Citation: *M. N. v. Minister of Employment and Social Development*, 2015 SSTAD 1245

Appeal No. AD-15-430

BETWEEN:

M. N.

Appellant

and

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

Respondent

and

P. N.

Added Party

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

SOCIAL SECURITY TRIBUNAL MEMBER: Janet LEW

DATE OF DECISION: October 22, 2015

REASONS AND DECISION

INTRODUCTION

[1] The Appellant appeals a decision dated April 30, 2015 of the General Division, whereby it summarily dismissed her appeal of a division of unadjusted pensionable earnings under the *Canada Pension Plan*. The General Division summarily dismissed her appeal, given that it was satisfied that it did not have a reasonable chance of success.

[2] The Appellant filed an appeal on July 6, 2015 (the "Notice of Appeal"). No leave is necessary in the case of an appeal brought under subsection 53(3) of the *Department of Employment and Social Development Act* ("DESDA"), as there is an appeal as of right when dealing with a summary dismissal from the General Division. The Appellant and Respondent have both filed written submissions. Having determined that no further hearing is required, this appeal before me is proceeding pursuant to subsection 37(a) of the *Social Security Tribunal Regulations.*

ISSUES

[3] The issues before me are as follows:

1. What is the applicable standard of review when reviewing decisions of the General Division?

2. Did the General Division err in choosing to summarily dismiss the Appellant's claim?

3. Did the General Division err in allowing a division of unadjusted pensionable earnings between the Appellant and the Added Party?

FACTUAL BACKGROUND

[4] The Appellant and the Added Party married in March 1978, separated in September 1990 and divorced in February 1992. The parties resided in Michigan during their marriage but the Appellant worked in Ontario and contributed to the Canada Pension Plan from 1978 to 1989, while the Added Party worked in Michigan throughout their marriage. The parties

obtained a divorce on consent in Michigan. The terms of the court order included a provision that any interest which either party had or may have ever had in any claim of any pension or accumulated contributions in any pension, were extinguished and that the parties would hold those interests "free and clear" from any right or claim of the other (GT1-26).

[5] The Appellant currently resides in Ontario, Canada while the Added Party resides in Michigan, U.S.A.

[6] On August 12, 2011, the Added Party applied for a Canada Pension Plan credit split, i.e. a division of unadjusted pensionable earnings. The Respondent approved the application for Canada Pension Plan credit splitting for the period from 1978 to 1989.

[7] On August 9, 2012, counsel for the Appellant sought a reconsideration regarding the division. The Appellant maintained that there should be no division of such credits, as this would be contrary to the provisions of the Michigan divorce order between the parties. Counsel explained that the result of the Michigan judgment for divorce was that the Appellant gave up any claim against the Social Security Benefits earned by the spouse during marriage. The Appellant understood that she was giving up her claim on the basis that her spouse was giving up his claim for a division of Canada Pension Plan credits. Counsel submitted that the Appellant's former spouse relinquished his rights against any pension of the Appellant and that he should now not be able to avoid the terms of the Michigan divorce and claim the advantages of Ontario law, which does not permit opting out of a division of unadjusted pensionable credits, when the Appellant was unable to do so regarding the U.S. Social Security payments.

[8] On November 9, 2012, the Respondent maintained its decision to accept the Added Party's application for Canada Pension Plan credit splitting for the period from 1978 to 1989. The Respondent explained as follows:

> The Canada Pension Plan states that credits may be split in cases where a couple obtained a divorce on or after January 1, 1978. Credits may also be split in cases where a couple has separated for more than one year, provided this separation occurred on or after January 1, 1987.

> In certain circumstances, credits may be split despite an agreement or court order. The Canada Pension Plan states that we are not bound by the terms of agreements or court orders made on or after June 4, 1986, unless they expressly mention that the parties waived their rights under the Canada Pension Plan, and that laws under the province specifically enable parties to waive their rights to a credit split. At present court orders and agreements only entered into in the provinces of Saskatchewan, British Columbia and Quebec have a statute that permits a provision of this type in an agreement.
>
> Although [the Added Party and the Appellant] agreement was entered into in the state of Michigan and may be recognized by the province of Ontario, we are not bound by their agreement and we must uphold the decision to divide the pension credits for the period that [the Added Party and the Appellant] resided together.

