doesn't say this. It doesn't define "separated" or "separate and apart." There aren't any court decisions that tell me what to consider when deciding if a married couple is separated under the OAS Act.[10]

[18] To decide what "separated" means for this appeal, I have to look at the ordinary meaning of the word and consider how it fits in with the purpose of the OAS and the intention of Parliament.[11]

[19] "Separated" generally describes people or things that are apart. But when we talk about married people being separated, we usually mean more than that. We mean they are apart because at least one of them has decided they no longer want to live or be seen as a married couple and has acted on that decision.

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[9] See GD6-8.
[10] One decision discusses this, but it was applying a provision in the *Old Age Security Regulations* that explained when parties were separated. That provision was repealed in 2000. See *Canada (Minister of Human Resources Development) v Neron*, 2004 FC 101.
[11] See *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC).

[20] I find that Parliament intended the OAS Act to mean this as well. I reached this conclusion by looking at how the GIS is calculated for common law partners.[12] Like married spouses, common law partners are paid GIS at the married rate. If they stop being common law partners for more than three months, their GIS is calculated at the single rate.

[21] I find that Parliament intended to treat common law couples and married couples the same way. This means the factors that show two people have stopped being common law partners are the same ones that show a married couple is separated.

[22] The OAS Act says a common law partner is "a person who is cohabiting with [an] individual in a conjugal relationship."[13] Court decisions have set out a list of factors to look at in order to decide what this means. They include:

- their living and sleeping arrangements
- their financial arrangements
- their behaviour towards each other privately and in public
- what help they give each other in the home
- how their family and community view their relationship[14]

[23] Depending on the case, some of these factors may be more relevant than others. The decision-maker must take a flexible approach.[15] A common law relationship ends "when either party regards it as being at an end and, by his or her conduct, has demonstrated in a convincing manner that this particular state of mind is a settled one."[16]

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[12] See section 15(4.2) of the OAS Act.
[13] See section 2 of the OAS Act.
[14] See *McLaughlin v. Canada (Attorney General)*, 2012 FC 556. This decision is about the *Canada Pension Plan*. It applies here because section 2 of the *Canada Pension Plan* defines "common law partner" the same way as the OAS Act.
[15] See *M v H*, [1999] 2 SCR 3 at paragraphs 59-60.
[16] See *Hodge v Canada (Minister of Human Resources Development)*, 2004 SCC 65.

[24] As I explained above, I interpret the OAS Act to mean that spouses are separated if they are not cohabiting in a conjugal relationship. So, I will look at these factors to decide if the Appellant and HW are separated.

The Appellant and HW separated in October 2021

[25] I find that the Appellant and HW separated on October 24, 2021.

[26] This case is complicated by the fact that the Appellant and HW still live under the same roof. The Appellant told me he supports HW financially because she is disabled and can't work. She has no other means of support. According to him, they still share a bedroom and are occasionally intimate.

[27] HW confirmed that the Appellant supports her. However, she said they have different personalities and conflicts. They live together "in order to save money under the pressure of high inflation." She did not say they had a sexual relationship.[17]

[28] A married couple can separate and still live in the same household.[18] I find that is what happened here. The fact that there is some remaining affection, financial dependence, and possible intimacy, cannot override the fact that the Appellant started and followed through with a divorce from HW. By doing so, he showed clearly that he intended to end the marriage and any marriage-like relationship.

[29] The Appellant said that he and HW decided to divorce in October 2021 because they weren't happy together. He liked to gamble, and she didn't approve. He found an accountant online to help them. He filed the papers to start the divorce proceedings on October 24, 2021. (There is some confusion about whether the Appellant started the divorce proceedings in October 2021 or October 2022.[19] At the hearing, he was quite firm that he started them in 2021.)

[30] I asked the Appellant what the grounds for divorce were. I explained that the only possible grounds were cruelty, adultery, or living separate and apart for at least one

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[17] See GD4-2.
[18] See *Kombargi v Minister of Human Resources Development*, 2006 FC 1511.
[19] See GD5-34.

year.[20] He said the grounds were not cruelty or adultery. That left the last ground: living separate and apart for one year.

[31] The Appellant told me that he didn't understand that he and HW had to be separated when he started the divorce proceedings and be separated for at least one year immediately before the determination of the divorce.[21]

[32] I don't accept this. I question why an accountant would be giving out divorce advice,[22] but I have no reason to believe the Appellant didn't fully understand that he and HW had to be separated when he started the proceedings on October 24, 2021. Besides the fact that he would have had to make that statement when he filed for divorce, he repeated it in a questionnaire and a statutory declaration more than a year later.[23] In addition, both he and HW gave evidence that they no longer considered themselves to be a married couple. They lived together only for convenience.

The Appellant and HW stayed separated after October 2021

[33] I find that the Appellant and HW continued to be separated after October 2021.

[34] First, nothing changed about their living arrangement. They lived together for financial reasons, not because they wanted to reconcile their spousal relationship.

[35] Second, the Appellant said that he signed the papers to finalize the divorce in October 2022.[24] He would have had to still be separated at that time, and to have been separated for at least a year. The divorce order was made on September 19, 2023, to take effect 31 days later.[25] He would have had to still be separated when the order was made.[26]

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[20] See section 8(2) of the *Divorce Act*.
[21] See section 8(2) of the *Divorce Act*.
[22] The accountant would not be allowed to give legal advice unless they were licensed to practice law.
[23] See GD5-37-39.
[24] See GD5-38.
[25] See GD4-3.
[26] See section 8(2) of the *Divorce Act*.

[36] The Appellant cannot claim to have separated in October 2021 in order to get a divorce, and then claim that he didn't actually mean it in order to get more GIS. I am not prepared to find that he lied in a statutory declaration and in whatever documents he had to file in the divorce proceedings. As a result, I find that he and HW separated in October 2021, and were still separated on September 19, 2023.

The Appellant and HW are not common law partners

[37] The Appellant and HW did not become common law partners after they were divorced. Again, nothing changed about their relationship. They are roommates who used to be married. That isn't enough to create a common law relationship.

The Tribunal doesn't have power over the Appellant's debt

[38] I recognize that the Appellant's debt creates a hardship for him. The Minister can forgive all or part of the debt or make a payment plan. But the Tribunal doesn't have any authority over this process.[27]

[39] The Minister's June 8, 2023, decision letter said the Appellant should contact Service Canada if the overpayment causes him financial difficulty.[28] The Appellant may want to consider doing this. He can use the contact information that is in the letter. As I said above, the Tribunal can't be involved in this and can't hear appeals of whatever decision the Minister makes about a payment plan or forgiving the debt.

Conclusion

[40] The Appellant and HW separated in October 2021. As a result, the Appellant must be paid GIS as a single person as of February 2022.

[41] This means the appeal is dismissed.

Virginia Saunders
Member, General Division – Income Security Section

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[27] See *Canada (Minister of Human Resources Development) v Tucker*, 2003 FCA 278; *Canada (Attorney General) v Vinet-Proulx*, 2007 FC 99.
[28] See GD5-40.