Citation: *B. K. v. Minister of Employment and Social Development*, 2015 SSTAD 1466

Appeal No. AD-15-996

BETWEEN:

B. K.

Appellant

and

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

Respondent

and

Estate of R. K.

Added Party

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

SOCIAL SECURITY TRIBUNAL MEMBER: Janet LEW

DATE OF DECISION: December 21, 2015

REASONS AND DECISION

INTRODUCTION

[1] The Appellant appeals a decision dated August 11, 2015 of the General Division, whereby it summarily dismissed her appeal seeking cancellation of an application for 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 September 9, 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. Both the Appellant and Respondent 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. Is a standard of review analysis applicable 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 fail to observe a principle of natural justice when it refused to exercise its discretion and cancel the Appellant's application for a division of unadjusted pensionable earnings?

FACTUAL BACKGROUND

[4] The Appellant married her spouse (now deceased) on May 6, 1972. They divorced on September 16, 2004. According to the information provided, the Appellant resided with her former spouse from May 6, 1972 until January 25, 2000. The Appellant's former spouse passed away on June 21, 2012.

[5] The Appellant filed the form SC ISP-1901 (2013-01-15) E Canada Pension Plan Credit Split (upon separation or divorce) with Service Canada on October 8, 2013 (GD3- 15 to GD3-19).

[6] The Respondent sent a letter dated December 12, 2013 to the Appellant, advising her that the amount of her retirement pension had been revised due to a change in the late Added Party's pension credits split. In the Appellant's case, the division of unadjusted pensionable earnings resulted in a reduction of the total amount of the pension credits of the late Added Party, which in turn reduced the amount of the Appellant's own retirement pension (GD1-14 to GD1-15).

[7] Upon receiving notice of the reduction in her retirement pension, the Appellant wrote to the Respondent by letter dated January 24, 2014. She advised that she was shocked to learn of the reduction in her retirement pension, as she had instead expected that she would become eligible to receive a portion of her former spouse's pension credits. She was already receiving a Canada Pension Plan retirement pension, so assumed that she would at the very least continue to receive her "already established Canada Pension Plan [retirement pension]", and on top of that, would now possibly receive a portion of her former spouse's pension credits. She advised that she contacted the Respondent's office (Service Canada) by telephone but at no time was advised that an application for a division of unadjusted pensionable earnings could adversely affect her. She submitted that had she been properly advised, the Service Canada agent would have made her aware that her own retirement pension might be reduced, and under these circumstances, she would not have proceeded with the application for a division of unadjusted pensionable earnings. The Appellant requested a reconsideration and asked the Respondent to withdraw her application and reinstate her retirement pension to its previous amount. She also

questioned whether there was a "proper application to inquire whether or not [she] could possibly be eligible to receive a portion of [her] ex-husband's Canada Pension Benefits?" (GD1-17 to GD1-19).

[8] The Respondent wrote to the Appellant on April 2, 2014, advising that it was maintaining its decision to split her pension credits (GD3-6 to GD3-7). The letter reads:

> The *Canada Pension Plan* states that when pension credits are split, each spouse or common-law partner receives one half of the couple's pension credits for the years the couple lived together in a conjugal relationship.
>
> This period starts the latest of:
>
> - January of the year the spouses or common-law partners started living together; or
> - the month in which the youngest spouse or common-law partner turned 18; or
> - in 1966 (the year in which the Canada Pension Plan began);
>
> and ends the earliest of:
>
> - December of the year before the couple separated; or
> - the month before either spouse or common-law partner began receiving a Canada Pension Plan or Quebec Pension Plan benefit; or
> - the month in which either spouse or common-law partner turns 70.
>
> **The *Canada Pension Plan* legislation states that Credit Splitting is permanent** (except in case of a successful appeal or the end of a permitted withdrawal period which exist in cases of **separated couples only)** and does not revert back after the death of one spouse;
>
> The information in your file shows that you and [the late Added Party] were divorced effective October 1990 (*sic)*. **Therefore, the Credit Splitting is permanent and cannot be withdrawn.**

[9] On June 13, 2014, the Appellant filed a Notice of Appeal with the General Division.