[9] In early 2013, the Appellant filed an appeal with the Office of the Commissioner of Review Tribunals. Under section 257 of the *Jobs, Growth and Long-term* Prosperity Act (JGLPA), any appeal filed before April 1, 2013 under subsection 82(1) of the Canada Pension Plan, as it read immediately before the coming into force of section 229 of the JGLPA, is deemed to have been filed with the General Division of the Social Security Tribunal on April 1, 2013. On April 1, 2013, the OCRT transferred the Appellant's appeal of the reconsideration decision to the Social Security Tribunal. This was communicated to the parties.

[10] On March 12, 2014, the Appellant filed a Notice of Readiness, along with a letter dated March 22, 2012 from the Added Party, in which he stated that "the split will not affect [the Appellant's] benefit through Pension Canada" (GT3). On May 27, 2015, the Appellant filed a Hearing Information Form (GT4). On September 4, 2014, the Respondent filed submissions.

[11] On March 16, 2015, the General Division gave notice in writing to the Appellant, advising that it was considering summarily dismissing the appeal because:

> 1) Paragraph 55.1(1)(a) of the *Canada Pension Act* (CPP) provides a division of unadjusted pensionable earnings shall take place, in the case of spouses, following a judgment granting a divorce, on the Respondent being informed of the judgment.

2) Paragraph 55.2(2) provides that a court order made after June 4, 1986, is not binding on the Respondent for the purposes of a division of unadjusted pensionable earnings under paragraph 55.1.

3) The Appellant and the Other Party were married on March 12, 1978, lived together thereafter until September 1, 1990, and were divorced pursuant to a Divorce Judgment dated February 10, 1992.

4) The Respondent was informed of the Divorce Judgment on August 12, 2001, the date the Respondent received an application for a CPP Credit Split submitted by the Other Party.

5) The decision to split the Appellant's CPP pension credits was mandatory after the Respondent was informed of the Divorce Judgement [*sic*], and no provision in the judgment prohibiting division of CPP pension credits is binding on the Respondent.

[12] The General Division invited the Appellant to provide detailed written submissions by no later than April 17, 2015 if she believe that the appeal should not be summarily dismissed, explaining why her appeal had a reasonable chance of success.

[13] The Appellant filed submissions on April 23, 2015. She explained that she has had a longstanding belief that the Added Party would never have a claim against any type of her pensions. She submitted that the Consent Judgment of Divorce from the Oakland County Circuit Court in Michigan dated February 10, 1992, clearly states that neither party has any claim against any pension of the other party and that "any interest … in any claim or pension ... is hereby extinguished". The Appellant submits that any application of the Added Party to secure benefits under the *Canada Pension Plan* is therefore in direct violation of their Consent Judgment of Divorce. She further submits that it would be unreasonable to expect a Michigan divorce order to specifically mention the *Canada Pension Plan*, as there is no *Canada Pension Plan* in the United States. She submits that the provisions of the *Canada Pension Plan* ought not to apply, as Michigan is not one of the Canadian provinces which permit opting out of the division of unadjusted pensionable earnings. The Appellant submits that it would now be unfair that the Added Party be permitted to avoid the terms of their divorce order and that he be able to take advantage of Canadian law in order to claim a portion of her pension. The Appellant notes also that her pension will be reduced significantly, as a result of the credit splitting.

