Citation: *E. U. v. Minister of Human Resources and Skills Development*, 2014 SSTGDIS 41

Tribunal Number: GP-14-1537

BETWEEN:

**E. U.**

Appellant

and

**Minister of Human Resources and Skills Development**

Respondent

and

**S. H**

Added Party

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

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SOCIAL SECURITY TRIBUNAL MEMBER: Raymond Raphael

DATE OF DECISION: December 16, 2014

## DECISION

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

## INTRODUCTION

[2] By letter dated July 30, 2013 and date stamped by the Respondent on August 13, 2013, the Appellant appealed to the Minister pursuant to s. 81.(3) of the *Canada Pension Plan* (CPP) requesting that the Minister's decision dated February 15, 2005 be rescinded because of new facts.

[3] By letter dated September 4, 2013 the Respondent advised the Appellant that his request could not be considered.

[4] The Appellant is appealing to the *Social Security Tribunal* (SST).

## BACKGROUND

### *The Initial Application*

[5] The Added Party's application for a division of unadjusted pensionable earnings (DUPE) under the CPP was date stamped by the Respondent on March 16, 2004. In her application, the Added Party indicated that she and the Appellant were married on June 5, 1976; that they separated on September 27, 1996; and that they divorced on May 29, 1999.

[6] On April 14, 2014 the Added Party wrote to the Respondent asking that her application for a division of pension credits be withdrawn. On May 3, 2014 the Respondent approved a division of unadjusted pension credits for the period from January 1976 to December 1995. On May 7, 2004 the Respondent refused the Added Party's request to withdraw her application, stating that in accordance with the provisions of the CPP, an application for a division of pension credits in relation to a divorce occurring after January 1, 1987 cannot be withdrawn.

[7] By letter dated May 27, 2004, the Appellant wrote to the Respondent requesting a reconsideration of the decision to proceed with the division of pension credits.

[8] By letter dated February 15, 2005 the Respondent maintained its decision to deny the Added Party's request to withdraw her application. The Respondent referred to paragraph 55.1.(1)(a) of the CPP which provides that once the Minister has been informed of a divorce that occurred on or after January 1, 1987, and the necessary information is received, the division of unadjusted pensionable earnings in mandatory. *The February 15, 2005 decision is decision that the Appellant now seeks to have rescinded.*

***Review Tribunal Decision***

[9] The Appellant appealed the February 15, 2005 decision to the Office of the Commissioner of Review Tribunals (OCRT). On July 29, 2005 the Added Party wrote to the OCRT requesting that her application be reversed, if this caused great hardship to the Appellant.

[10] In a letter to the OCRT dated April 6, 2006 the Respondent referred to Section 55.1 (5) of the CPP which provides that the Minister may refuse to make the division, if the Minister is satisfied that the benefits are payable to or in respect of both persons subject to the division, and the amount of both benefits would decrease at the time the division was made, or would decrease at the time the division was proposed to be made. The letter goes on to state:

> As per section 55.1(5) of the Canada Pension Plan, an application for divorced parties may be withdrawn if the division proves to be detrimental to both parties. This file has been carefully reviewed and it is clear that it is to Ms. S. H. [sic] advantage if these pension credits arc divided. Ms. S. H.'s earnings prior to the division and after the division are indicated on the Notice of Division of Pension Credits. As a result of the division, she has an increase in her pension credits in 18 of the 20 years that were divided.
>
> Canada Pension Plan benefits are calculated based on a person's earnings and contributions to the Plan. Consequently, as Ms. S. H.'s earnings are higher as a result of the division, she would receive a greater benefit upon application for Retirement or Disability etc.

> Therefore, as the division of pension credits is advantageous to one of the ex-spouses, section 55.1 (5) cannot be applied to cancel the application for pension credits.

[11] On April 10, 2007 the Appellant's appeal was heard by a Review Tribunal, and on June 8, 2007 the Review Tribunal released its reasons for decision dismissing the Appellant's appeal.

[12] During the hearing, the Minister's representative referred to the Notice of Division of Pension Credits for the Added Party, and noted that it was clear that the division increased the Added Party's pension credits. He submitted that, accordingly, s. 55.1 (5) did not apply. The Appellant referred the Tribunal to s. 55.1 (5) and argued that the Minister had failed to correctly consider this provision, because it had failed to apply the Child Rearing Dropout (CRDO) provision to the application prior to the processing. The reasons indicate that according to the Appellant, when the CRDO is applied to the Added Party's application, she would receive almost 100% of her benefits, and that while she may have more pension credits she will not have the same benefits.

