



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *T. D. v. Minister of Employment and Social Development*, 2017 SSTGDIS 28

Tribunal File Number: GP-15-3938

BETWEEN:

T. D.

Appellant

and

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

Respondent

and

The Estate of L. C.

Added Party

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

DECISION BY: Freda Shamatutu

DATE OF DECISION: March 13, 2017

REASONS AND DECISION

INTRODUCTION

[1] The Appellant applied for a reversal or cancellation of the Division of Unadjusted Pensionable Earnings (DUPE) allowed by the Respondent following an application by the Appellant's former spouse the late Ms. L. C. The Respondent denied the application initially and upon reconsideration. The Appellant appealed the reconsideration decision to the Tribunal on November 9, 2015.

ISSUE

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

THE LAW

[3] Subsection 53(1) of the *Department of Employment and Social Development Act* (DESD Act) states that the General Division must summarily dismiss an appeal if satisfied that it has no reasonable chance of success.

[4] Section 22 of the *Social Security Tribunal Regulations* (SST Regulations) states that before summarily dismissing an appeal, the General Division must give notice in writing to the Appellant and allow the Appellant a reasonable period of time to make submissions.

EVIDENCE

[5] The Appellant and L. C. (deceased) were married on August 26, 1978 and cohabited together until April 1, 2008 when they began living separate and apart. They divorced on September 19, 2013.

[6] On November 20, 2009, L. C. applied for credit splitting (DUPE) of the Appellant's pension credits for the period 1978 to 2007. The DUPE was performed on June 9, 2015 granting the late L. C. pension credits for the years from 1998 to 2007. L. C. died on August 14, 2015.

[7] On September 17, 2015, the Appellant requested that the DUPE be reversed and the pension credits granted to the deceased L. C. be returned to him on the basis of new facts and a material change in circumstances (death of L. C.).

[8] The Respondent denied the Appellant's request to cancel the credit splitting on the grounds that once a pension credit is performed it is permanent and cannot be reversed.

[9] The Appellant appealed the reconsideration decision to the Tribunal requesting that the Tribunal set aside the credit split between him and the late L. C. on the basis that new facts had arisen "the death of the late L. C." which resulted in a "material change" to the circumstances surrounding the credit split and "on equitable basis".

SUBMISSIONS

[10] The Appellant submitted that:

- a) The death of the late L. C. had resulted in a material change to the circumstances surrounding the credit split of his pensionable earnings.
- b) There is no justifiable explanation as to why the credit split should be maintained when the intended recipient is deceased.
- c) The absence of provision in the legislation for cancelling or overturning credit splitting is not a justified reason to refuse to cancel the credit split when the intended recipient is deceased.
- d) If anything, the credit split should be done on the basis of the law of contract.
- e) There is considerable prejudice to him if the credit split is maintained in view of the fact that the beneficiary of the credit split is deceased.
- f) The appeal should be decided with due consideration to its unique circumstance and on equitable basis as not doing so merely enriches CPP at his expense when he was the contributor who funded the pension credits.

- g) The Trustee of the estate of the deceased sought clarification from the Respondent about the Estate's entitlement flowing from the DUPE which the Respondent has not responded to (GD9-1). This causes an adverse interest on the Trustee as she is duty bound on behalf of the Estate's beneficiaries to pursue all benefits owed the Estate.
- h) The Tribunal should narrow down the focus of the appeal by providing a ruling on the Estate's entitlement flowing from the DUPE so as to allow the Trustee to pursue any actual entitlement or wind up the Estate.
- i) In the alternative, the Tribunal should dismiss the appeal and grant leave to appeal to the Appellant Division over an extended period of time so as to allow time for the Respondent to exercise/decline to exercise their discretion and save the Appeal Division time from fielding a perhaps unnecessary appeal (GD9-2).

[11] The Respondent submitted that:

- a) The Application for a Division of Unadjusted Pensionable Earnings cannot succeed as the Canada Pension Plan does not allow the reversal or cancellation of a DUPE in the Appellant's circumstances.
- b) The DUPE performed in this case is mandatory and cannot be reversed.
- c) The Tribunal does not have the authority to cancel, reverse or reinstate credits once a DUPE has been done.
- d) The appeal has no reasonable chance of success and must be summarily dismissed pursuant to subsection 53(1) of the *Department of Employment and Social Development Act*.