[10] On June 29, 2015, the General Division gave notice in writing to the Appellant, advising that it was considering summarily dismissing the appeal because:

> *You were married to your late ex-spouse on May 6, 1972 and divorced on September 18, 2004. Your late ex-spouse passed away on June 21, 2012. The information provided in your application indicates that you and your late ex-spouse cohabited from May 6, 1972 until January 25, 2000.*
>
> *You made an Application for a Division of Unadjusted Pension Earnings (DUPE) on June 21, 2012. Your application was approved and a letter was sent from the Minister advising you of the decrease in your Retirement Pension as a result of the credit split. You made a request for consideration on January 27, 2014, which was subsequently denied on April 2, 2014. You have now appealed to this Tribunal.*
>
> *The evidence submitted in support of this appeal indicates that as a result of the DUPE, you experienced a decrease in CPP payments. The evidence also indicates that the estate of your late ex-spouse has experienced an increase in CPP payments as a consequence of the DUPE.*
>
> *Section 55.1(1)(a) of the CPP stipulates that a DUPE is mandatory where parties divorce after January 1, 1987. Although there is provision to withdraw an application in the CPP Regulations, it does not apply to applications that were considered under section 55.1(1)(a). The only discretion afforded to the Minister under this section is when both parties experience reduction in those benefits as a result of the DUPE as per subparagraph 55.1(5). In the circumstances of this case, your late ex-spouse has not experienced a reduction in benefits as a result of the DUPE and as such, there is no discretion.*

[11] The General Division invited the Appellant to provide detailed written submissions by no later than July 31, 2015, if she believed that the appeal should not be summarily dismissed, explaining why her appeal had a reasonable chance of success.

[12] The Respondent filed submissions on July 16, 2015, requesting that the appeal be dismissed on the basis that the *Canada Pension Plan* does not allow the Minister of Employment and Social Development to reverse a credit split in the Appellant's circumstances. The Respondent cited *Strezov v. Canada (Attorney General)*, 2007 FC 417 and *Bernier v. Canada (Minister of Human Resources Development)*, 2005 FCA 4, and also referred to the applicable sections of the *Canada Pension Plan*.

[13] The Appellant filed submissions on July 22, 2015. She stated that she relied upon and thereby faults Service Canada for not fully setting out her options and their potential consequences, in regards to the pensionable earnings of her former spouse. She stated that

she made a mistake in applying for a division of unadjusted pensionable earnings, and would not have applied for such a division, had she been aware that it would result in a reduction of her retirement pension. She submitted that the division was unjust as it resulted in a "lifetime penalty of reduced benefits" and should therefore be reversed. The Appellant did not cite any provisions of the *Canada Pension Plan* or any legal authorities in support of her submissions.

[14] On August 11, 2015, the General Division rendered its decision. The General Division relied upon the following provisions, in coming to its decision:

i. Paragraph 55.1(1)(a) of the *Canada Pension Plan*, which provides that in the case of spouses, a division of unadjusted pensionable earnings shall take place following a judgment granting a divorce or nullity of the marriage, on the Minister being informed of the judgment and after receiving the required information;

ii. Subsection 55.1(5) of the *Canada Pension Plan*, which provides that before a division of unadjusted pensionable earnings is to take place, or within the prescribed period after such a division is made, the Minister may refuse to make the division or may cancel the division 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;

iii. 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; and

iv. 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.

[15] The General Division found that a division of unadjusted pensionable earnings was mandatory and that there were no factual circumstances whereby the Minister could exercise any discretion to refuse to make or cancel the division. The General Division also found that it lacked any discretionary authority to supersede the provisions of the *Canada Pension Plan*.

[16] On September 9, 2015, the Appellant filed an appeal from the summary dismissal decision of the General Division.

SUBMISSIONS

[17] The Appellant, who was unrepresented, submits that she did not intend to file an application for a division of unadjusted pensionable earnings if it would result in a reduction of her retirement pension, and that it was a mistake on her part to have done so. The Appellant submits that Service Canada failed to fully advise and that she ought not to be effectively penalized for having relied on incomplete or erroneous advice from Service Canada. She submits that there should be some recourse to correct her "mistaken application" and that she should be provided with an opportunity for what she described as a "reduced sentence". The Appellant cites *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, 1999 CanLII 699 (SCC), for the proposition that the requirements of natural justice vary according to the context of the matter. The Appellant submits that the General Division failed to observe a principle of natural justice, when it refused to exercise any discretion and cancel her application for a division of unadjusted pensionable earnings.

