



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *H. L. v. Minister of Employment and Social Development*, 2016 SSTGDIS 98

Tribunal File Number: GP-16-996

BETWEEN:

H. L.

Appellant

and

Minister of Employment and Social Development

Respondent

and

S. K.

Added Party

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

DECISION BY: Jackie Laidlaw

HEARD ON: October 26, 2016

DATE OF DECISION: December 1, 2016

REASONS AND DECISION

PERSONS IN ATTENDANCE

H. L., Appellant

Thu To Tran, Cantonese translator

PRELIMINARY ISSUES

[1] The added party is Mr. S. K., the Appellant's divorced husband.

[2] On April 1, 2016 the Tribunal sent a letter to the Added Party that he is entitled to receive documents related to the appeal, make submissions, participate in the hearing and be notified of the decision in the appeal. On April 15, 2016 the Added Party sent in a notice of readiness without any added documents. On September 8, 2016 a notice of hearing was sent to the Appellant and the Added Party. The notice of hearing was delivered to the Added Party on September 13, 2016 and signed by the Added Party as received.

[3] The Added Party did not attend the hearing. The Tribunal decided to proceed with the hearing in his absence.

INTRODUCTION

[4] The Appellant applied for a *Canada Pension Plan* (CPP) division of unadjusted pensionable earnings (DUPE or credit split) on November 19, 2015 with all the documentation required. The DUPE was approved on December 30, 2015. On February 1, 2016 the Appellant requested to withdraw her application.

[5] This appeal was heard in person for the following reasons:

- a) More than one party will attend the hearing.
- b) The method of proceeding is most appropriate to allow for multiple participants.
- c) The method of proceeding provides for the accommodations required by the parties or participants.

- d) The issues under appeal are not complex.
- e) There are gaps in the information in the file and/or a need for clarification.
- f) 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

[6] Section 45 (3) of the CPP Regulations provides that 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 of notification of the decision respecting the application.

[7] Subsection 55.1(1) of the CPP provides that 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's being informed of the judgment and receiving the prescribed information;
- b) in the case of spouses, following the approval by the Minister of an application made by or on behalf of either spouse, by the state or succession of either spouse or by any person that may be prescribed, if the spouses have been living separate and apart for a period of one year or more, 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, who have been living separate and apart for a period of one year or more.

[8] The Minister has discretion to refuse to make a division or cancel a division in some circumstances under Subsection 55.1(5) CPP:

Before a division of unadjusted pensionable earning 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.

[9] Subsection 55.2(2) of the CPP states that a spousal agreement or court order is not binding on the Minister, except as provided in subsection 55.2(3):

- a) A written agreement between persons subject to a division under section 55 or 55.1 entered into on or after June 4, 1986 contains a provision that expressly mentions this Act and indicates the intention of the persons that there be no division of unadjusted pensionable earning under section 55 or 55.1,
- b) that provision of the agreement is binding on the Minister and, consequently, shall not make a division under section 55 or 55.1 (S.C. 2000, c.12, s48(2).)

ISSUE

[10] The issue in this case is whether the DUPE performed in accordance with the *Canada Pension Plan*.

[11] The issue in this case is also whether the Appellant has met the criteria for the Minister to use his discretionary powers to cancel the DUPE.

[12] The Tribunal must determine if the Appellant is entitled to a withdraw her DUPE application.

EVIDENCE

Oral Testimony: Appellant

[13] The Appellant applied for an Old Age Security (OAS) benefit in person at a Service Canada office and included in the application package was an application for the CPP retirement benefit and the DUPE application form. She stated she applied in February 2016, and was turning 65 in May. She started receiving both OAS and the CPP retirement pension, the latter in the amount of \$137.42 per month in June 2016.

[14] She stated the Added Party was born in November 1951 and would be age 65 this November. She does not know if he had already started receiving an early CPP retirement pension.

[15] She was not eligible for a CPP retirement pension as she had been self-employed and did not have any pension credits. She did not know she could still get a DUPE from her ex-husband as she had been divorced for so long.

[16] She did not understand the form and what it meant. She filled it all out without asking anyone to translate the forms for her, and stated that was her mistake.

[17] When she divorced the Added Party almost 20 years ago she also received the same DUPE form and did not fill it out at the time as she was not at retirement age. She does not remember who gave her the form at the time.

[18] She came to Canada in 1990. She is capable of reading, writing and understanding English. She filled out all the forms herself without help or the use of a translator.