[14] On April 30, 2015, the General Division rendered its decision. The General Division relied upon the following provisions, in coming to its decision:

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

ii. Section 22 of the *Social Security Tribunal Regulations*, which states that before summarily dismissing an appeal, the General Division must give notice in writing to the appellant and allow the appellant a reasonable amount of time to make submissions;

iii. Paragraph 55.1(1)(a) of the *Canada Pension Plan*, which provides that a division of unadjusted pensionable earnings shall take place, in the case of spouses, following a judgment granting a divorce, on the Respondent being informed of the judgment;

iv. Paragraph 55.2(2) of the *Canada Pension Plan*, which provides that a court order made on or after June 4, 1986, is not binding on the Respondent for the purposes of a division of unadjusted pensionable earnings under paragraph 55.1;

v. Paragraph 55.1(4) of the *Canada Pension Plan* , which provides that, in determining the period for which the unadjusted pensionable earnings of the persons subject to a division shall be divided, only those months during which the two persons cohabited as determined by the *Canada Pension Plan Regulations* shall be considered; and

vi. Subsection 78.1(1) of the *Canada Pension Plan Regulations*, which provides that in determining the months during which former spouses cohabited, those months shall be reckoned as beginning in the first month of the year in which the former spouses were married, and shall be reckoned as ending in the last month of the year before the former spouses commenced living separate and apart.

[15] On July 6, 2015, the Appellant filed an appeal from the summary dismissal decision of the General Division.

SUBMISSIONS

[16] The Appellant filed the Notice of Appeal on June 29, 2015. She does not make any specific allegations that the General Division erred, either in choosing to summarily dismiss her appeal, or in determining that a division of unadjusted pensionable earnings applies.

However, her submissions can be interpreted such that she alleges that the General Division erred as it failed to consider the consent Judgment of Divorce from Michigan. The Appellant submits that the Judgment of Divorce is final and binding on the parties and that as a consequence, the Added Party does not have a claim against any of her pensions. The Appellant submits that it would be unreasonable that a Michigan Divorce Order specifically provide that there be no division of Canada Pension Plan credits, and unfair to now permit the Added Party to avoid the terms of the divorce and exploit Canadian law by obtaining a division of pension credits, when there is no opportunity for her to seek a reciprocal split against any pensions which the Added Party might have. Notwithstanding the Added Party's opinion that a division of unadjusted pensionable earnings will not impact her, she advises that her pension will in fact be significantly reduced, making retirement much more difficult.

[17] The Appellant further submits that only four provinces thus far have opted out of the legislation governing the Canada Pension Plan division of unadjusted pensionable earnings, and as Michigan is not one of the Canadian provinces that even had a choice to opt in or out of the legislation, the legislation should not apply to Michigan.

[18] The Respondent filed written submissions on August 20, 2015. The Respondent submits that the General Division correctly stated the test for a summary dismissal under section 53 of the DESDA. The Respondent further submits that the General Division also correctly set out the law with respect to a division of unadjusted pensionable earnings under sections 55.1 and 55.2 of the *Canada Pension Plan*. The Respondent submits that the General Division did not err in its application of the law to the facts, which are not in dispute. The Respondent submits that, according to the *Canada Pension Plan*, a division of unadjusted pensionable earnings is mandatory following a judgment of divorce once the Respondent is informed of the divorce judgment. The Respondent submits that a court order is not binding on the Respondent for the purposes of a division of unadjusted pensionable earnings unless the requirements in subsection 55.2(3) of the Canada Pension Plan are met. The Respondent notes that, at present, only Saskatchewan, British Columbia, Quebec and Alberta have enacted legislation that allows parties to opt out of a division of unadjusted pensionable earnings under the *Canada Pension Plan*.

[19] The Respondent submits that as a division of unadjusted pensionable earnings was mandatory and that as the Consent Judgment was issued in Michigan, U.S.A., which does not have legislation permitting the parties to opt out of a division of unadjusted pensionable earnings under the Canada Pension Plan, the appeal had no reasonable chance of success. The Respondent submits that accordingly, the General Division did not err in summarily dismissing the appeal. The Respondent submits that the decision of the General Division contains no reviewable error to permit the intervention of the Appeal Division. The Respondent submits that the General Division correctly stated the law and reasonably applied it to the facts and that the appeal should therefore be dismissed.

[20] The Added Party did not file any written submissions.

ISSUE 1: STANDARD OF REVIEW

[21] The Appellant did not address the issue of the standard of review.

