

Citation: *S. S. v. Minister of Employment and Social Development*, 2015 SSTGDIS 139

Date: December 15, 2015

File number: GP-13-2720

GENERAL DIVISION - Income Security Section

Between:

S. S.

Appellant

and

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

Respondent

and

M. S.

Added Party

Decision by: Virginia Saunders, Member, General Division - Income Security Section

Heard by Questions and answers on June 24, 2015 to December 15, 2015

REASONS AND DECISION

INTRODUCTION

[1] The Appellant's application for a Division of Unadjusted Pensionable Earnings (Credit Split) under the *Canada Pension Plan* (CPP) was date stamped by the Respondent on September 24, 2012. The Respondent denied the application initially and upon reconsideration. The Appellant appealed the reconsideration decision to the Social Security Tribunal (Tribunal).

[2] The hearing of this appeal was by written questions and answers for the following reasons:

- a) There are gaps in the information in the file and/or a need for clarification.
- b) 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] Subsection 55(1) of the CPP states:

(1) Subject to this section, subsections 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 former 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.

[4] Subsection 55(2) states:

- (2) For the purposes of this section,
 - (a) notwithstanding paragraphs (b) and (c), the former spouses must have cohabited for at least thirty-six consecutive months during the marriage before an application made under subsection (1) may be approved by the Minister;
 - (b) the marriage is deemed to have been solemnized or nullified or a divorce is deemed to have been made final on the last day of the year preceding the registered

date of the marriage or the judgment of nullity or the effective date of the judgment granting a divorce; and

(c) the former spouses shall be deemed to have cohabited throughout the year in which the marriage was solemnized, and shall be deemed not to have cohabited at any time during the year of divorce or of annulment of the marriage.

[5] Subsection 55(3) states:

(3) In determining the period for which the unadjusted pensionable earnings of the former spouses shall be divided, only those months during which the former spouses cohabited during the marriage shall be considered and, for the purposes of this section, months during which former spouses cohabited shall be determined in the prescribed manner.

[6] Subsection 78(1) of the *Canada Pension Plan Regulations* (CPP Regulations) states:

(1) For the purposes of section 55 of the Act, months during which the former spouses have cohabited include

(a) all consecutive months during the marriage in which the former spouses have lived together as husband and wife without interruption for more than 90 days; and

(b) any period of the marriage preceding the minimum period of 36 consecutive months of cohabitation required by paragraph 55(2)(a) of the Act.

[7] Subsection 78(3) of the CPP Regulations states:

(3) For the purposes of section 55 of the Act, where the cohabitation of the spouses is interrupted for more than 90 days as referred to in paragraph (1)(a), the cohabitation shall be deemed to have ceased immediately before the year in which the interruption commenced.

[8] A person who is dissatisfied with a decision made under section 55 has the right to request reconsideration by the Minister pursuant to subsection 81(1)(a) of the CPP. Section 82 of the CPP provides that a party who is dissatisfied with a reconsideration decision made by the Minister under section 81 may appeal that decision to the Tribunal.

[9] Subsection 54(1) of the Department of Employment and Social Development Act (DESDA) states that the Tribunal may dismiss the appeal or confirm, rescind or vary a decision of the Minister in whole or in part or give the decision that the Minister should have given.

ISSUE

[10] In this case, the Tribunal must decide if the Credit Split application can be made and approved; and, if so, the period of cohabitation for which the Credit Split applies.

EVIDENCE

[11] The Appellant applied for a Credit Split on September 24, 2012. In her application she stated that she and the Added Party were married in Fiji on December 12, 1971, and that the marriage ended on October 1, 1982. In the application she stated that she and the Added Party last resided together on October 1, 1982; that there were no periods during which they lived together common-law before the marriage; and that there were no periods from December 12, 1971, to October 1, 1982 in which they did not reside together.

[12] Over the next several months the Respondent made written requests to the Appellant to provide a certified copy of the marriage certificate; a completed “Statutory Declaration – Separation of Legal Spouses”; and an original or certified copy of the divorce order.

[13] The application was denied on January 2, 2013, because the Appellant had not provided the requested documents. The Appellant requested reconsideration of the decision on January 25, 2013. She then provided the following documents:

- a) A “Statutory Declaration of Legal Marriage” made by the Appellant on January 8, 2013, in which she declared that she and the Added Party were married before a District Officer in Nadi City Hall, Nadi, Fiji Islands, on December 12, 1971. She declared that she was unable to produce a marriage certificate because the original was lost and she was unable to obtain a replacement.
- b) A “Statutory Declaration – Separation of Legal Spouses” made by the Appellant on January 8, 2013, in which she declared that she and the Added Party last resided together on January 1, 1982, and that they lived separate and apart from that date until they were divorced.

- c) A copy of a Judgment in the Supreme Court of British Columbia signed on June 21, 1983, and entered on June 22, 1983, ordering that a Decree Nisi dated March 7, 1983, be made absolute and that the Appellant and the Added Party were thereby divorced.

[14] On April 18, 2013, the Respondent wrote to the Added Party, informing him of the Credit Split application and asking him to confirm that he and the Appellant lived together from December 12, 1971, to January 1, 1982.

[15] On May 24, 2013, the Respondent advised the Appellant that, as the divorce occurred before January 1, 1987, and her application was made more than 36 months after the Decree Absolute, the Added Party's agreement to the Credit Split application was required. She was given a waiver to have the Added Party sign and return in order for the Respondent to proceed with the application. She was advised that if the signed waiver was not returned "within 90 days of the date you receive this letter" her application would be denied.

[16] Before the 90 days were up, the Respondent wrote to the Appellant denying her application. The decision stated:

We have reviewed your letter of January 20, 2013, concerning the splitting of Canada Pension Plan (CPP) credits earned between you and [the Added Party] from December 12, 1971 to October 1, 1982 following your divorce.

