Federal Court of Appeal | Cour d'appel fédérale

Date: 20210625

Docket: A-206-20

Citation: 2021 FCA 124

CORAM: **RENNIE J.A.**
GLEASON J.A.
LEBLANC J.A.

BETWEEN:

HELEN HAVARIS

Applicant

and

ATTORNEY GENERAL OF CANADA and MARIE-CLAIRE PRELORENTZOS

Respondents

Heard by online video conference hosted by the registry on June 14, 2021.

Judgment delivered at Ottawa, Ontario, on June 25, 2021.

REASONS FOR JUDGMENT BY: GLEASON J.A.

CONCURRED IN BY: RENNIE J.A.
LEBLANC J.A.

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REASONS FOR JUDGMENT

GLEASON J.A.

[1] The applicant seeks to set aside the February 14, 2020 decision of the Social Security Tribunal - Appeal Division (the SST-AD) in *H. H. v. Minister of Employment and Social Development and M. P.*, 2020 SST 106, dismissing an appeal from a first level determination of the General Division of the Social Security Tribunal (the SST-GD) in 2019 SST 1564. In that decision, the SST-GD dismissed the applicant's application for a survivor's pension under the

Canada Pension Plan, R.S.C. 1985, c. C-8 (the CPP), determining that the applicant had not been in a conjugal relationship with a deceased contributor at the relevant time.

[2] In an earlier proceeding before the Ontario Superior Court, in the context of a claim for support under Ontario's *Succession Law Reform Act*, R.S.O. 1990, c. S.26 (the SLRA), the Superior Court reached a different conclusion. It awarded a modest lump-sum support payment to the applicant, after finding that she and the deceased had been in a conjugal relationship for the requisite period under the SLRA and thus were spouses within the meaning of the support provisions in that legislation (*Prelorentzos v. Havaris*, 2015 ONSC 2844, 2015 CarswellOnt 6370, aff'd 2016 ONCA 727, 2016 CarswellOnt 15049). However, in so concluding, the Superior Court judge found the evidence to have been unsatisfactory, stating he was satisfied by only "a very thin margin" that the applicant met the relevant definition of spouse (at paragraph 101).

[3] Before us, the applicant, who represented herself, raises three arguments, only one of which was made by her former counsel in the memorandum of fact and law that he filed on her behalf. More specifically, the applicant asserts that the SST-AD erred in: (1) finding that the hearing before the SST-GD was fair, (2) declining to interfere with the SST-GD's evidentiary findings, particularly in light of some of the additional evidence that was before the SST-GD but not before the Superior Court, and (3) declining to find that the doctrine of *res judicata* prevented the SST-GD from reaching the conclusion it did. The latter argument was fleshed out more fully in the applicant's memorandum, where her former counsel submitted that the

principles of issue estoppel or, alternatively, abuse of process, prevented the SST-GD from re-determining whether the applicant was in a conjugal relationship with the deceased contributor.

[4] With respect, I disagree with each of the applicant's assertions.

[5] Insofar as concerns the claim that the hearing before the SST-GD was unfair, for much the same reasons as were advanced by the SST-AD, I conclude that there was no violation of the applicant's procedural fairness rights.

[6] There was nothing improper or unfair in allowing the deceased's married spouse, from whom he had separated, to appear and present arguments and evidence after her adjournment request had been refused. This individual was properly named as an Added Party before the SST-GD because the Minister of Employment and Social Development had determined that she was entitled to the CPP survivor pension at issue. Moreover, the applicant was represented by a paralegal before the SST-GD, and as noted in the decision of the SST-AD, the paralegal knew or ought to have known that the Added Party was entitled to participate in the hearing.

[7] Nor was the applicant's paralegal improperly limited in his ability to present the applicant's case. A review of the transcript of the hearing before the SST-GD demonstrates that the paralegal was afforded the opportunity to make opening and closing statements, question the Added Party and present evidence on behalf of the applicant. While the tribunal member did intervene to pose questions and seek clarifications, there is nothing improper in this.

[8] Turning to the evidentiary issues, under section 58 of the *Department of Employment and Social Development Act*, S.C. 2005, c. 34, the SST-AD is empowered to intervene in evidentiary findings made by the SST-GD only if they were made in a perverse or capricious manner or without regard for the material before the tribunal. This cannot be said of the findings made by the SST-GD in the present case as it did not ignore evidence or reach conclusions that were unsupported by the evidence. It was accordingly reasonable for the SST-AD to have dismissed the applicant's evidentiary arguments as it is not its role to re-weigh the evidence.

[9] Turning, finally, to the issue estoppel and abuse of process arguments, contrary to what the applicant asserts, the SST-GD and SST-AD were not bound to reach the same conclusion as the Superior Court in respect of the existence of a conjugal relationship between the applicant and the deceased contributor.

[10] The doctrine of issue estoppel applies to prevent re-litigation of an issue where the following criteria are met: the same question was decided in the previous proceeding; that proceeding involved the same parties or their privies; and the previous decision was a final one (*Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460 at para. 25, *Penner v. Niagara (Regional Police Services Board)*, 2013 SCC 19, [2013] 2 S.C.R. 125 at para. 92).

[11] Here the questions decided by the Ontario Superior Court and the SST-GD were not the same given the differences between the SLRA and the CPP, which define "spouse" differently.

[12] Under Part II of the SLRA, for purposes of the division of property of a deceased who died intestate, where such property has a value below $200,000.00, a "spouse" does not include an unmarried spouse but does include a married spouse from whom the deceased has been separated, even if they were separated for several years (SLRA, ss. 1(1), referring to the definition of "spouse" in ss. 1(1) of the *Family Law Act*, R.S.O. 1990, c. F.3, and SLRA, s. 45; General, O. Reg. 54/95 under the SLRA, ss. 1(a)). Conversely, for purposes of support of dependants, under Part V of the SLRA, a "spouse" is defined to include persons who are not married and have cohabited "continuously for a period of not less than three years" (SLRA, ss. 57(1), referring to the definition of "spouse" in s. 29 of the *Family Law Act*).

