

Citation: *E. S. v. Minister of Employment and Social Development*, 2015 SSTGDIS 123

Date: November 4, 2015

File number: GP-13-1398

Between: GENERAL DIVISION - Income Security Section

E. S.

Appellant

and

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

Respondent

Decision by: Judy Daniels, Member, General Division - Income Security Section

REASONS AND DECISION

INTRODUCTION

[1] The Appellant applied for a *Canada Pension Plan* (CPP) division of unadjusted pensionable earnings (commonly referred to as a “DUPE” or a “credit split”. The Respondent approved the Appellant’s application, which resulted in a reduction of the total amount of her pension credits. The Appellant requested a reconsideration of the Respondent’s decision, essentially asking that her application be discarded. The Respondent maintained its decision to perform a credit split upon reconsideration. The Appellant appealed the reconsideration decision to the Tribunal on October 2, 2013.

ISSUE

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

THE LAW

[3] 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.

[4] 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.

[5] Section 55.1 of the CPP states:

- (1) Subject to this section and sections 55.2 and 55.3, a division of unadjusted pensionable earnings shall take place in the following circumstances:
 - (a) in the case of spouses, following a judgment granting a divorce or a judgment of nullity of the marriage, on the Minister being informed of the judgment and receiving the prescribed information;

- (b) in the cases of spouses, following the approval by the Minister of an application made by or on behalf of either spouse, by the estate or succession of either spouse or by any person that may be prescribed, if
 - (i) the spouses have been living separate and apart for a period of one year or more, and
 - (ii) in the event of the death of one of the spouses after they have been living separate and apart for a period of one year or more, the application is made within three years after the death; and
- c) in the case of common-law partners, following the approval by the Minister of an application made by or on behalf of either former common-law partner, by the estate or succession of one of those former common-law partners, or by any person that may be prescribed if
 - (i) the former common-law partners have been living separate and apart for a period of one year or more, or one of the former common-law partners has died within that period, and
 - (ii) the application is made within four years after the day on which the former common-law partners commence to live separate and apart or, if both former common-law partners agree in writing, at any time after the end of that four-year period.

[6] Subsection 55.1(5) of the CPP reads as follows:

Before a division of unadjusted pensionable earnings is made under this section, or within the prescribed period after such a division is made, the Minister may refuse to make the division or may cancel the division, as the case may be, if the Minister is satisfied that

- (a) benefits are payable to or in respect of both persons subject to the division; and
- (b) 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.

[7] Section 45(3) of the CPP Regulations states

An applicant for a division of unadjusted pensionable earnings under section 55 or paragraph 55.1 (1) (b) or (c) of the Act may withdraw the application by sending a notice in writing to the Director not later than 60 days after the date of receipt by the applicant or notification of the decision respecting the application.

EVIDENCE

[8] The Appellant submitted that she and her former spouse were married on August 11, 1973, and cohabited until July 1997.

[9] The Appellant and her former spouse were divorced on June 20, 2005.

[10] The Appellant's former spouse died on March 22, 2011. In January 2013, the Appellant submitted information to the Minister for a DUPE.

[11] The Minister approved the Appellant's application for a DUPE for the period from January 1973 to December 1996.

[12] The Respondent sent a letter to the Appellant dated April 23, 2013 notifying the Appellant that her retirement pension under the CPP was reduced from \$679.47 to \$664.82 effective May 2013.

[13] On May 1, 2013, the Appellant requested that her DUPE application be discarded.

SUBMISSIONS

[14] In her Notice of Appeal, the Appellant submitted that:

- a) As a result of the pension credit splitting, her retirement pension has decreased;
- b) Her ex-spouse is deceased, thus there is no benefit to pension credit splitting to either her ex-spouse or the Appellant;
- c) In the spirit of the legislation, at least one spouse should benefit from the pension credit split;

- d) The Minister may refuse to make a division or cancel the division, as the case may be, if the Minister is satisfied 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”; and
- e) In this situation there is no equity or benefit to the survivor or the deceased ex-spouse.

[15] In response to the Notice of Intent to Summarily Dismiss, the Appellant submitted that:

- a) She submitted a written request to withdraw her application for a pension credit split on April 26, 2013;
- b) Once the division of credits are permanently split, there is no way to reverse or cancel that credit split except when a written request to withdraw the application for the credit split is received by the Respondent within 60 days after the applicant receives notice of the division taking place under section 45(3) of the *Canada Pension Plan Regulations* (CPP Regulations); which was done by the Appellant; and
- c) The Respondent has failed to acknowledge her timely request that the CPP regulation permits.

[16] The Respondent submitted that:

- a) The language of the CPP is clear that the division shall take place as set out in subsection 55.1(1)(a) of the CPP: there is no authority to withdraw a request for a credit split upon divorce;
- b) The division of pension credits accumulated during the period of a marriage are permanently split and assigned to the other spouse. Once done, there is no way to reverse or cancel that Credit Split except under paragraph 55.1 (5) of the CPP, which does not apply to the Appellant or to her late husband; and
- c) Since the CPP legislation governs how credit splitting will be achieved, the Tribunal does not have power to cancel, reverse or reinstate credits once a division of the unadjusted pensionable earnings has been done. In other words, there is no provision in

the CPP legislation which expressly permits the Tribunal to order the reversal of a division of unadjusted pensionable earnings in the absence of statutory provisions under the Plan allowing it to do so.

ANALYSIS

[17] 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.

[18] The Appellant and her ex-spouse were married on August 11, 1973. The Appellant made an application for a credit split which was approved by the Respondent. A credit split was performed pursuant to paragraph 55.1 (1)(a) of the CPP for the period between January 1973 to December 1996. The Appellant subsequently requested that her application be discarded on May 1, 2013.

[19] The Appellant submitted that subsection 45(3) of the CPP Regulations applies in these circumstances as she requested that her application be discarded within 60 days of making that application. Subsection 45(3) of the CPP Regulations allows the withdrawal of an application for a division of unadjusted pensionable earnings, but only where the application is made under section 55 or paragraph 55.1(1)(b) or (c) of the CPP. In this case, the Appellant is divorced and, therefore, her credit split application was made pursuant to paragraph 55.1(1)(a) of the CPP. As such, the Appellant's credit split application could not be withdrawn under subsection 45(3) of the CPP Regulations.

[20] Paragraph 55.1(1)(a) of the CPP requires a mandatory DUPE upon divorce. As the Appellant was divorced, a mandatory DUPE is required under the CPP.

[21] The Tribunal is created by legislation and, as such, it has only the powers granted to it by its governing statute. The Tribunal is required to interpret and apply the provisions as they are set out in the CPP. The Tribunal cannot use the principles of equity or consider extenuating circumstances to make its decision.

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

CONCLUSION

[23] The appeal is summarily dismissed.

Judy Daniels
Member, General Division - Income Security