Citation: *T. H. v. Minister of Human Resources and Skills Development*, 2014 SSTGDIS 18

Appeal #: GT-112502

BETWEEN:

T. H.

Appellant

and

Minister of Human Resources and Skills Development

Respondent

and

N. D.

Added Party

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security – Summary Dismissal

SOCIAL SECURITY TRIBUNAL MEMBER: Raymond Raphael

DATE OF DECISION: July 8, 2014

DECISION

[1] The Tribunal finds that the appeal has no reasonable chance of success; therefore, the appeal is summarily dismissed.

BACKGROUND AND INTRODUCTION

[2] The Added Party's application for a Division of Unadjusted Pensionable Earnings (DUPE) under the Canada Pension Plan was date stamped by the Respondent on December 6, 2004. In her application, the Added Party indicated that she and the Appellant were married on August 21, 1979, that they separated in April 1998, and that they divorced on August 11, 2008.

[3] The Respondent approved the DUPE on February 8, 2010 for the years 1979 to 1987. On February 28, 2010 the Appellant requested a reconsideration of the DUPE. The Appellant agreed that this decision was correct under the existing legislation; however, he took the position that "the existing legislation regarding the DUPE is gender-biased against male parents when it overlaps with any periods of potential Child-Rearing Dropout (CRDO) eligibility." The Respondent denied this request at the reconsideration level by letter dated July 9, 2010.

[4] An application by the Appellant for the benefit of the Child Rearing Provision (CRP) with respect to K. H. born April 11, 1980 and D. H. born December 12, 1985 was date stamped by the Respondent on May 12, 2010. In a letter dated May 7, 2010 accompanying that application, the Appellant indicated that he was the primary caregiver for K. H. from 1980 to 1987 and for D. H. from 1985 to 1988. By letter dated June 7, 2010 the Respondent advised the Appellant that he was not eligible for the CRP.

[5] On September 16, 2010 the Appellant appealed to the Office of the Commissioner of Review Tribunals (OCRT). In his notice of appeal the Appellant indicated, inter alia, as follows:

> The basis of my appeal is not that the department has made the wrong decision under the existing legislation. Instead, I am appealing because the

> existing legislation regarding the CRDO is unfair and unjust when it overlaps with the Division of Unadjusted Pensionable Earnings (DUPE) provision. In this situation, I (as the working parent) am at a significant disadvantage as compared to my ex-wife (as the "child-rearing" parent) for the period of time where these two provisions overlap.
>
> Further, the existing CRDO provision is gender-biased against me as a male contributor compared to a female contributor, especially again when a DUPE is also involved for an overlapping period of time. For this gender-bias discrimination, I am appealing under Section 15 of the *Canadian Charter of Rights and Freedoms* …

PRELIMINARY MATTER

[6] On March 7, 2011 the Appellant wrote to the Respondent indicating that his appeal related to the interaction between the CRP and the DUPE provisions. He stated that he may have misunderstood the Respondent's letter of July 9, 2010 which denied his request for a reconsideration of the DUPE decision. He requested that the Respondent either consider that letter as denying a reconsideration of both the DUPE and the CRP decisions and allow the current appeal to consider both issues, or alternatively, that the Respondent clarify that the letter was a denial of reconsideration on only the DUPE decision and accept the March 7, 2011 letter as a request for reconsideration of the CRP denial decision. On March 5, 2014 the Tribunal wrote to the Respondent noting that there was no response to the Appellant's letter dated March 7, 2011 in the hearing file, and requesting a response to that letter by April 7, 2014.

[7] On April 4, 2014 the Respondent forwarded a copy of the recent decision of the Federal Court of Appeal (FCA) in *Runchey v. Attorney General of Canada et al,*2013 FCA 16 to the Tribunal and advised that having regard to that decision it was the Respondent's position that "it is open to the Tribunal to consider the Child Rearing Provision (CRP) to the extent that the Appellant's constitutional challenge is based on its interaction with the credit splitting provisions (DUPE) (*Runchey* at paras 17-22, attached)."

[8] In the *Runchey decision* (supra) Justice Stratas dismissed the submission by the Attorney General that the only matter before the court was the Minister's decision under the DUPE provisions. Justice Stratas found that the constitutional discrimination claimed by the Appellant involved the interaction of the CRP and DUPE provisions, and that the constitutional issue raised by the Appellant was "squarely before the Court and must be determined." In view of this decision, the Tribunal determined that it was open to it to determine the constitutional issues raised by the Appellant in this appeal.