We examined your eligibility for a division of pension credits with your former spouse. However, you do not qualify because spouses who were divorced before 1987 had to submit their application within 36 months of the divorce.

The information in your file shows that you were divorced on October 1, 1982. Your application for credit splitting was received on September 4, 2012, which is 20 months *[sic]* after the date of your divorce. Because you missed the 36 month deadline we cannot approve your application for credit splitting.

[17] The Added Party provided two documents that were date-stamped received by the Respondent on August 22, 2013, within the 90 day deadline:

- a) A "Canada Pension Plan Credit Split Waiver" dated August 20, 2013, in which he agreed to waive the 36-month limitation period under subsection 55(1) of the CPP; and in which he declared that he and the Appellant cohabited in a conjugal relationship from December 12, 1971, to January 1, 1980;

- b) a Statement dated August 21, 2013, in which he stated that he did not agree with the period of cohabitation that had been indicated (December 12, 1971, to January 1, 1982). He stated that he had been separated from the Appellant since January 1, 1980, that their divorce took place in 1982, and that they never lived together after the divorce.

[18] In A Notice of Hearing – Questions and Answers which the Appellant received on June 27, 2015, she was asked to explain why she chose different dates than the Added Party for the last date on which they cohabited, and to provide supporting evidence by July 24, 2015. No answer was received by the Tribunal.

[19] A similar Notice of Hearing was sent to the Added Party and he was given until November 2, 2015, to reply. This Notice was returned to the Tribunal. Tribunal records indicate that the Added Party was contacted by telephone about the returned mail on October 26, 2015, and he replied “Don’t worry about it” and then hung up the phone.

[20] The Tribunal decided to proceed to a decision, as it was apparent that neither the Appellant nor the Added Party was interested in making submissions or adding anything further to the evidence.

SUBMISSIONS

[21] In her Notice of Appeal the Appellant did not address the issue of the dates of cohabitation. She asked that her appeal be allowed because she had been unaware of the 36 month rule, and that the Added Party had agreed to the Credit Split.

[22] The Respondent submitted that the Appellant did not submit an application for a Credit Split within 36 months of the date of divorce, as required by the legislation, and so the appeal should be denied.

ANALYSIS

[23] The Appellant and the Added Party were divorced after January 1, 1978, and before January 1, 1987. In these circumstances section 55(1) of the CPP requires that a Credit Split application can only be made if both spouses agree in writing. Obviously the Appellant agreed

in writing when she made the application. The Added Party agreed in writing when he signed and submitted the waiver on August 20, 2013.

[24] Thus, the Credit Split application can be made. Although the wording of s. 55(1) suggests that the Minister's decision to approve the Credit Split is discretionary, it is clear that the only bar to this particular application being processed and approved was that the waiver had not been obtained by the time the reconsideration decision was issued.

[25] Subsection 54(1) of the DESDA provides that the Tribunal may confirm, rescind or vary a decision of the Minister in whole or in part or give the decision that the Minister should have given. Thus the Tribunal has jurisdiction to approve the Credit Split in compliance with the legislation. As the parties both agreed in writing to the application, and there is no question that they cohabited for at least 36 consecutive months during the marriage, the application may be approved.

[26] The remaining issue is the period of cohabitation for which the Credit Split applies. Only those months during which the former spouses are deemed by the legislation to have cohabited during the marriage can be considered.

[27] The Appellant stated that she was unable to produce a marriage certificate. The Appellant and the Added Party agree that they were married on December 12, 1971. That is the date that was accepted by the Supreme Court of British Columbia for the purposes of granting the divorce. The Tribunal finds that December 12, 1971, is the "registered date of the marriage." Pursuant to paragraph 55(2)(b) of the CPP, the marriage is deemed to have been solemnized on the last day of the year preceding that date; that is, on December 31, 1970. Pursuant to paragraph 55(2)(c), the Appellant and the Added Party are deemed to have cohabited throughout 1970.

[28] The Appellant offered two different dates of separation. In her application for the Credit Split dated September 13, 2012, she stated that she and the Added Party last resided together on October 1, 1982. In a statutory declaration made four months later on January 8, 2013, she stated that she and the Added Party last resided together on January 1, 1982.

[29] The Added Party stated twice that the parties separated on January 1, 1980.

[30] There is no other evidence that might shed light on the date of separation. Neither the Appellant nor the Added Party provided any evidence to support their statements as to the claimed date of separation.

[31] The Tribunal notes that both parties seemed unaware of the actual date of their divorce, and unwilling to expend the effort to even look it up. That lack of interest in providing accurate information casts some doubt on the veracity of any of their statements. However, it is clear that the parties were married and that they ceased to cohabit at some point before the Decree Nisi was issued in March 1983. The Tribunal has to decide when that occurred based on the evidence before it.

[32] The Tribunal prefers the evidence of the Added Party. Within the space of four months, the Appellant gave two different dates of separation; the Added Party gave consistent statements, albeit only a day apart. Nevertheless, the Tribunal finds that it is more likely than not that the Appellant and the Added Party ceased to cohabit on January 1, 1980, and that they have not resided together since that date.

[33] Subsection 78(3) of the CPP Regulations provides that where the cohabitation of the spouses is interrupted for more than 90 days, as it was in this case after January 1, 1980, the cohabitation is deemed to have ceased immediately before the year in which the interruption commenced. Thus, the period of cohabitation is deemed to have ended in 1979.

CONCLUSION

[34] The Tribunal finds that the Appellant's application for a Credit Split can be and is approved based on a period of cohabitation from 1970 through 1979.

[35] The appeal is allowed, in part.

Virginia Saunders
Member, General Division - Income Security