[18] Counsel for the Respondent filed written submissions on October 26, 2015. Counsel submits that the General Division correctly stated the test for a summary dismissal under section 53 of the DESDA, and that it did not err in its application of the test for summary dismissal. Counsel further submits that the General Division also correctly referred to and applied the applicable provisions of the *Canada Pension Plan*.

[19] Counsel submits that, as set out in paragraph 55.1(1)(a) of the *Canada Pension Plan*, a division of unadjusted pensionable earnings is mandatory where the Minister is

informed of the divorce judgment. Counsel submits that the Minister has discretion under subsection 55.1(5) of the *Canada Pension Plan* to refuse to make a division or to cancel a division only if it is satisfied that (1) both parties are entitled to benefits, and (ii) the amount of both benefits would decrease upon division or when the division was proposed to be made. Counsel submits that subsection 55.1(5) of the *Canada Pension Plan* is not available to the Appellant in this case.

[20] Counsel submits that the outcome of the appeal is manifestly clear and that it was therefore appropriate for the General Division to have summarily dismissed the appeal. Counsel submits that the legislation imposes an obligation on the Respondent to perform the division of unadjusted pensionable earnings once the required information is provided. Counsel submits that the jurisprudence also clearly indicates that the Respondent has no discretion in this case. Counsel submits that "merely feeling [a division of unadjusted pensionable earnings] produces an unfair result does not indicate the Respondent can ignore the mandatory nature of the provision, nor does it indicate a breach in natural justice".

[21] Counsel submits that the Respondent is under no obligation to provide any pension advice to the Appellant, but that even if it had provided advice, and it had been in error (which the Respondent denies), this still would not form the basis of an appeal before the Appeals Division, in light of jurisprudence from the Federal Court of Canada.

[22] Counsel submits that neither the General Division nor the Appeal Division of the Social Security Tribunal have the any authority to consider alleged erroneous advice complaints. The Respondent continues to deny that any errors were made by any of its employees. Counsel submits that the Appellant has not provided any evidence to support her allegations that she received erroneous advice from the Respondent, nor has there been any investigation or decision into these allegations. Counsel submits that had there been an investigation or decision made on any erroneous advice which might have been provided to the Appellant, it also would not be reviewable by either the General Division or the Appeal Division of the Social Security Tribunal.

[23] No submissions were filed on behalf of the Added Party.

ISSUE 1: STANDARD OF REVIEW

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

[25] Counsel for 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.

[26] Counsel submits however that the main issue in this appeal -- whether the decision by the General Division to summarily dismiss the appeal on the basis that it has no reasonable chance of success -- involves a question of mixed fact and law, and that as such, the Appeal Division should review the decision of the General Division on a reasonableness standard. Counsel submits that with respect to the Appellant's allegations that there has been a breach of natural justice, this should be reviewable on a correctness standard.

[27] Counsel submits that the Appeal Division should show no deference to the General Division's statement of the test for summary dismissal and to its statement of the law with respect to the division of unadjusted pensionable earnings.

[28] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, the Supreme Court of Canada determined that there are only two standards of review at common law in Canada: reasonableness and correctness. Questions of law generally are determined on the correctness standard, while questions of fact and of mixed fact and law are determined on a reasonableness standard. And, 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.

[29] 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.

[30] Assuming that a standard of review analysis is appropriate, the applicable standard of review is dependent upon the nature of the alleged errors involved.

[31] In past decisions, I have applied this very standard of review analysis, in relying upon the line of authorities that emanated from appeals of decisions of boards of referees to umpires, in the context of the Employment Insurance Act. In *Chaulk v. Canada (Attorney General)* et al., 2012 FCA 190, for instance, the Federal Court of Appeal noted the limited grounds of appeal set out in subsection 115(2) of the *Employment Insurance Act*, S.C. 1996, c. 23 (since repealed) and then proceeded to conduct a standard of review analysis.