[13] The Review Tribunal determined that it had no jurisdiction to grant the appeal based on section 55.1(5) and section 66 of the Act. The Tribunal, however, went on to consider the substance of the Appellant's position and determined that the Minister did not fail to properly consider the CRDO provision. The Review Tribunal determined that there was nothing in the wording of s. 55 that links its application to the CRDO, and that in reviewing the Notice of Division of Pension Credits it is clear that the Added Party's benefits increased as a result of the division. The Review Tribunal found that the division of pension credits was mandatory, and that the Minister was correct in proceeding with the division as required by the legislation.

***The Federal Court of Appeal orders leave to appeal to PAB***

[14] The Appellant sought leave to appeal the decision of the Review Tribunal to the PAB. On August 10, 2007 the PAB dismissed the Appellant's application for leave to appeal. On June 26, 2008 the Federal Court dismissed the Appellant's application for judicial review of the dismissal of his leave application. On October 5, 2009 the Federal

Court of Appeal set aside the order of the Federal Court and referred the matter back for a redetermination by another Member of the PAB, on the basis that leave to appeal the decision of the Review Tribunal should be granted.

***Pension Appeal Board Decision***

[15] On July 26, 2011 the PAB upheld the decision of the Review Tribunal. Before the PAB, the Appellant asked that the DUPE be set aside, and that it be done on a different basis, in particular, he asked that the pension credits be adjusted before the division is carried out by applying the CRDO provisions to the Added Party. The PAB noted that the provisions of the CPP do not permit this

[16] The Appellant also attempted to argue that by not permitting this, s. 55.1 of the CPP was discriminatory, contrary to section 15 of the Charter, and thus, of no force or effect. The PAB declined to entertain the constitutional argument because the Appellant had failed to serve a notice of constitutional question. Accordingly, the PAB dismissed the Appellant's appeal.

***Federal Court of Appeal Decision***

[17] The Appellant applied to the Federal Court of Appeal for judicial review of the PAB decision. On June 27, 2013 the Federal Court of Appeal dismissed the Appellant's judicial review application. In his judicial review application, the Appellant sought to argue the constitutionality of s. 55. 1 of the CPP. The Federal Court of Appeal held that he could not do this because he could only properly raise the constitutional issue before the Federal Court of Appeal, if he had properly raised it before the PAB, and the PAB had determined it. The Federal Court of Appeal went on, however, to indicate that the Appellant's constitutional argument, namely, that the interaction between s. 55.1 and the CRDO provisions causes unfairness that is discriminatory under s. 15 of the Charter of Rights, must fail for two reasons. Firstly, the Appellant has not offered any evidence to show that the interacting provisions discriminate in the sense described by the Supreme Court of Canada. And secondly, the argument in this case is identical to that of the unsuccessful applicant in *Runchey v Canada (Attorney General),* 2013 FCA 16. In that case the Federal Court

dismissed the applicant's submissions that the interacting provisions discriminate under section 15. The Court indicated that the only remedy for the unfairness that the Appellant identifies is an amendment to the provisions of the CPP.

**ISSUE**

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

**THE LAW**

[19] 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.

[20] 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.

**The Application and Notice of Appeal**

[21] By letter dated July 30, 2013 the Appellant applied, pursuant to s. 81.(3) of the CPP, to rescind the Respondent's February 15, 2005 decision (see paragraph 8 above), on the basis of new facts. He is appealing the Respondent's decision that his request could not be considered.

[22] In his s. 81.(3) application the Appellant noted that he had appealed the Respondent's February 15, 2005 decision, and that the appeal and subsequent hearings had resulted in the Federal Court of Appeal decision on June 27, 2013. He argued that, "Various hearings, decisions and judicial comments through the process, brought forward new facts on this matter."

[23] In his notice of appeal, the Appellant indicated that the February 15, 2005 decision should be changed because the Attorney General of Canada's legal representative has stated

that is unfair; because it violates section 28 of the Canadian Constitution; because it is gender discriminatory; and because it is not established in law in compliance with section 15 of the charter.

