Citation: *J. R. v. Minister of Employment and Social Development*, 2015 SSTGDIS 130

Date: November 20, 2015

File number: GT-99782

GENERAL DIVISION - Income Security Section

Between:

J. R.

Appellant

and

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

Respondent

and

I. F.

Added Party

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

Decided On the Record on November 20, 2015

REASONS AND DECISION

INTRODUCTION

[1] The Appellant applied for a division of unadjusted pensionable earnings (DUPE) on November 29, 2006. 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 Social Security Tribunal (Tribunal) in April 2013.

[2] The hearing of this appeal was by On the Record for the following reasons:

a) The member has decided that a further hearing is not required.

b) Credibility is not a prevailing issue.

c) This method of proceeding respects the requirement under the Social Security Tribunal Regulations to proceed as informally and quickly as circumstances, fairness and natural justice permit.

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] Section 55 (1) of the CPP provides:

> Subject to this section, subsection 55.2(2), (3) and (4) and section 55.3, an application for a division of the unadjusted pensionable earnings of former spouses may be made in writing to the Minister by or on behalf of either former spouse, by the estate or succession of either former spouse or by any person that may be prescribed, within 36 months or, if both spouses agree in writing, at any time after the date of a judgment granting a divorce or of a judgment of nullity of the marriage, rendered on or after January 1,1978 and before January 1, 1987.

ISSUE

[5] The Tribunal must decide whether the Appellant is eligible to apply for a DUPE.

BACKGROUND AND EVIDENCE

[6] The Appellant and the late D. S. were married on December 22, 1996, and divorced on February 21, 1980. D. S. passed away in December 2006. The Appellant did not apply for a DUPE until November 2006 (more than 26 years after the divorce). Since the Appellant's former spouse is deceased he is not able to sign a waiver pursuant to s. 55 (1) of the CPP.

[7] 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.

[8] 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.

Notice That Considering Summary Dismissal

[9] On June 25, 2015 the Tribunal notified the Appellant that the Tribunal Member assigned to this appeal was considering summarily dismissing the appeal because:

> *You and the late D. S. were married on December 22, 1966 and divorced on February 21, 1980. You applied for a division of unadjusted pensionable earnings (DUPE) on November 29, 2006. D. S. passed away in December 2006.*
>
> *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. Your DUPE application was brought after the three year time limit.*
>
> *Your 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 you on April 17th, last.*
>
> *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.*

> *Since your DUPE application was made after the three year time limitation, you are not eligible for a DUPE.*
>
> *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).*

[10] On July 15, 2015 Mr. Granatstein, solicitor for the Appellant, filed an objection to summary dismissal of the appeal on the grounds that the appeal has a reasonable chance of success because s. 55 (1) of the CPP does not provide that the application for a DUPE must be brought within a three year time limit. Mr. Granatstein provided detailed submissions on this issue as well as supporting case law.

[11] In view of the objection from Mr. Granatstein, the Tribunal Member determined that the appeal should proceed ON THE Record and both parties were given the opportunity to make further submissions.

SUBMISSIONS

[12] Mr. Granatstein submitted that the Appellant qualifies for a DUPE because:

a) S. 55(1) of the CPP does not provide that an application by a former spouse for a DUPE must be brought within a time limit of three years following a divorce for the following reasons:

1. There is no comma in s. 55 (10) before the qualifying words "after the date of a judgment granting the divorce… which indicates that the qualifying words only apply to the last antecedent "if both former spouses agree in writing, at any time…" Therefore the qualifying words, "after the date of a judgment granting the divorce…" do not qualify the first antecedent or the words "within 36 months."

2. A liberal construction should be given to social legislation such as the CPP.

3. S. 55(1) contrasts with sections 60 (2) and 60 (30 which clearly set out a one year time limit for applications for a benefit after death and where "The time limitation for making an application…is not left dangling as it is in s. 55 (1)."

4. The French language version of s. 55 (1) does not provide for a three year time limit, and where the words of one version raise an ambiguity, the Tribunal should first look to the other official language version to determine whether its meaning is plain and unequivocal.