[32] In *Chaulk*, the Federal Court of Appeal held at paragraphs 26 and 27 that:

> [26] It has been consistently held by this Court that both umpires and the Court should review questions of law involving the interpretation of the employment insurance legislation on a standard of correctness: see for example, *Canada (Attorney General) v. Sveinson,* 2001 FCA 315 (CanLII), [2002] 2 F.C. 205 at paras. 12-17 (umpires); *Budhai v. Canada (Attorney General),* 2002 FCA 298 (CanLII), [2003] 2 F.C. 57 at paras. 42, 48 (boards of referees); *Stone v. Canada (Attorney General),* 2006 FCA 27 (CanLII), [2006] F.C.R. 120 paras. 13-18 (boards of referees).
>
> [27] Statements to this effect can also be found in cases decided after *Dunsmuir v. New Brunswick,* 2008 SCC 9 (CanLII), [2009] 1 S.C.R. 190 (*Dunsmuir),* even though *Dunsmuir* decided that a specialist tribunal's interpretation of its enabling statute is normally reviewed on the reasonableness standard: see, for example, *Martens v. Canada (Attorney General),* 2008 FCA 240 (CanLII) at para. 30 (umpires and board of referees); *MacNeil v. Canada (Employment Insurance Commission),* 2009 FCA 306 (CanLII), 396 N.R. 157 at paras. 24-27; *Canada (Attorney General) v. Lemire,* 2010 FCA 314 (CanLII) at paras. 8-9; *Canada (Attorney General) v. Trochimchuk,* 2011 FCA 268 (CanLII), 415 N.R. 88 at para. 7.

[33] Significantly, subsection 115(2) of the *Employment Insurance Act* (since repealed) mirrors the very same limited grounds of appeal under subsection 58(2) of the DESDA. Subsection 115(2) of the *Employment Insurance Act* (since repealed) reads:

> **115.**
>
> (2) The only grounds of appeal are that
>
> (a) the board of referees failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;
>
> (b) the board of referees erred in law in making its decision or order, whether or not the error appears on the face of the record; or
>
> (c) the board of referees based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

[34] It should come as no no surprise then that the Appeal Division should be inclined to apply the same standard of review analysis which umpires had, given the language of its enabling statute and the same limited grounds of appeal under subsection 58(2) of the DESDA, and the guidance it has received in past from the Federal Court of Appeal in this area.

[35] However, in *Canada (Attorney General) v. Paradis; Canada (Attorney General) v. Jean*, 2015 CAF 242 (CanLII), 2015 FCA 242, the Federal Court of Appeal recently suggested that that approach is not appropriate when the Appeal Division is reviewing appeals of decisions rendered by the General Division. At paragraphs 18 and 19, the Federal Court of Appeal wrote:

> [18] … This Court has frequently established that the umpire must apply the standard of reasonableness to mixed questions and to matters of fact determined by the board of referees (*Pathmanathan v. Office of the Umpire,* 2015 FCA 50 (CanLII), at paragraph 15; *De Jesus v. Canada (Attorney General),* 2013 FCA 264 (CanLII), at paragraph 30; *Canada (Attorney General) v. Merrigan,* 2004 FCA 253 (CanLII), at paragraph 10 [*Merrigan*] and the standard of correctness to matters of law (*Martens v. Canada (Attorney General),* 2008 FCA 240 (CanLII), at paragraphs 30-31; *Chaulk v. Canada (Attorney General),* 2012 FCA 190

(CanLII), at paragraphs 26-29; *Stone v. Canada (Attorney General)*, 2006 FCA 27 (CanLII), at paragraphs 15-18). Where the Appeal Division heard appeals of decisions by the boards of referees, assuming the role previously assigned to the umpire pursuant to the transitional measures set out by the *Jobs, Growth and Long-term Prosperity Act*, S.C. 2012, c. 19, ss. 266-267, it was appropriate that it refer to the appeal methods in effect immediately prior to April 1, 2013 and to the case law on the standard of review applicable under this system. For the purposes of the instant dispute, there is no need to rule on the standard of review that the Appeal Division should apply when reviewing appeals of decisions rendered by the General Division of the Social Security Tribunal.

[19] That being said, I am not convinced of the relevance of subjecting decisions rendered by the Appeal Division to an analysis based on the standard of review. When it acts as an administrative appeal tribunal for decisions rendered by the General Division of the Social Security Tribunal, the Appeal Division does not exercise a superintending power similar to that exercised by a higher court. Given the risk of a blurring of lines, it seems to me that we must refrain from borrowing from the terminology and the spirit of judicial review in an administrative appeal context. Not only does the Appeal Division have as much expertise as the General Division of the Social Security Tribunal and thus is not required to show deference, but an administrative appeal tribunal also cannot exercise the review and superintending powers reserved for higher provincial courts or, in the case of "federal boards", for the Federal Court and the Federal Court of Appeal (ss. 18.1 and 28 of the *Federal Courts Act*, R.S.C. 1985, c. F-7). Where it hears appeals pursuant to subsection 58(1) of the *Department of Employment and Social Development Act*, the mandate of the Appeal Division is conferred to it by sections 55 to 69 of that Act. In particular, it must determine whether the General Division "erred in law in making its decision, whether or not the error appears on the face of the record" (paragraph 58(1)(b) of the *Act).* There is no need to add to this wording the case law that has developed on judicial review.