[13] Given the different definitions in Part II and Part V of the SLRA, a deceased's estate may be divided between more than one spouse as that term is defined differently for different purposes. Indeed, that is precisely what occurred in the applicant's case before the Superior Court, where she was awarded only a relatively small portion of the deceased's estate.

[14] In contrast, the survivor's pension under the CPP cannot be split in this way as the CPP provides that only one spouse may be awarded a survivor's pension (see *Canada (Minister of Human Resources Development) v. Tait*, 2006 FCA 380, 356 N.R. 382 at para. 22; *Carter v. Canada (Minister of Social Development)*, 2006 FCA 172, 351 N.R. 83 at para. 15; *Dilka v. Canada (Attorney General)*, 2009 FCA 90, 388 N.R. 72 at para. 3).

[15] Under paragraph 44(1)(d) of the CPP, a survivor's pension is payable to "the survivor of a deceased contributor who has made base contributions for not less than the minimum

qualifying period". Subsection 42(1) defines the "survivor" of a contributor as "a person who was the common-law partner of the contributor at the time of the contributor's death", or, if there is no such person, "a person who was married to the contributor at the time of the contributor's death". The term "common-law partner" of a contributor is in turn defined in section 2 as "a person who is cohabiting with the contributor in a conjugal relationship at the relevant time, having so cohabited with the contributor for a continuous period of at least one year".

[16] While the case law under the CPP has relied on the case law decided under provincial family or succession law legislation for the sorts of factors to be assessed to determine the existence of a conjugal relationship (see, for example *McLaughlin v. Canada (Attorney General)*, 2012 FC 556, 408 F.T.R. 286 at paras. 15-16; *Perez v. Hull*, 2019 FCA 238, 2019 CarswellNat 4956 at paras. 7 and 22-23; *L.H. v. Minister of Employment and Social Development and L.K.*, 2021 SST 58 at para. 10; *C.L. v. Minister of Employment and Social Development*, 2020 SST 985 at para. 11), determinations of spousal status under provincial legislation are not binding under the CPP given the different statutory contexts.

[17] Thus, findings made under provincial law as to the existence of a conjugal relationship are not binding under the CPP. Several decisions of the Social Security Tribunal, while not binding on this Court, are instructive on this point: see for example *K. B. v. Minister of Employment and Social Development and S. C.*, 2019 SST 1501 at paras. 14 and 52; *J. R. v. Minister of Employment and Social Development*, 2019 SST 1357 at paras. 23-24, rev'd on other grounds in *Canada (Attorney General) v. Redman*, 2020 FCA 209, 2020 CarswellNat 5280); see also, by analogy, *A. V. v. Minister of Employment and Social Development*, 2019 SST 645 at

paras. 9-14 (where the Social Security Tribunal found that the meaning of “separated” under provincial law was not determinative for the purposes of the *Old Age Security Act*, R.S.C. 1985, c. O-9).

[18] The second requisite factor for the application of the doctrine of issue estoppel is likewise absent in the instant case as the Minister of Employment and Social Development was not a party to the case before the Superior Court but was the respondent and essential party before the SST-GD and SST-AD. Nor could the Minister be considered a “privy” to the deceased’s married spouse as the Minister’s interests were not allied with hers. In *The Doctrine of Res Judicata in Canada*, 4th ed. (Toronto: LexisNexis Canada Inc. , 2015) at pp. 80-81, Donald Lange explains that for a party in later proceedings to be considered the privy of another party who participated in earlier proceedings, there must be a community or unity of interest between the two parties; their interests “cannot be different in substance.” They must have “a parallel interest in the merits of the [previous] proceeding, not simply a financial interest in the result.” This cannot be said of the Minister and the Added Party as the Minister has an independent interest in the application of the CPP and an obligation to ensure its correct application to all claimants, which is different from the Added Party’s interest in the deceased’s estate.

[19] Thus, the doctrine of issue estoppel did not apply to prevent the SST-GD from reaching its own decision as to whether the applicant was in a conjugal relationship with the deceased.

[20] The doctrine of abuse of process was likewise inapplicable. A court or tribunal possesses discretion to preclude re-litigation of an issue that has already been decided where re-litigating

the issue would be an abuse of the court or tribunal's process (*Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77 at paras. 37-38).

[21] Given the difference in the issues before the Ontario Superior Court and the SST-GD, as well as the fact that the applicant was largely unsuccessful before that Court, which found her to be a "spouse" for purposes of Part V of the SLRA by only a "very thin margin", it was not abusive for the SST-GD to have made its own determination as to the existence of a conjugal relationship at the relevant time.

[22] Thus, it was reasonable for the SST-AD to have declined to find an error in the SST-GD's conclusion that the decision of the Ontario Superior Court did not finally determine whether there was a conjugal relationship, within the meaning of the CPP, between the applicant and the deceased.

[23] I would accordingly dismiss this appeal, without costs as, appropriately, none were sought by the respondent.

"Mary J.L. Gleason"
J.A.

"I agree.
Donald J. Rennie J.A."

"I agree.
René LeBlanc J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-206-20
STYLE OF CAUSE:	HELEN HAVARIS v. ATTORNEY GENERAL OF CANADA and MARIE-CLAIRE PRELORENTZOS
PLACE OF HEARING:	BY ONLINE VIDEO CONFERENCE
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CONCURRED IN BY:	RENNIE J.A. LEBLANC J.A.
DATED:	JUNE 25, 2021

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