[13] 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) This time limit cannot be waived because the Appellant's former spouse is deceased.

Respondent's Legal Submissions

[14] In response to a request from the Tribunal, the Respondent provided legal submissions dated November 2, 1915 (GT8).

History of DUPE provisions

[15] In its legal submissions the Respondent provided a history of the DUPE and the various amendments to its provisions under the CPP.

[16] The Respondent referred to the 1977 House of Commons Debates relating to the inception of the credit splitting provisions which indicate a concern that without the three-year limitation period, the administration of credit splitting would be virtually impossible (paragraphs 28 - 30, submissions).

[17] The submissions note that effective January 1, 1987, credit splitting became mandatory for married couples upon the Minister being informed of the decree absolute, a judgment for

divorce or nullity of marriage and upon receiving the prescribed information related to the marriage in question. As a result of this change, the three-year limitation period to apply for a credit split for former spouses divorced after January 1, 1987 was removed The new credit split provision was created under what is now s. 55.1 of the CPP (paragraph 23, submissions).

[18] The initial credit splitting provisions under what is now s. 55(1) of the CPP, which has a three year limitation period, remains in force for all divorces and annulments that occurred after January 1, 1978, and prior to January 1, 1987.

Summary of Respondent's legal submissions

[19] The Respondent's legal submissions are summarized as follows:

a) The statutory interpretation arguments raised by counsel for the Appellant based upon the placement of a comma and the comparison of the French and English language text of s. 55(1) cannot succeed;

b) Given the presumption against meaningless language in legislation, the prepositional phrase "within 36 months" must relate to something. In subsection 55(1), the only thing it can relate to is "the date of a judgment granting a divorce or of a judgment of nullity of the marriage."

c) While there are cases in which the presence or absence of a comma can produce ambiguity, none arises in this context.

d) The legislative history of the subsection and of the credit splitting regime within the CPP does not support the Appellant's argument that the thirty-six month limit does not apply to the Appellant or anyone else.

e) The French version of subsection 55(1) is crystal clear in conveying the intended message - that a three year limit applies to making an application for the DUPE following the date of a judgment granting a divorce or a judgment of nullity of the marriage. Moreover, the legislative evolution of the provision reinforces it.

f) Furthermore, the use of the permissive form "may/ peut" is explained by the fact that an application for division is optional rather than mandatory

ANALYSIS

[20] There is no issue that but for the three year time limitation the Appellant would be entitled to a DUPE. The Tribunal has, however, determined that s. 55 (1) of the CPP clearly and unequivocally provides for a three year time limit for divorces rendered on or after January 1, 1978 and before January 1, 1987. Since the Appellant was divorced in February 1980 and she did not apply for a DUPE until November 2006, she is not eligible for the DUPE.

Punctuation Argument

[21] Mr. Granatstein refers to the decision of the Nova Scotia Supreme Court in *Bell et al v. A.G. Canada and A.G.N.S.* [2001 NSSC 112] and relies on the reference made by Justice Davison to the *Interpretation of Legislation in Canada* by Pierre André Coté (2nd Ed.) at p. 62 and 63 which states:

> In Canada, punctuation is considered to be a part of the statute and may be looked at in its interpretation:
>
> > In construing the clause it is my opinion that we should have regard to the punctuation...
> >
> > Punctuation, particularly the comma, is essential to written communication, and judges cannot totally ignore it.

[22] He also refers to Driedger (3rd Edition) at page 277:

> > ... A comma before the qualifying words ordinarily indicates that they are meant to apply to all antecedents while the absence of a comma indicates they are meant to apply to the last antecedent alone.

[23] In the *Bell* decision, however, Justice Davison at paragraph 33 stated that "In Canada the courts look at punctuation with some caution" and also stated "But even admitting that punctuation is part of an enactment, the question of its relative weight remains. As with other parts of a statute, the authorities indicate that this will vary according to the circumstances."