[36] More recently, in *Maunder v. Canada (Attorney General)*, 2015 FCA 274, the Federal Court of Appeal affirmed the approach set out in *Jean*, indicating that it would assist the Appeal Division in its decision, as might other pending applications and appeals to the Federal Court of Appeal.

[37] Section 18.1 of the *Federal Courts Act* deals with applications for judicial review, sets out the powers of the Federal Court and the grounds of review. Section 28(1) of the *Federal Courts Act* confers jurisdiction on the Federal Court of Appeal to hear and determine applications for judicial review made in respect of a number of federal boards, commissions or other tribunals listed in that section.

[38] The *Employment Insurance Act* did not confer any jurisdiction on umpires to hear and determine applications for judicial review, yet the umpires exercised a superintending power and applied standard of review analyses to decisions of the board of referees. Although the Federal Court of Appeal cautions against "borrowing from the terminology and the spirit of judicial review in an administrative appeal context" and that an "administrative appeal tribunal also cannot exercise the review and superintending powers reserved for higher provincial courts or … "federal boards", it held that that was the appropriate approach for umpires, notwithstanding the administrative appeal context in which umpires operated. I do not purport to reconcile this seeming discrepancy, that the Appeal Division ought not to exercise the same power which the umpires held, despite the similarities in the language of their governing statutes, as there is the doctrine of *stare decisis* by which I must abide and assuming that the law on this legal issue is now settled by the Federal Court of Appeal.

[39] As the Federal Court of Appeal has pointed out in *Jean*, the mandate of the Appeal Division is conferred to it by sections 55 to 69 of the DESDA, where it hears appeals pursuant to subsection 58(1) of the DESDA. Subsection 58(1) of the DESDA sets out the grounds of appeal, and subsection 59(1) of the DESDA sets out the powers of the Appeal Division. The only grounds of appeal under subsection 58(1) of the DESDA are 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.

[40] The Appellant does not dispute any of the facts set out by the General Division; the facts are not the subject of any dispute. Rather, the Appellant submits that the

General Division erred as it failed to observe a principle of natural justice when it refused to exercise its discretion and cancel her application for a division of unadjusted pensionable earnings.

[41] Before I proceed with a determination as to whether the General Division might have failed to observe a principle of natural justice, I must determine whether the General Division may have erred in law in summarily dismissing the appeal in the first instance. In other words, did the General Division apply the correct test for a summary dismissal?

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

[42] 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.

[43] Counsel for 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, which it did at paragraph 5 of its decision. Counsel submits that the General Division did not err in this regard, as it correctly stated that under section 53 of the DESDA, it must summarily dismiss an appeal if it is satisfied that it has no reasonable chance of success.

[44] Counsel for the Respondent cited *R.M. v. Minister of Employment and Social Development*, October 2, 2015, AD-15-403, at para. 40, now reported at 2015 SSTAD 1190, where I held in part that it may be appropriate for a matter to be summarily dismissed if the outcome of the appeal is manifestly clear or "utterly hopeless".

[45] 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.

[46] Here, the General Division correctly stated the test by citing subsection 53(1) of the DESDA at paragraph 5 of its decision.

[47] It is insufficient, however, 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.

[48] 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. As long as there is an adequate factual foundation to support an appeal and the outcome is not "manifestly clear", then the matter is not appropriate for a summary dismissal. A weak case is not 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".

[49] Counsel for the Respondent submits that the General Division correctly stated the law and reasonably applied it to the facts. Counsel points to paragraph 55.1(1)(a) of the *Canada Pension Plan*, which requires that a division of unadjusted pensionable earnings takes place when "in the case of spouses, following a judgment granting a divorce or a judgment of nullity of the marriage, on the Minister's being informed of the judgment and receiving the prescribed information", and to subsection 55.1(5) of the *Canada Pension Plan*, which confers some discretion upon the Minister to refuse to make or to cancel a division of unadjusted pensionable earnings only if it is satisfied that (i) both parties are entitled to benefits and (ii) the amount of benefits to both contributors would decrease upon division or when the division was proposed to be made.