[22] Subsection 58(1) of the DESDA sets out the grounds of appeal as follows:

> (a) The General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;
>
> (b) The General Division erred in law in making its decision, whether or not the error appears on the face of the record; or
>
> (c) The General Division based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

[23] The Respondent submits that the standard of review is reasonableness for questions of fact and for questions of mixed fact and law. The Respondent submits that for questions of law, the Appeal Division should not show deference to the General Division's decision and should apply a correctness standard. I accept the Respondent's submissions that the applicable standard of review will depend upon the nature of the alleged errors involved.

[24] The Respondent submits that the main issue in this appeal, whether the General Division erred in summarily dismissing the appeal on the basis that it has no reasonable chance of success, involves a question of mixed fact and law and that the decision of the General Division should therefore be reviewed on a reasonableness standard.

[25] The Respondent submits that the correctness standard of review applies to the General Division's statement of the test for summary dismissal and to the General Division's statement of the law with respect to a division of unadjusted pensionable earnings under the *Canada Pension Plan.*

[26] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, the Supreme Court of Canada determined that when applying the correctness standard, a reviewing body will not show deference to the decision-maker's reasoning process and instead, will conduct its own analysis, which could involve substituting its own view as to the correct outcome.

[27] The Supreme Court of Canada set out the reasonableness approach in *Dunsmuir* at paragraph 47:

> Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[28] The Appellant does not dispute any of the factual findings made by the General Division. Rather, she submits that the General Division erred as it failed to consider the consent Judgment of Divorce from Michigan. She submits that the Judgment of Divorce is final and binding on the parties. if these submissions are borne out, these would amount to an error of law on the part of the General Division. For an error of law, a correctness standard applies.

ISSUE 2: DID THE GENERAL DIVISION ERR IN CHOOSING TO SUMMARILY DISMISS THE APPELLANT'S APPEAL?

[29] Although the Appellant does not appear to question the appropriateness of the summary dismissal procedure, I will address that issue before I assess the decision of the General Division.

[30] The Respondent submits that the first task for the General Division was to identify the law with respect to summary dismissals under section 53 of the DESDA. The Respondent submits that the decision of the General Division to summarily dismiss the appeal contains no reviewable error to permit the intervention of the Appeal Division. The Respondent submits that the decision is reasonable.

[31] Subsection 53(1) of the DESDA requires the General Division to summarily dismiss an appeal if it is satisfied that it has no reasonable chance of success. If the General Division either failed to identify the test or misstated the test altogether, this would qualify as an error of law which, under the correctness standard, would require me to conduct my own analysis and substitute my own view as to the correct outcome: *Dunsmuir* and *Housen v. Nikolaisen*, [2002] S.C.R. 235, 2002 SCC 33 (CanLII) at para. 8.

[32] Here, the General Division correctly stated the test by citing subsection 53(1) of the DESDA at paragraphs 4 and 19 of its decision.

[33] It is insufficient to simply recite the test for a summary dismissal set out in subsection 53(1) of the DESDA, without properly applying it. Having correctly identified the test, the second step required the General Division to apply the law to the facts. If the correct law is applied, the decision to summarily dismiss must be reasonable. This requires an assessment on a reasonableness standard, as it involves a question of mixed fact and law.

[34] In determining the appropriateness of the summary dismissal procedure and deciding whether an appeal has a reasonable chance of success, a decision-maker must determine whether there is a "triable issue" and whether there is any merit to the claim. In *A.P. v. Minister of Employment and Social Development and P.P.,* (August 12, 2015), SSTAD-15-297 (currently unreported), I used the language of "utterly hopeless" and "weak"

case, in distinguishing whether an appeal was appropriate for a summary dismissal. As long as there was an adequate factual foundation to support the appeal and the outcome was not "manifestly clear", then the matter would not be appropriate for a summary dismissal. I determined that a weak case would not be appropriate for a summary disposition, as it necessarily involves assessing the merits of the case and examining the evidence and assigning weight to it. As I see it, essentially "no reasonable chance of success" has been more or less defined in the jurisprudence as "no chance of success".