[24] Justice Davison goes on to state:

> Punctuation, particularly the comma, is essential to written communication, and judges cannot totally ignore it. However, they will hesitate to base a decision solely on the presence or absence of particular punctuation marks. Several reasons justify such caution: '. . . punctuation is not subject to rigorous and well-defined rules.' To the extent that rules exist, they are poorly understood and may not have been respected, with the result that a document may be '. . . copiously, if not carefully, punctuated'…
>
> Replying to arguments based on punctuation, the courts will not only refer to its unreliable nature but also the context and object of the statute. A "misplaced comma" will not be allowed to override the meaning suggested by the provision as a whole.

[25] The Tribunal is satisfied that an argument based on the location of a comma is an unreliable approach to statutory interpretation and that the Tribunal should adopt the entire context approach and have regard to the plain meaning of the statutory provision and the intention of the legislature.

Interpretation should be in total context

[26] The Supreme Court of Canada in *Verdun v Toronto-Dominion Bank* [1996] 3 S.C.R. 550 sets out the modern principles of statutory interpretation. Justice L'Heureux- Dubé at paragraph six of her reasons quoted from Driedger on the Construction of Statutes (3rd ed. 1994) at p. 131 as follows:

> There is only one rule in modern interpretation, namely, courts are obliged to determine the meaning of legislation in its total context, having regard to the purpose of the legislation, the consequences of proposed interpretations, the presumptions and special rules of interpretation, as well as admissible external aids. In other words, the courts must consider and take into account all relevant and admissible indicators of legislative meaning. After taking these into account, the court must then adopt an interpretation that is appropriate. An appropriate interpretation is one that can be justified in terms of (a) its plausibility, that is, its compliance with the legislative text; (b) its efficacy, that is, its promotion of the legislative purpose; and (c) its acceptability, that is, the outcome is reasonable and just.

[27] Justice Iacobbucci at paragraph 22 of his reasons quoted from Driedger as follows:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense

> harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.... *Lord Atkinson in Victoria (City) v. Bishop of Vancouver Island* [[1921] A.C. 384, at p. 387] put it this way:
>
> > In the construction of statutes their words must be interpreted in their ordinary grammatical sense, unless there be something in the context, or in the object of the statute in which they occur, or in the circumstances with reference to which they are used, to show that they were used in a special sense different from their ordinary grammatical sense.

[28] The Tribunal in interpreting the provision in its entire context and harmoniously with other provisions of the statute considered the following:

- A plain and simple reading of the provision is that "within 36 months" completes the first alternative which is an application for a division of unadjusted pensionable earnings with respect to divorces rendered on or after January 1, 1978 and before January 1, 1987.

- "Within 36 months" is followed by "or" which suggests an alternative which allows the application to be made at any time if both parties agree in writing.

- If there is no 36 months time limit as Mr. Granatstein submits then there is no purpose for the expression "within 36 months" nor is there any purpose for an alternative in which both parties agree in writing. Surely, it must be assumed that the legislature did not add an unnecessary and purposeless phrase and alternative.

- If the Appellant's position is accepted there would be no purpose for s. 55.1 of the CPP which applies to divorces on or after January 1, 1987. If there is no three year time limit, then only one section dealing with all divorces after January 1, 1978 would be necessary.

Other Cases

[29] There are numerous cases which have discussed and applied s. 55 (1) of the CPP and all of those cases have proceeded on the basis that there is a three year time limit for applying for a DUPE with respect to divorces rendered on or after January 1, 1978 and before January 1, 1987. In none of these cases has there been any suggestion that there is no three year time limit

as submitted by the Appellant. This is further support for the position that the three year time limitation is clear and unambiguous.

[30] The Charter challenge decision referred to at paragraph 7, *supra*, was an unsuccessful challenge to the three year limitation which the Appellant now suggests does not exist. That case was heard by a Review Tribunal of the OCRT, by the Pension Appeals Board (PAB), by the Federal Court, and lastly by the Appeal Division of the SST. In none of those proceedings was there any suggestion that there was no three year limitation. If there was no three year limitation, the charter challenge would have been unnecessary.