**The Respondent's Decision**

[24] In its decision denying the Appellant's s. 81.(3) request, the Respondent indicated that the Federal Court of Appeal had dismissed the Appellant's application for judicial review of the July 26, 2011 PAB decision; that the PAB decision is now final and binding; that this matter has now concluded; and that, therefore, the Appellant's request cannot be considered.

**The Notice of Intent to Summarily Dismiss**

[25] In compliance with section 22 of the *Social Security Tribunal Regulations*, 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.

[26] The notice of intent indicates that the Member assigned to this appeal is considering summarily dismissing the appeal because:

> The Appellant seeks to rescind the reconsideration decision dated February 15, 2005 which maintained the decision to split pension credits between the Appellant and his former spouse. The Appellant brings his application pursuant to s. 81.(3) of the CPP which provides that "The Minister, may, on new facts, rescind or amend a decision made him or her under this Act."
>
> In his request to rescind dated July 30, 2013 that Appellant stated as follows:
>
> > In June 2004 I appealed to the minister related to the above referenced file. That appeal and subsequent hearings resulted in the Federal Court of Appeal decision on 27 June, 2013, (A-1-12). Various hearings, decisions, and judicial comments through the process, brought forward new facts on this matter.
> >
> > In accordance, with section 81.(3) of the Canada Pension act, I hereby request that the minister rescind the decision contained in the letter dated February 15, 2005.

In his Notice of Appeal the Appellant argues that:

> The reconsideration decision should be changed for several reasons. The Attorney General of Canada legal representative has stated it is unfair. It violates s. 28 of the Canadian constitution. It is gender discriminatory, and not establish in law in compliance with s. 15 of the charter.

In order for new facts to meet the test to rescind a previous decision, they must meet the test of materiality and discoverability. In order to meet the test the Appellant must present evidence that:

1. Could not have been obtained for original hearing by due diligence.

2. The evidence must be relevant in the sense it bears upon a decisive or potentially decisive issue at the hearing.

3. The evidence must be credible in the sense that is it reasonably capable of belief.

4. The evidence must be such that, if believed, it could reasonably be expected to have affected the result when taken with the other evidence adduced at the original hearing.

In his request for rescission dated July 30, 2013 the Appellant made bald allegations of new facts having been brought forward during various hearings, decisions, and judicial comments. He fails to set out what these new facts are.

In his Notice of Appeal the Appellant relies on a statement allegedly made by a representative of the Attorney General and he also raises constitutional issues. A statement that may have been made by a representative is merely a statement, and does not constitute a new fact. Further, the fact that an individual may have thought the decision to be unfair, is of no legal significance, and is not material to the issue as to whether there should be a division of pension credits.

Constitutional arguments are not new facts, and the Appellant either did, and/or was obligated to, raise them during the original proceedings. He cannot reargue and/or raise new legal arguments on a motion to rescind.

**The Appellant's response to the Notice of Intent**

[27] The Appellant submitted a detailed written response to the Notice of Intent. He submitted that the new criteria and information are as follows:

a) The Added Party has turned sixty and is concurrently applying for CPP benefits;

b) That the tabulation and mathematic process will verify that the pension credits taken from him and reserved for the Added Party will not be needed;

c) That she will have a near equivalent amount from the CRDO provisions but the unneeded or unwarranted credits will not be returned to him;

d) That redundant or spoiled credits are not authorized in the CPP;

e) That the problem with lost or stolen credits only applies to divorced parents who worked outside the home in most provinces, and they do not become aware of the scheme at the time of divorce, but only when applying for benefits;

f) The evidence in the Added Party's file, which is not available to him, but which is currently being upgraded, if known to the original hearing would have had a significant impact;

g) The increased credits to the Added Party were temporarily assigned to her on paper, and they only have a marginal effect on benefits because the Respondent did not differentiate between credits and benefits;

h) He referred to the *Bernier* (CP21241) decision which indicates that the facts cry out for a remedy which was beyond the PAB's jurisdiction, and he submitted that because of the unfairness the equality provisions of the Charter of Rights are infringed.

**ANALYSIS**

[28] The Tribunal has determined that the Appeal has no reasonable chance of success for two reasons. Firstly, s. 81.(3) of the CPP is not applicable where there has been an unsuccessful appeal to a Review Tribunal, and/or in as in this case, a further unsuccessful appeal to the Pension Appeal Board. It only applies to cases where there has been no appeal.