[50] Counsel for the Respondent submits that the General Division reasonably determined that "there was no evidence that the *Appellant* and her former spouse's estate were entitled to benefits and that both of their benefits decreased as a result of a division of unadjusted pensionable earnings". Counsel submits that subsection 55.1(5) of the

Canada Pension Plan therefore was unavailable for the Respondent to refuse to make or cancel the division of unadjusted pensionable earnings in this case.

[51] Counsel for the Respondent relies on *Strezov v. Canada (Attorney General),* 2007 FC 417. There, the Federal Court wrote,

> **20 …**the case law under section 55.1(1)(a) of the Canada Pension Plan is quite clear: **These provisions are mandatory, and the division of pensionable earnings is to be the rule and not the exception.**
>
> **21 The Minister has no discretion in exercising his authority under this provision** - in this regard, I refer to cases such as the decision of the Federal Court of Appeal in the *Minister of Health and Human Resources Development v.Wiemer,* [1998] F.C.J. No. 809 **- unless one can bring one's self within one of the enumerated exceptions, none of which apply here**.
>
> **22 Moreover, the wording of section 55.1(1)(a) is itself clear that once the Minister is made aware of the fact that contributor to the Plan has been divorced, then a division of pensionable credits between the contributor and his or her spouse is mandatory.**
>
> **23** This was so in Ms. Strezov's case, quite irrespective of whatever bad advice she may have been given by Sheila in March of 2004.
>
> **24** Thus, **while Ms. Strezov clearly went to the departmental office simply seeking information, once she told Sheila about her divorce from Luben and provided Sheila with her social insurance number and that of Luben, HRSDC had no choice but to carry out the division of pension credits, whether it worked to Ms. Strezov's advantage or not.**
>
> (My emphasis)

[52] Counsel for the Respondent submits that in addition to being mandatory, once an application for the division of unadjusted pensionable earnings has been made and approved according to the relevant provisions of the *Canada Pension Plan,* the division is final, and the Respondent does not have the discretion or the authority to deny or reverse the grant of a division once all the necessary criteria have been met, unless the Appellant can bring herself within the exception outlined in subsection 55.1(5) of the *Canada Pension Plan.*

[53] Counsel submits that as the outcome was manifestly clear, the appeal before the General Division was appropriately summarily dismissed. Once the necessary information was furnished to the Respondent, and provided that the Appellant did not fall within the exception set out in subsection 55.1(5) of the *Canada Pension Plan*, the Respondent was required to perform the division of unadjusted pensionable earnings.

[54] The General Division found that it was empowered only to the extent of its governing statute and that it was 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. The General Division also noted that it did not have the jurisdiction to consider humanitarian and compassionate considerations.

[55] Ultimately the General Division found that a division of unadjusted pensionable earnings was mandatory under paragraph 55.1(1)(a) of the *Canada Pension Plan*, and given the factual circumstances, the Minister did not have any discretion to cancel the division of unadjusted pensionable earnings under subsection 55.1(5) of the *Canada Pension Plan*.

[56] 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. There was no allegation by the Appellant that she met any of the exceptions to the mandatory division of unadjusted pensionable earnings.

[57] I find that 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 FAIL TO OBSERVE A PRINCIPLE OF NATURAL JUSTICE WHEN IT REFUSED TO EXERCISE ITS DISCRETION AND CANCEL THE APPELLANT'S APPLICATION?

[58] Setting aside the issue of the appropriateness of summarily dismissing the appeal, I will consider whether, as the Appellant alleges, the General Division failed to observe a principle of natural justice when it refused to exercise its discretion and cancel her application for a division of unadjusted pensionable earnings.

[59] Counsel submits that there was no breach of natural justice by either the General Division or by the Respondent, when it performed the division of unadjusted pensionable earnings. Counsel submits that the Respondent was required to perform a division, once it was notified of all of the information. Counsel submits that there are only very narrow exceptions when the Respondent has any discretion to refuse to make or cancel a division, but that they are not are not available in this case, given the facts. Counsel notes that the Appellant claims that her application for a division of unadjusted pensionable earnings represents a legitimate enquiry into whether she might be entitled to a portion of her former spouse's pension., and that to now proceed with a division of unadjusted pensionable earnings is unfair, as it reduced her own retirement pension.