ISSUE

[9] The Tribunal must decide whether the appeal should be summarily dismissed

THE LAW

[10] Section 257 of the *Jobs, Growth and Long-term Prosperity Act* of 2012 states that appeals filed with the OCRT before April 1, 2013 and not heard by the OCRT are deemed to have been filed with the General Division of the Social Security Tribunal.

[11] Subsection 53(1) of the *Department of Employment and Social Development Act* (DESD Act) states that the General Division must summarily dismiss an appeal if it is satisfied that it has no reasonable chance of success.

[12] Section 22 of the *Social Security Tribunal Regulations* states that before summarily dismissing an appeal, the General Division must give notice in writing to the Appellant and allow the Appellant a reasonable period of time to make submissions.

[13] Subsection 20 (1) of the Social Security Tribunal Regulations provides that if the constitutional validity, applicability, or operability of any provision of the *Canada Pension Plan* is to be put at issue before the Tribunal, the party raising the issue must file a notice with the Tribunal that sets out the provision that is at issue, and contains any submissions in support of the issue that is raised.

THE APPELLANT'S CHARTER SUBMISSIONS

[14] The Appellant has submitted extensive charter submissions. The Tribunal has carefully reviewed these submissions.

[15] The Appellant's primary submission is that the DUPE that was approved under s. 55.1 of the CPP is discriminatory against him as a divorced parent, and is a breach of sections 15 and 28 of the *Canadian Charter of Rights and Freedoms* (Charter) and section 53 (1) of the Constitution Act. His position is that the breach of the Charter does not result from the DUPE provision in its own right, but results when it is applied in combination with the CRP provisions under sections 48 and 49 of the CPP. *The CRP provisions are often referred to as the CRDO provisions; however, for purposes of consistency they are being referred to by the Tribunal throughout these reasons (except when directly citing a quotation) as the CRP provisions.* The Appellant submitted that the CRP provision is biased in favour of female parents and is discriminatory in its own right, but even more when a DUPE is involved during the same period.

[16] The Appellant reviewed the history of the CPP legislation which was enacted in 1965, the initial inclusion of a drop-out period allowing all contributors to drop out the lowest 15% of their earning years, and the approval of a further "Child–Rearing Dropout (CRDO)" enacted in 1983 which allowed qualified parents to exclude or drop out periods of low earnings while raising children under 7 years of age, in addition to the initial drop-out period. He noted that an Access to Information request revealed that for CPP retirement benefits approved in 2007, the female parent was the qualified parent 98.9% of the time. The Appellant also reviewed the 1978 amendment which included the DUPE provisions. He then submitted:

> Unfortunately, while the DUPE provision purports to acknowledge that "both spouses contribute equally to the accumulation of family assets", only the earnings (or UPE) of both spouses are considered as assets, and not the value of the CRDO to the "child-rearing" parent. Further, the CRDO provision seems to totally ignore the fact that both parents play a role in raising the children. Only one parent can claim the CRDO at any one time, and by legislative design it

> applies almost exclusively to female contributors. This is true even after a DUPE has equalized the former spouses' earnings. Finally, the female parent has primary eligibility to the CRDO even when she was working fulltime and when the male parent remained at home and was the primary caregiver for the child(ren).

[17] The Appellant set out potential examples of gender bias discrimination to include: the need for a male parent to meet more stringent requirements to qualify for the CRP and his generally needing his wife's consent to qualify, even when he was the actual stay-at-home parent looking after the children; the female parent's CPP benefits being potentially higher in situations where the male parent was the primary wage-earner and the female parent was the primary childcare provider because she can dropout lower shared earnings years from her contributory period under the CRP provisions; the female parent, who was the primary wage-earner while the male parent who was the primary child care provider, being able to use the CRP and the male parent not being able to do so even though he was the primary childcare provider; the female parent being able to retain sole entitlement to the CRP after a DUPE even though both parents played equal roles in working and in providing childcare; and the female parent being eligible for the CRP, when the male parent was both the primary wage-earner and the primary childcare provider.