[19] The Appellant stated that when she and the Added Party divorced they agreed they would not split any benefits, assets or properties. She still owns and lives in the matrimonial home. When she applied for the CPP DUPE, the Added Party told her it would only be fair that she should split her \$700 per month pension from Hong Kong with him if he is to split his benefit with her. This proposal by the Added Party is not legislated by any law in Hong Kong, or in Canada that if the CPP DUPE is applied then the Hong Kong pension must be split as well.

[20] Prior to the DUPE she would not have received any CPP retirement pension. After the DUPE she receives \$137.42 per month.

Documentary Evidence

[21] There were three redacted pages in the reconsideration file which appear to be the divorce decree. The Tribunal requested the pages from the Minister. The Tribunal did not receive the pages.

[22] The Tribunal then requested the total divorce decree from the Appellant after the hearing and received the full divorce judgement which outlined Matters Other Than Divorce and Custody. There was no mention in the Divorce Judgement specifically indicating the CPP DUPE.

[23] A certificate of marriage between the Appellant and the Added Party dated April 2, 1974 was provided.

[24] A joint petition for divorce dated December 18, 2003 and signed December 15, 2003 by both parties was provided.

[25] A Divorce Judgement dated March 1, 2004 from the Ontario Superior Court of Justice orders that the divorce between the Appellant and the Added Party takes effect on April 2, 2004.

[26] A hand written letter from the Appellant to Service Canada dated December 3, 2015 and received December 8, 2015 indicates she never intended to apply for the CPP credit split as it was a mutual agreement at the time of divorce. She wishes to withdraw the CPP credit split application.

[27] A typed letter dated December 3, 2015 from the Appellant again notes it was never her intention to apply for the credit split. She only blames herself for not realizing the consequences of signing the application, or, the Service Canada agent did not explain clearly enough. She regrets what has happened and wishes to withdraw the application.

[28] A statement from the Added Party signed December 4, 2015 received December 8, 2015 enclosed documents supporting the credit split claim and notes he lived with the Appellant from April 2, 1974 until December 1, 2000 and has been separated from the Appellant since December 1, 2000. He also wrote in a note to respect the Appellant's wish to withdraw and be kind to his present marriage.

[29] A letter from Service Canada to the Appellant dated December 30, 2015 notes that following a CPP credit split resulted in an increase in the total amount of her pension credits which increased the amount of her benefit.

[30] A typed letter to Service Canada from the Added Party dated January 27, 2016 requests a cancellation of the CPP credit split. He agreed with the Appellant to withdraw the application.

[31] A letter dated February 1, 2016 handwritten from the Appellant notes she wrongly understood the information when she applied for a CPP credit split on November 19, 2015. She attached a letter from her ex-husband the Added Party. She requested a cancellation of the credit split.

[32] In the Ministers submissions the following history was noted:

- a) The Appellant applied for a CPP DUPE on November 19, 2015 and submitted the certificate of marriage and the Divorce Judgement.
- b) The Minister sent a letter to the Added Party on November 27, 2015 requesting verification of the cohabitation period. His reply was received December 8, 2015 confirming the period of April 2, 1974 to December 1, 2000 and attached a letter from the Appellant asking for the DUPE to be withdrawn.
- c) The Minister notified both parties on December 30, 2015 the DUPE was performed for the years between 1974 and 1999.

[33] The Reconsideration Decision letter dated February 16, 2016 outlines the background reason behind credit splitting, making it mandatory for spouses that were divorced after 1987. No application was required. The Department is required by legislation to perform credit splitting after receiving sufficient proof that a divorce has taken place. It also outlined that it is not the policy of Service Canada to counsel clients about the specific effects of a proposed credit split, but only to counsel on the general nature of the provision.

SUBMISSIONS

[34] The Appellant submitted that she qualifies for the cancellation of her DUPE application:

- a) If she had received proper counsel on the nature of the provision she would not have agreed to proceed. She should have been given the opportunity of seeking advice from other sources.

- b) She and the Added Party agreed not to split any assets, property or benefits in the divorce.
- c) Her \$700.00 per month Hong Kong pension would have to be split with the Added Party.

[35] The Added Party submitted that the Appellant qualifies for the cancellation of her DUPE application:

- a) The Tribunal should respect the mutual wishes of the Added Party and the Appellant to cancel her application in order to be kind to his present wife.