[60] Counsel submits that while the Appellant is of the position that the result is unjust, neither the Respondent nor the Department had or have any authority to reverse the division of unadjusted pensionable earnings and there is therefore no breach of natural justice. Counsel submits that the more apt description of this case is that the Appellant made an application for a division "based on her own misperceptions about the [*Canada Pension Plan*] and the possibility that she might be entitled to a portion of her then deceased ex-husbands (sic) pension".

[61] Counsel submits that, even if the Department provided erroneous advice upon which the Appellant might have relied, this would not relieve the Department from its obligations to perform a division of unadjusted pensionable earnings under the *Canada Pension Plan*. Counsel again referred to *Strezov,* where the appellant in that case relied on erroneous advice which she had received from the Department. Counsel submits that, in

that case, despite its sympathy, the Federal Court dismissed Ms. Strezov's application for judicial review.

[62] Counsel submits that there are some factual similarities in the proceedings before me to the *Strezov* appeal. As in *Strezov*, once the Department received the request for a division of unadjusted pensionable earnings, along with all required information, as a matter of law, the Respondent was required to perform the division of unadjusted pensionable earnings. Also, there was no discretion on the part of the Minister to refuse to perform or to cancel the division of unadjusted pensionable earnings.

[63] Counsel also relies on *Bernier v. Canada (Minister of Human Resources Development)*, 2005 FCA 4, at paras. 8, 10 and 12. There, the applicant's former wife applied for a division of unadjusted pensionable earnings following their separation. After the division had taken place, the aggregated amount of benefits received by each spouse was less than they had been before the division had occurred; the applicant's former wife benefited from the division, but the applicant did not. The Federal Court of Appeal agreed that the division led to an unfair result but nevertheless dismissed the appeal. The Federal Court of Appeal held that it had no jurisdiction to intervene in the decision of the Pension Appeals Board on the basis that the division led to an unfair result, if the decision was otherwise unreviewable.

[64] Finally, counsel notes that the Appellant has not argued that any of the narrow exceptions to the mandatory implementation of the division of unadjusted pensionable earnings apply.

[65] The Appellant submits that both the Respondent and the General Division failed to observe a principle of natural justice when each refused to exercise its discretion and cancel her application for a division of unadjusted pensionable earnings. This presupposes that both the Minister and the General Division have wide latitude and some discretionary authority to cancel applications for divisions of unadjusted pensionable earnings. The Appellant has not pointed to and I am unaware of any provisions within the *Canada Pension Plan* or the DESDA to support any allegations that either the Respondent or the

General Division has any discretionary authority in the circumstances of this case to refuse to make or to cancel a division of unadjusted pensionable earnings.

[66] Section 55.1 of the *Canada Pension Plan* is clear 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. The division is made, subject to the narrow exception set out under subsection 55.1(5) of the *Canada Pension Plan*. The subsection specifically confers discretion upon the Respondent to refuse to make the division or cancel the division, only when benefits are payable to or in respect of both persons subject to the division, and 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. The Respondent could neither refuse to make or cancel the division, as the necessary circumstances were not present to trigger the discretionary authority under subsection 55.1(5) of the *Canada Pension Plan* for the Respondent to do so. The narrow exception to a division of unadjusted pensionable earnings was not available to the Appellant in the circumstances of this case.

[67] The Appellant submits that the General Division breached the principles of natural justice by refusing to exercise its discretion, but the *Canada Pension Plan* does not confer any discretion upon either the General Division or the Appeal Division, for that matter, to either refuse to make the division or cancel the division of unadjusted pensionable earnings, under any circumstances.

[68] The fact that the division of unadjusted pensionable earnings resulted in an unfair outcome does not unto itself indicate that there was a breach of the principles of natural justice, by either the Respondent or the General Division.

[69] I accept the submissions of counsel. Based on the set of facts before it, the General Division was left with no option but to dismiss the Appellant's appeal of a decision to proceed with a division of unadjusted pensionable earnings. 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.

CONCLUSION

[70] Given these considerations, the Appeal is dismissed.

Janet Lew
Member, Appeal Division