

Citation: *J. H. v. Minister of Employment and Social Development*, 2015 SSTGDIS 96

Date: August 28, 2015

File number: GT-112963

GENERAL DIVISION - Income Security Section

Between:

J. H.

Appellant

and

**Minister of Employment and Social Development
(formerly Minister of Human Resources and Skills Development)**

Respondent

and

L. H.

Added Party

Decision by: Raymond Raphael, Member, General Division - Income Security Section

REASONS AND DECISION

INTRODUCTION

[1] The Appellant applied for a division of unadjusted pensionable earnings (DUPE) on June 10, 2008. The Respondent denied the application initially and upon reconsideration. The Appellant appealed the reconsideration decision to the Office of the Commissioner of Review Tribunals (OCRT) and this appeal was transferred to the Tribunal in April 2013.

ISSUE

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

THE LAW

[3] 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 Tribunal.

[4] 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 satisfied that it has no reasonable chance of success.

[5] Section 22 of the *Social Security Tribunal Regulations* (SST 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.

[6] Section 55(1) of the CPP provides that subject to certain conditions, where former spouses divorced after January 1, 1978 and before January 1, 1987, the application for a DUPE must be made within 36 months of the divorce, unless both former spouses agree in writing to the application being made after this time period.

BACKGROUND AND EVIDENCE

[7] The Appellant and L. H. were married on July 31, 1972 and divorced on October 12, 1982. The Appellant did not apply for a DUPE until June 2008 (more than 15 years after the

divorce). The Appellant's former spouse has not signed a waiver agreeing to waive the three year time limit set out in s. 55 (1) of the CPP.

[8] On October 3, 2008, the Appellant requested an incapacity determination stating that she was "not mentally capable of applying" for the DUPE. After an incapacity adjudication the Respondent notified the Appellant that their medical adjudicators have determined that her medical condition did not prevent her from submitting an application on a timely basis

[9] The appeal was put in abeyance because another individual brought a charter challenge to the three year time limitation. The Appeal Division of the Tribunal recently heard this matter and concluded that s. 55(1) does not violate the Charter. A copy of that decision was sent to the Appellant on April 17th, last.

[10] The deadline has passed and no party has filed an appeal to the Federal Court of Appeal. Accordingly, the decision of the Appeal Division is of persuasive authority for the General Division.

SUBMISSIONS

[11] The Appellant submitted that:

- a) Her appeal is based on natural justice and fairness because of her former spouse's failure to comply with the provisions of the divorce settlement which calls for a division of family assets in unequal shares and a sharing of the non-family assets pursuant to the Family Reform Act;
- b) She was subjected to many years of physical and verbal abuse by her former spouse and was afraid of the consequences of confronting him;
- c) She should not suffer the consequences of her former spouse's refusal to sign the waiver.

[12] The Respondent submitted that:

- a) The Appellant does not qualify for CPP credit splitting because her application was made after the 36-month time limit set out in s. 55(1) of the CPP;
- b) The Appellant's former spouse has not signed a waiver agreeing to waive the three year time limit;
- c) The Medical Adjudicators have reviewed the Appellant's incapacity claim and determined that her medical condition did not preclude her from submitting an application on a timely basis.

ANALYSIS

[13] In compliance with section 22 of the SST 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. The Appellant did not respond to this notice.

Incapacity

[14] The statutory requirements for incapacity are set out in sections 60 (8) to (10) of the CPP. The primary issue is whether the Appellant lacked and continuously lacked the capacity to form and express the intent to apply for the benefit.

[15] Although the medical evidence establishes that the Appellant suffers from long-standing psychiatric and emotional issues, and she has claimed that she was physically and emotionally abused by her former spouse and that as a result of this abuse she were afraid to apply for the DUPE, there is no plausible basis to suggest that she lacked the capacity to form and express the intent to apply for the benefit.

[16] In this regard, the Tribunal noted that the Declaration of Incapacity (GT1-4) completed by the Appellant's psychiatrist, Dr. Rajan, indicates that she suffers from bipolar disorder and that her incapacity began on November 23, 1995 (which was more than 13 years after the divorce and more than 10 years after the three year time limit for applying for the DUPE expired). There is no suggestion that she lacked the requisite capacity during the three year time period for applying for the DUPE.

[17] The Tribunal also noted that the Appellant was capable of applying for CPP disability benefits in June 1996 (GT1-111) and that she was able to pursue that application through to, and attend at, a Review Tribunal hearing on August 18, 1997 (GT1-118).

Application is beyond the three year time limit

[18] The Appellant's DUPE application was made after the three year time limit set out in s. 55 (1) of the CPP. The Appellant's former spouse has not signed a waiver agreeing to waive the time limit.

[19] The Tribunal is sympathetic to the Appellant's circumstances and recognizes that her not receiving the DUPE, to which she would otherwise have been entitled, because of the three year time limitation is unjust.

[20] Unfortunately, the Tribunal is bound by the CPP provisions. It is not empowered to exercise any form of equitable power in respect of the appeals coming before it. It is a statutory decision-maker and is required to interpret and apply the provisions as they are set out in the CPP: *MSD v Kendall* (June 7, 2004), CP 21690 (PAB).

[21] The Tribunal has no authority to make exceptions to the provisions of the CPP nor can it render decisions on the basis of fairness, compassion, or extenuating circumstances.

[22] Regrettably, the Tribunal must conclude that the Appellant is not eligible for a DUPE.

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

CONCLUSION

[24] The appeal is summarily dismissed.

Raymond Raphael
Member, General Division - Income Security