Secondly, even if s.81.(3) is applicable, the facts and allegations made by the Appellant have no reasonable prospect of meeting the new facts test.

***S. 81.(3) is not applicable***

[29] S. 81.(3) of the CPP provides that the Minister may, on new facts, rescind or amend a decision made by him or her under this Act.

[30] This provision must be read in harmony with other applicable legislative provisions.

[31] Up until April 1, 2013 s. 84 (1) of the CPP provided that the decision of a Review Tribunal, except as provided for in this Act, or the decision of the PAB, except for judicial review under the Federal Courts Act, as the case may be, is final and binding for all purposes of this Act. As of April 1, 2013, this provision was replaced by what is now s. 68 of the *Department of Employment and Social Development Act* (DESD Act), which provides that the decision of the Tribunal on any application made under this Act is final and, except for judicial review under the Federal Court Act, is not subject to appeal to or review by any court. This provision is similar in effect to s. 84 (1) of the CPP.

[32] The doctrine of res judicata applies to the June 8, 2007 decision of the Review Tribunal (see paragraphs 12 & 13 above) and to the July 26, 2011 decision of the Pension Appeal Board (see paragraphs 15 & 16 above). This doctrine prohibits the re-litigation of an issue that a court or tribunal has decided in a previous proceeding, with the underlying rationale of balancing the public interest in the finality of litigation with the public interest in ensuring that justice is done on the facts of a particular case: *Danyluk v. Ainsworth Technologies Inc*., [2001] SCC 44.

[33] For Tribunals such as the SST the general rule has been stated in *Chandler v Alberta Association of Architects*, [1989] 2 S.C.R. 848 as follows:

> …once such a tribunal has reached a final decision in respect to the matter that is before it in accordance with its enabling statute, that decision cannot be revisited because the tribunal has changed its mind, made an error within jurisdiction or

> because there has been a change of circumstances. It can only do so if authorized by statute or if there has been a slip or error….

[34] The existence of new facts can, however, trigger the reopening of a case by the Tribunal. Up until April 1, 2013 the Appellant's right to apply on the basis of new facts was governed by s. 84 (2) of the CPP which provided that the Minister, a Review Tribunal or the Pensions Appeal Board may, notwithstanding subsection (1), on new facts, rescind or amend a decision under this Act given by him, the Tribunal, or the Board, as the case may be.

[35] As of April 1, 2013, this provision was replaced by what is now s. 66.(1)(b) of the DESD Act, which provides that, with respect to a decision under the CPP, the Tribunal may rescind or amend a decision given by it if a new material fact is presented that could not have been discovered at the time of the hearing with the exercise of reasonable diligence. S. 66. (2) provides that an application to rescind or amend a decision must be made within one year after the day on which a decision is communicated to the appellant. S. 66. (3) provides that each person who is subject of a decision may make only one application to rescind or amend that decision. S. 66. (4) provides that a decision is rescinded or amended by the same Division that made it.

[36] These provisions replicate s. 84 (2) which was repealed effective April 1, 2013 with notable differences: firstly, the new section codifies the common law due diligence requirement; secondly, the application must be brought within one year of the original decision; and thirdly, the claimant can only bring the application once with respect to a particular decision.

[37] There is a further difference which is of particular significance for this appeal. S. 66. (2) of the DESD Act does not apply to an application to rescind or amend a decision of the Minister. Such an application is now covered by s. 81.(3) which is entirely new provision that came into effect on April 1, 2013.

[38] All of these provisions must be read in harmony with each other, and the Tribunal is satisfied that s. 81.(3) only applies in cases where there has been no appeal to a Review Tribunal. Where there has been an unsuccessful appeal to a Review Tribunal, or as in this a

further unsuccessful appeal to the Pension Appeal Board, the Appellant's application rights with respect to new facts are now governed solely by s. 66. (2) of the DESD Act.

[39] To allow the Appellant to make a new fact application to the Minister, in situations where the Appellant has unsuccessfully appealed the Minister's decision would fly in the face of the provisions that provide that Review Tribunal decisions are final and binding. If such decisions are to be reopened on the basis of new facts, the application should be made to the Tribunal which made the final and binding decision. The procedure followed by the Appellant, if permitted, would open the possibility of unlimited new fact applications, over an endless period of time, after there has been an unsuccessful appeal. This would defeat the new limitations set out in s. 66 (2) and (3) of the DESD Act, which provide that such an application must be brought within one year of the communication of the decision, and that a claimant can only bring one application with respect to a decision.