[31] In *Von Der Kammer v MNHW* (July 19, 1991), CP 1916 and *Warner v MEI* (November 1995), CP 2710 the PAB stated that despite the use of the word "may" in s. 55 (1), the application for a division of unadjusted pensionable earnings must be made within 36 months of the date of the parties' decree absolute and that the PAB has no jurisdiction to extend the time period. In *Harrison-Wilson v MSD* (April 14, 2005) CP 22023 the PAB found that a waiver signed by the administrator of an estate waiving the 36 month time limitation under s. 55 (1) to make the DUPE application was inoperative.

[32] These decisions, although not binding, provide guidance to the Tribunal and they all proceed on the basis that s. 55 (1) sets out a 36 month time limitation.

Appellant's other submissions

[33] All of the Appellant's other submissions as set out in sub-paragraphs 12 (a) 2-4, *supra*, are premised on the assumption that there is some ambiguity with respect to the interpretation of s. 55 (1). Since the Tribunal has found that that the three year time limitation is clear and unequivocal, these alternative submissions must fail.

The social legislation argument

[34] In his submissions Mr. Granatstein stated as follows:

> In Canada, courts have been especially careful to apply a liberal construction to so - called "social legislation." The Supreme Court of Canada in the *Rizzo* case emphasized that benefits – conferring legislation ought to be interpreted in a broad and generous manner and that any doubt arising from the language of such

> legislation ought to be resolved in favour of the claimant. This interpretive approach to legislation has been adopted in a number of Supreme Court decisions dealing with the Unemployment Insurance Act as well as with the CPP.

[35] That Tribunal agrees that the CPP is social legislation that provides benefits, however, there is no "doubt arising from the language" of s. 55 (1) concerning the three year limitation requirement.

The sections 60(2) and (3) argument

[36] The Tribunal disagrees that s. 55 (1) contrasts with sections 60(2) and 60 (3) and that the three year limitation period in s. 55 (1) is left dangling as submitted by Mr. Granatstein. Sections 60 (2) and (3) which deal with applications for benefits after the death of a person provide:

> S. 60 (2)…An application for a benefit…may be approved…only if is made within 12 months after the death of a person;
>
> S. 60(3)…An application may be made within one year after death by…

[37] No conclusions should be drawn just because there are different sentence structures in provisions dealing with matters. The Tribunal also noted that sections 60 (2) and (3) also use the term "may" and that Mr. Granatstein has not suggested that this detracts from the mandatory nature of the one year time limitation in those sections.

The French language version argument

[38] Mr. Granatstein also submitted that the French language version of s. 55 (1) does not provide that the application of a former spouse must be brought within the time limit of three years because its language and structure make the provision for the application permissive, not mandatory, and that where the words of one version may raises an ambiguity, the Tribunal should first look to the other official language to determine whether its meaning is plain and unequivocal.

[39] Not only has the Tribunal determined that the English language version of s. 55(1) is plain and unequivocal, the Tribunal disagrees with Mr. Granatsteins's interpretation of the French version. In his submissions, Mr. Granatstein submitted as follows:

> The French language version of this section provides that a former spouse "peut" meaning "may, is able or can" apply for a division of the unadjusted pensionable earnings of a former spouse within 36 months following the divorce.
>
> In a separate sentence, the French language version provides that former spouses may agree in writing to present the request after 36 months.
>
> By separating the provisions for application by a former spouse from the provisions for application by former spouses who agree in writing, the French version makes the provision for the application by a former spouse permissive; not mandatory. Therefore, a former spouse applying for division is not precluded from applying after the 36 months; the application is not restricted to the 36 months following the divorce.

[40] There does not appear to be any significant difference between the English and French language versions of s. 55 (1). Both use a permissive term which allows the application to be made as long as it is made within three years of the divorce. There is no suggestion that the three year term is not mandatory (unless waived by the former spouse), and if it were not mandatory it would have no purpose whatsoever in either language version and there would be no need for a waiver.

Closing

[41] The Appellant's DUPE application was made after the three year time limit set out in s. 55 (1) of the CPP. Since the Appellant's former spouse is deceased he cannot waive the time limit.

[42] 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.

[43] 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).

[44] 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.

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

CONCLUSION

[46] The appeal is dismissed.

Raymond Raphael
Member, General Division - Income Security