[36] The Respondent submitted that the Appellant does not qualify for the cancellation of the DUPE application because:

- a) There is no discretionary provision that would allow the Minister to refuse or cancel the DUPE as the Appellant's retirement pension increased as a result of the DUPE.
- b) The DUPE between the Appellant and the Added Party was performed in accordance with Section 55.1 of the CPP. The divorce took effect after January 1, 1987 and the DUPE is mandatory according to the legislation.

ANALYSIS

[37] The Appellant must prove on a balance of probabilities that she is entitled to a withdrawal of her DUPE application.

[38] When the Respondent received the divorce judgement and certificate of marriage, along with the DUPE application on November 19, 2015, and after receiving confirmation of the dates of cohabitation and divorce from the Added Party on December 8, 2015 the Respondent performed the DUPE to the benefit of the Appellant and informed both parties on December 30, 2015 as legislated by the CPP.

[39] The Tribunal finds the DUPE was performed in accordance with the CPP.

[40] The Appellant was reminded by the Tribunal member at the hearing that the DUPE was not a split of all the Added Party's pension credits, just the credits for the years they cohabitated from 1974 until 1999 only. The Appellant was also reminded at the hearing of the reasons behind the legislation requiring a DUPE be performed for all couples that divorced after 1987.

[41] According to subsection 55.1(5) of the CPP, both parties' benefits would have to decrease in order for the DUPE to be cancelled. The Appellant's CPP retirement benefit increased from \$0 to \$137.42 per month after the DUPE.

[42] The Appellant used the argument that her Hong Kong pension would decrease. This is not based on any legislation in Hong Kong, but rather the direction proposed to the Appellant by the Added Party. The Tribunal is not bound by a private agreement, and therefore will not accept that a non-legislated agreement with the Added Party to share her Hong Kong pension satisfies the subsection 55.1(5) discretionary provision. Subsection 55.1(5) refers to her CPP pension decreasing and not the Hong Kong pension. If she chooses to split her Hong Kong pension with the Added Party that is her decision to make and not a legislated condition.

[43] The Appellant brought about the submission that she and the Added Party had agreed they would not divide any assets, benefits or properties in their divorce. She did not provide any evidence that this was in the divorce judgement and that the judgement expressly mentioned the Division of Unadjusted Pensionable Earnings. Although the Appellant and the Added Party may have had a verbal agreement that there would be no division of assets, there is no evidence of a written agreement that meets the exception set out under subsection 55.2(3)(a) of the CPP and therefore the spousal agreement is not binding on the Minister.

[44] The Appellant also argued that she was not given proper counsel when filling out the form. The Tribunal notes that the reconsideration letter states the policy of the Respondent not to counsel clients on the ramifications of an application, only on the general principles. The Appellant could have consulted with a trusted advisor, or researched the provision herself. She did not ask anyone to translate the application, showing she had enough ability to understand the application itself.

[45] The Tribunal does not accept ignorance of the application to be a defence as the Appellant was not barred from doing her due diligence on the DUPE. Service Canada was not the only avenue for information. She could have researched the SST information on the internet, or sought counsel. As well, she was aware of the DUPE as she had received the application along with her divorce decree 20 years earlier. In any event, there is no provision in the legislation that allows the cancellation of the DUPE due to lack of information.

[46] The Appellant's CPP retirement benefit has increased due to the DUPE. She has failed to satisfy section 55.1(5) of the CPP which allows for a cancellation of the DUPE for divorced couples.

[47] Section 45.3 of the CPP Regulations allows for a withdrawal of the CPP DUPE application only applies to couples that are either separated, living apart for over one year and not yet divorced (subsection 55.1(1)(b) of the Act) or common-law partners that are separated for over one year (subsection 55.1(1)(c) of the Act). The Appellant and the Added Party were legally married, and legally divorced when the Appellant applied to withdraw her application, and therefore do not meet subsection 55.1(1)(b) or subsection 55.1(1)(c) of the ACT, and consequently Section 45(3) of the CPP Regulations is not applicable.

[48] The Tribunal finds the DUPE was performed in accordance with the CPP.

[49] The Tribunal finds the Appellant has failed to meet the criteria for the Minister to use his discretionary powers to cancel her DUPE application.

[50] The Tribunal finds the Appellant is not entitled to withdraw her DUPE application.

CONCLUSION

[51] The appeal is dismissed.

Jackie Laidlaw
Member, General Division - Income Security