[18] The Appellant stated that he was always the primary wage-earner, and that for part of the marriage, he was also the primary caregiver for the children because his wife struggled with drug and alcohol usage. He stated that his wife lived at home and was the family allowance recipient and thus eligible for the CRP regardless of her parenting role. The Tribunal noted that in her letter dated October 23, 2011 to the OCRT, the Added Party emphatically denied these allegations and stated that she stayed at home with their children, that she also attended Dunham College for upgrading twice a week, and that she worked part-time for the Durham Board of Education after school for from 1986-1987. She referred to the Appellant's allegations as involving "fraudulent documents that [he] is now insisting is the truth…" and stated, "I have been a very hard working woman, who has raised her children on her own. I have worked and have an impeccable record with Canada Post, only leaving now due to health issues."

[19] The Appellant attached a copy of the CRP policy guidelines, and submitted that because of these guidelines he would not be eligible for the CRP even if he could prove he was the primary child caregiver, unless his ex-wife waived her rights to the CRP. The CRP policy guideline provision referred to by the Appellant provide, inter alia, as follows:

> The Child Rearing Provision is typically intended for Family Allowance (FA) recipients and eligible individuals of the Canada Child Tax Benefit (CCTB). However, the spouse of a FA recipient may use the Child Rearing provision if he/she was the one who remained at home and was the primary caregiver for the children under the age of seven (7). *In this situation, the FA recipient must waive his/her right to the Child Rearing provision in favour of his/her spouse.* (emphasis added).
>
> According to the Income Tax Act, the default CCTB recipient is the female parent. If the male parent stayed home to care for the children, but the female parent received the CCTB, then according to Section 77 (c) and (d) of the CPP Regulations, the male is not eligible for the CRP, even though his record of earnings would reflect the fact that he was the stay at home parent. The Canada Revenue Agency (CRA) has agreed to provide male parents with a letter confirming the fact that if he had applied for the CCTB at the time when he was at home, caring for the children, he would have been determined to have been the "eligible "individual….
>
> Under the FA Program, if the contributor is the spouse of a FA recipient, the contributor must provide the CRP administration with the form 1640 stating the periods during which he/she remained at home and is/was the primary for the child(ren). However, the contributor will benefit from the CRP for those periods *only if the FA recipient confirms the periods claimed and also waives his/her rights to the Child Rearing provision in favour of the contributor for those periods as per Sections 53 and 77 of the CPP Regulations.* (emphasis added).

[20] In his submissions, the Appellant also refers to what he describes as a further anomaly that exists due the interactions of the CRP and DUPE provisions being that the combined pensions of the two ex-spouses after a DUPE will often be less than their combined pensions prior to DUPE. Although he makes reference to and discusses this claimed anomaly in some detail, the Appellant does not suggest that this is germane to his claim of gender based discrimination.

[21] In analyzing what he considers to be the applicable CPP provisions, the Appellant initially referred to s. 49 (d) which allows a contributor to exclude any month after December 1977 for which he was a family allowance recipient in a year for which his unadjusted pensionable earnings were equal to or less than his basic exemption for the year. The Appellant noted that in the Added Party's case the years that met this definition were 1980 to 1985.

[22] The Appellant then sets out and comments on sections 48 (1) (2), 55.1 (1) and (4), 55.2(3), and 55.2 (8) of the CPP, sections 77(1) and 78.1 (1) of the CPP Regulations, section 7(1) of the Family Allowances Act and sections 9 (1) and (3) of the Family Allowances Act regulations. The Appellant then cites legal authorities referring to situations where the DUPE led to a larger decrease in the male contributor's CPP benefit than the increase in the female contributor's CPP benefit. The Tribunal noted that this claimed anomaly is not relevant to the charter discrimination issues raised by the Appellant. He also refers to the PAB decision in *D.R. v Minister of Human Resources and Skills Development and J.W.* CP27301 (September 9, 2011) in which a male recipient apparently raised similar Charter arguments to those he is arguing, but whose appeal was dismissed because one of the main arguments relied upon by the Minister was that his claim for gender-biased discrimination was moot because there had not yet been a ruling on the Appellant's CRP eligibility. None of these cases are of assistance to the Appellant on this appeal, since in *D.R.* the Appellant's appeal was dismissed and the other authorities deal with a different issue.

[23] In his Charter analysis, the Appellant compares himself as a working male parent to both a child-rearing female parent and to a working female parent, and claims that he

is disadvantaged compared to both of these groups because of the overlap between the CRP and the DUPE. He states that he is subject to differential treatment because even though the DUPE has equalized their UPE, his ex-wife retains sole access to the CRP provisions because she was the female parent, irrespective of whether or not she was the child-rearing parent. He stated that because of the DUPE his CPP retirement pension was reduced from $631.48 to $550.24 effective March 2010 (a monthly reduction of $83.24); however, if he was entitled to CRP eligibility his retirement income would increase by $50 per month. The Appellant proposes that either the CRP provision be left as is, and to change the DUPE to exclude any year where there is eligibility for CRP, or to leave the DUPE provision as is, and to change the CRP to allow both parents to qualify for CRP during any year they are subject to a DUPE.