[35] The General Division found that it was empowered only to the extent of its governing statute and that it is required to interpret and apply the provisions as set out in the *Canada Pension Plan.* The General Division found the provisions of the *Canada Pension Plan* to be clear and the evidence unequivocal. Ultimately the General Division found that the *Canada Pension Plan* superseded the divorce Order granted in Michigan, for the purposes of a division of unadjusted pensionable earnings under the *Canada Pension Plan.*

[36] The General Division considered whether, on the facts before it, the appeal met the high threshold set out under subsection 53(1) of the DESDA. The General Division was unable to find an adequate or factual foundation to support the appeal. The General Division found that there was no chance for the Appellant to succeed on an appeal, given the law and the facts. As the General Division was satisfied that the appeal was without any merit, it rightly concluded that the appeal had no reasonable chance of success, and properly summarily dismissed it on that basis.

ISSUE 3: DID THE GENERAL DIVISION ERR IN ALLOWING A DIVISION OF UNADJUSTED PENSIONABLE EARNIGNS BETWEEN THE APPELLANT AND THE ADDED PARTY?

[37] This issue is very closely intertwined with the preceding issue as to whether the General Division erred in choosing to summarily dismiss the Appellant's claim.

[38] As I have noted above, the Appellant does not advance any specific allegations of error which may have been made by the General Division. I understand however that she alleges that the General Division erred as it failed to consider the consent Judgment of

Divorce from Michigan to be final and binding on the Added Party. She submits that the divorce order should preclude a division of unadjusted pensionable earnings under the *Canada Pension Plan.* These submissions mirror those which the Appellant made previously to the General Division. The General Division also summarized the Appellant's submissions at paragraph 13 of its decision, so it cannot be said that it was unaware of them.

[39] In reviewing the law and in particular, sections 55.1 and 55.2 of the *Canada Pension Plan*, the General Division concluded that after a divorce judgment has been granted and after a party applies for a division, that a division of unadjusted pensionable earnings is mandatory. Under subsection 55.2(2) of the *Canada Pension Plan*, a spousal agreement or court order is not binding on the Respondent. The division is made, subject to the exception set out under subsection 55.2(3) of the *Canada Pension Plan*, i.e. when there is a written agreement entered into between the parties in which they mention the *Canada Pension Plan* and opt out of the division, and that provision of the agreement is expressly permitted in the province which governs the agreement and the provision in the written agreement has not been invalidated by a court order. The General Division's restatement of the law as it pertains to divisions of unadjusted pensionable earnings was correct.

[40] The Appellant submits that the *Canada Pension Plan* ought not to have any applicability outside of Canada, as there can never be an opportunity for a foreign court to order that there be no division of unadjusted pensionable earnings under the *Canada Pension Plan*. While that may be so, that a foreign court has no jurisdiction where a division of unadjusted pensionable earnings under the *Canada Pension Plan* is concerned, the same holds true for any court order, including provincial court orders, under subsection 55.2(2) of the *Canada Pension Plan (*unless there is a binding spousal agreement on the Minister, which has not been invalidated by a court order, as set out under subsection 55.2(3) of the *Canada Pension Plan).*

[41] Even had the Appellant and the Added Party entered into an agreement and stipulated that it be governed by the law of Ontario, where the Appellant worked during their marriage, there would have been no circumstances whereby they would have been able to opt out of the division of unadjusted pensionable earnings under the *Canada Pension Plan.*

[42] Based on the set of facts before it, the General Division was left with no option but to dismiss the Appellant's appeal against a division of unadjusted pensionable earnings occurring. Given that there was no basis to deny a division of unadjusted pensionable earnings, i.e. there were no triable issues or any merit to the claim, the General Division rightly concluded that the matter could be disposed of by way of a summary dismissal.

[43] Counsel for the Respondent submits that the decision of the General Division is entirely reasonable as it is transparent, intelligible and is the only acceptable outcome based on the law and the facts. Counsel for the Respondent further submits that as the General Division correctly stated the law and reasonably applied it to the facts, the decision contains no reviewable error to permit the intervention of the Appeal Division. I accept these submissions.

CONCLUSION

[44] The Appeal is dismissed.

Janet Lew
Member, Appeal Division