[40] In this case, the decision that the Appellant seeks to rescind or amend was made in February 2005, and that decision was unsuccessfully appealed to both a Review Tribunal and the Pension Appeal Board. The Appellant did not bring this application until his application for judicial review was dismissed by the Federal Court in June, 2013.

[41] There are no time limits, or limits on the number of applications, set out in s. 81. (3). If this procedure is open to the Appellant, the practical effect is that an unsuccessful Appellant to the Review Tribunal (or now to the Social Security Tribunal) could avoid the limitations set out in the DESD Act by making unlimited applications to rescind or amend the Minister's decision. This would clearly defeat the purposes of s. 66 (2) and (3) of the DESD, which are intended to put limits on the timing and number of new facts applications.

[42] The Tribunal has determined that s. 81.(3) of the CPP is not applicable where there has been unsuccessful appeal to a Review Tribunal, and/or in as in this case, a further unsuccessful appeal to the Pension Appeal Board. This provision only applies to cases where there has been no appeal.

***The Appellant's allegations are not new facts***

[43] In the event that the Tribunal is wrong with respect to its determination as to the applicability of s. 81. (3), the Tribunal has also made a determination as to whether the allegations made by the Appellant have a reasonable chance of meeting the new facts test.

[44] The test for new facts to be met in order to rescind a previous decision, as well as the Tribunal's analysis of their applicability to the allegations made by the Appellant in his s. 81. (3) request to rescind the decision, and his notice of appeal, are set out in paragraph 26 above. For the reasons set out, the Tribunal has determined that those allegations have no reasonable chance of meeting the new facts test.

[45] The Tribunal has also determined that the allegations raised by the Appellant in his response to the Notice of Intent (see paragraph 27 above) have no reasonable chance of meeting the new facts test.

[46] In his response, the Appellant argues that his wife has now turned sixty and is applying for CPP benefits, and that because of the CRDO provisions, she will receive a "near equivalent" amount to the amount she would receive without a credit split. He also argues that the "unneeded or unwarranted credits" should be returned to him. He also argues that this is unfair and contrary to the Charter of Rights. These arguments are similar to the arguments advanced by him in the previous proceedings.

[47] In his argument before the Review Tribunal (see paragraph 12 above) the Appellant argued that the Minister had failed to correctly consider s. 55. (1) (5) because it had failed to apply the CRDO provisions prior to processing the division of benefits, and that the Added Party would receive almost 100 % of her benefits, even if there is no credit split. The Review Tribunal found that there is nothing in the wording of s. 55 that links its application to the CRDO, and that in reviewing the Notice of Division of Pension Credits, it is clear that the Added Party's benefits increase as a result of the division (see paragraph 13 above). The Appellant unsuccessfully advanced similar arguments before the PAB and the Federal Court of Appeal. He also unsuccessfully attempted to argue constitutional arguments.

[48] The main thrust of the Appellant's position is that his wife is now applying for CPP, and that likely after the CRDO provisions are applied, she will obtain little benefit from the credit split. In advancing this position he is misconstruing the issue in the previous proceedings, which was whether the Added Party was able to withdraw the application for a credit split. The determination was that the credit split was mandatory, and that it could not be withdrawn because s. 55.1 (5) was not applicable.

[49] S. 55. 1 (5) provides that the Minister may refuse to make a division, or cancel, a division, if the Minister is satisfied that benefits are payable to or in respect of both persons subject to the division, and that the amount of both benefits decreased *at the time the division was made* or would decrease *at the time* the division was proposed to be made. (emphasis added). In this case, the division was made in May 2004, and the Review Tribunal determined that as of the time of the division the amount of the Added Party 's benefits increased. The actual amount of pension income that the Appellant will now receive after the application of the CRDO is totally irrelevant. The only relevant matter is the effect of the division on the Added Party's benefits as of the May 2004 division date.

[50] The previous proceedings have finally and conclusively determined that her benefits increased; that, accordingly, the division was mandatory; and that s. 55. 1 (5) was not applicable. The Appellant is now attempting to challenge those findings under the guise of a new fact application.

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

**CONCLUSION**

[52] The appeal is summarily dismissed.

*Raymond Raphael*
Member, General Division