[24] The Appellant summarized his Charter submissions as follows:

> In summary, it is clear that the DUPE provision has equally shared our Unadjusted Pensionable Earnings that we each accumulated during our marriage.
>
> It is equally clear that the DUPE provision has totally ignored the significant "benefit" that my ex-wife enjoys as a result of having sole rights to claim the CRDO provision, which she also acquired during our marriage.
>
> It is really irrelevant whether she acquired the right to the CRDO as a result of being the "child-rearing parent (as the government would have you believe), or whether she acquired that right as a result of being the female parent (which is the fact under current CPP legislation).
>
> The fact is that she has the sole right, and the DUPE provision ignores that "property" when sharing our CPP rights. The result is that my ex-wife enjoys a significant advantage over me when our equalized UPEs are used to calculate our CPP benefits, and this advantage is discriminatory against me under the Charter.

SUBMISSIONS

[25] The Appellant submitted that:

a) The existing legislation regarding DUPE is gender-biased against male parents when it overlaps with any periods of potential CRP eligibility;

b) He should be entitled to equal access to CRP eligibility as his ex-wife, and that his ex-wife received the Family Allowance simply because she was the female parent, and not because of a greater parenting role.

[26] The Respondent submitted that:

a) Based on the CRP of the CPP, the Appellant is not eligible for the CRP provisions because his ex-wife received the Family Allowance benefits and she has not waived her right to the benefit of the CRP provisions;

b) The charter issues raised by the Appellant have been determined by the Federal Court of Appeal decision in *Runchey v Attorney General of Canada et al*, 2013 FCA 16, and that decision is binding on the Tribunal.

ANALYSIS

[27] In compliance with section 22 of the *Social Security Tribunal Regulations*, on May 26, 2014 the Appellant was given notice in writing of the intent to summarily dismiss the appeal and was allowed a reasonable period of time to make submissions.

[28] The notice of intent indicated, inter alia, as follows:

> The Tribunal Member of the General Division assigned to this appeal is considering summarily dismissing the appeal because:
>
> > In *Runchey v Attorney General of Canada et al*, 2013 FCA 16, in a situation that parallels the Appellant's, the Federal Court of Appeal found that although there is a distinction based on gender created by the interaction between the CRP and DUPE provisions, this distinction is not discriminatory

> based on the principles applicable to s. 15 of the Charter. That decision is binding on the Tribunal.
>
> On April 11, 2014 the Tribunal requested that the Appellant provide supplementary written submissions setting out his position as to why the *Runchey* decision is not applicable to this appeal. The supplementary written submissions were to be filed no later than May 15, 2014. The Appellant did not provide supplementary written submissions.
>
> If you believe this appeal should not be summarily dismissed, the Tribunal must receive your **detailed written submissions** explaining why your appeal has a reasonable chance, no later than **June 27, 2014.**

[29] The Appellant did not respond to the notice of intent to summarily dismiss.

[30] It is clear that this is a matter about which the Appellant has very strong feelings and that he genuinely feels he has been discriminated against because he is a male parent. He has obviously put great effort into his submissions, and has provided the Tribunal with well-prepared, thorough, and helpful submissions. The difficulty facing the Appellant (and what the Tribunal considers to be an insurmountable barrier), however, is that the charter issues raised by the Appellant have already been thoroughly canvassed and dismissed by the Federal Court of Appeal in *Runchey* (supra), and that the *Runchey* decision is binding on this Tribunal.

[31] In the *Runchey* decision the Appellant, whose situation paralleled the Appellant's in this appeal, argued that the DUPE and CRP provisions interacted in a manner that treats men differently from woman and discriminates against men contrary to the constitutional guarantee of equality contained in subsection 15(1) of the Charter. Mr. Runchey had been married for 19 years and divorced in April 1992. In April 2008, Mr. Runchey's ex-wife applied for a DUPE for the period of their cohabitation. Mr. Runchey, when advised of the DUPE application, agreed to the period of cohabitation but refused to agree to the DUPE for any period of time that would be, or had been, excluded or dropped out of his ex-wife's contributory period due to the CRP. The DUPE was allowed for the entire period of cohabitation, and Mr. Runchey's request for reconsideration was denied by the Minister. Mr. Runchey appealed to the OCRT and argued that the interaction of the DUPE and CRP provisions treated men and women differently and in a

discriminatory way, contrary to s. 15(1) of the Charter. The OCRT dismissed Mr. Runchey's appeal holding that it did not have jurisdiction to hear the charter issue because the only decision before it was the DUPE decision, and that the DUPE decision by itself did not contravene the charter. The Pension Appeals Board (PAB) dismissed Mr. Runchey's appeal on the basis that the OCRT had correctly declined jurisdiction to deal with the charter issue because the only decision before it was the DUPE decision which Mr. Runchey agreed had been done correctly. The PAB also determined that even if the CRP provision in conjunction with the DUPE could be considered by it, they did not discriminate against men under subsection 15 (1) of the Charter.

[32] As indicated in paragraph seven (supra), on appeal to the Federal Court of Appeal, Justice Stratas found that the constitutional discrimination claimed by the Appellant involved the interaction of the CRP and DUPE provisions, and that the constitutional issue raised by the Appellant was "squarely before the Court and must be determined." The Federal Court of Appeal then proceeded to determine and to dismiss the constitutional issues raised by Mr. Runchey.

[33] After a very careful review of the issues and the relevant statutory and regulatory provisions of the CPP and the *Income Tax Act*, Justice Stratas found that, "The requirement that the female parent sign a declaration before the male can benefit is an administrative obstacle to the male parent that female parents do not encounter. And it might be quite an onerous obstacle where the marriage is broken down and the parents are not cooperating with each other." [para 91] Justice Stratas also found that although the *Income Tax Act* does not preclude male parents from claiming the Child Tax Benefit, because of the presumption in favour of the female parent, the "male person can face an additional administrative burden to qualify when both parents live with the child. Thus …it is easier for women to qualify for the Canada Child Tax Benefit as compared to men, and thus gain access to the CRP." [para 92]

[34] Justice Stratas concluded "that the interaction of the CRP and DUPE provisions does create a gender-based distinction, a qualitatively subtle one, but nonetheless a

distinction. Women do have disproportionate access to the CRP and this can affect the credit split under the DUPE to the detriment of men in certain circumstances."

[35] Having found that there was a gender based distinction, Justice Stratas then went on to determine whether this distinction constituted discrimination in contravention of s. 15 (1) of the Charter. Justice Stratas found that it did not. He noted that "section 15 [of the Charter] is aimed at combating discrimination, which is to be understood as perpetuating disadvantage and stereotyping… discrimination is more than just treating someone differently. There is a personal "sting to discrimination. When present, it assaults the dignity of the individual by labelling the individual , for reasons outside of his or her control, as being unworthy of equal respect, equal membership, or equal belonging in Canadian society…"[para 104]. Justice Stratas concluded, "I answer the question in the negative. The distinction created by the interaction between the CRP and DUPE provisions is not discriminatory, based on the general principles set out above." [para 117]

[36] Justice Stratas also considered the ameliorative purposes of the CRP. He stated, "The CRP is aimed at accommodating and assisting those who stay at home because of child rearing responsibilities. The evidence before us suggests that most who do so are women and they often suffer economically as a result…" [para 132]. Justice Statas goes on to state, "Accordingly, the DUPE provisions can be said to be aimed at assisting woman who, as a class, suffer economic disadvantage compared to men when they leave the workforce to rear children" [para 136].

[37] Justice Stratas goes on to conclude, "Indeed, the fact that the CRP and DUPE provisions are ameliorative in nature may have other consequences for the section 15 analysis. To the extent that they are aimed at ameliorating or remedying the condition of women, a subsection 15(1) enumerated group, they may be said to be a "law, program or activity" within the meaning of subsection 15(2). In such a case, they cannot be found to be discriminatory under subsection 15(1)…" [para 139]

[38] The decision of the Federal Court of Appeal in *Runchey* (supra) is binding on this Tribunal. The situation in *Runchey* parallels the Appellant's situation, and in that case the Federal Court of Appeal found that although there is a distinction based on gender created by the interaction between the CRP and DUPE provisions, this distinction is not discriminatory based on the principles applicable to s. 15 of the Charter.

[39] Accordingly, the Tribunal finds that the appeal has no reasonable chance of success.

CONCLUSION

[40] The appeal is summarily dismissed.

Raymond Raphael
Member, General Division