ANALYSIS

[12] In compliance with section 22 of the SST Regulations, the Appellant was given notice in writing of the intent to summarily dismiss the appeal and was allowed a reasonable period of time to make submissions. The Appellant provided his response in a letter dated February 23, 2017 and received by the Tribunal on February 28, 2017.

[13] The Tribunal finds that Section 53(1) of the *Department of Employment and Social Development Act* provides that the Tribunal must summarily dismiss an appeal if it is satisfied that the appeal has no reasonable chance.

[14] Section 55.1 of the *Canada Pension Plan* (CPP) allows the division of unadjusted pensionable earnings in cases where spouses have been granted a divorce or a judgment of nullity of the marriage and where the spouses have been living separate and apart for a period of one year or more.

[15] Under paragraph 55.1(1)(a) of the CPP, once an application is filed a DUPE will take place and is mandatory once the Minister is informed of a judgment granting a divorce or a judgment of nullity of marriage and once he receives information prescribed in subsection 54(2) of the *CPP Regulations*.

[16] Once a DUPE is performed, it is permanent and cannot be withdrawn. The only exceptions to this, are set out in paragraphs 55.1(1)(b) or (c). The exceptions apply when both parties experience a reduction in benefits after DUPE and only with respect to spouses that have been “living separate and apart” and to “common-law partners”. It does not apply to persons who are divorced.

[17] The Appellant and the late L. C. were married on August 26, 1978. They cohabited together until April 1, 2008 when they began to live separate and apart and divorced on September 19, 2013.

[18] The late L. C. applied for a DUPE on November 20, 2009. The DUPE was performed on June 9, 2015. The late L. C. died on August 14, 2015. On September 17, 2015, the Appellant requested that the DUPE be reversed and the pension credits be returned to him on the basis that his ex-spouse was deceased. The Respondent denied the request initially and on reconsideration. In a reconsideration decision letter dated October 27, 2015, the Respondent informed the Appellant that once DUPE is performed, it is permanent and that there is no provision in the CPP to cancel or overturn credit splitting credits in situations where a divorced couple mutually agreed to withdraw the credit split, or when one or both former spouses remarry, or resume living together or when one of the former spouses dies.

[19] The Appellant appealed the Respondent's decision to the Tribunal and requested to set aside the credit split between him and the late L. C. on the basis that new facts had arisen namely, "the death of the late L. C.", which resulted in a "material change" to the circumstances surrounding the credit split, and "on equitable basis". He also feels that the law of contract should prevail in absence of a provision in the legislation allowing for cancellation or withdrawing of a credit split when there has been a material change in circumstances, and that the contract between him and the Respondent should be interpreted against CPP who are the drafters of the contract or legislation and not against him.

[20] A DUPE is performed in line with governing legislation (the CPP) and not through the law of contract. The DUPE between the Appellant and his ex-spouse was performed as required under paragraph 55.1 (1)(a) of the CPP. The applicable provision of the CPP renders the DUPE mandatory and permanent. Exceptions to this mandatory requirement is according to subsection 55.1(5) only applicable when both parties experience a reduction in benefits after a DUPE and only with respect to spouses that have been "living separate and apart" and to "common-law partners". It does not apply to persons who are divorced or where one person dies. The exceptions set out in subsection 55.1(5) do not apply to the Appellant and the late L. C. as they were divorced when DUPE was performed.

[21] In this case, a DUPE was performed in accordance with section 55.1 of the CPP. It is a mandatory split and the credits are split permanently and cannot be withdrawn. The Federal Court of Appeal *Conkin v. Canada (Attorney General)* 2005 FCA 351 (at paragraph 3), confirmed the mandatory nature of a DUPE performed under paragraph 55.1(1)(a) of the CPP.

[22] The CPP legislation governs how a DUPE is performed and achieved. The Tribunal does not have the legislative authority to cancel, reverse or reinstate credits once a DUPE has been done. The Tribunal also does not have the legislative authority to rule on any interest of the estate (adverse or otherwise); or to narrow down the focus of issues between the parties; or to grant leave to appeal to the Appellant Division over an extended period of time as requested by the Appellant.

[23] The Tribunal is created by legislation and, as such, it has only the powers granted to it by its governing statute. The Tribunal is required to interpret and apply the provisions as they are set out in the CPP. Furthermore, the Tribunal's jurisdiction is to decide questions of law or fact.

[24] With respect to this appeal, the Tribunal's jurisdiction is limited to deciding whether any person is eligible for a division of unadjusted pensionable earnings or its amount pursuant to subparagraph 64(2)(b) of the DESD Act. It does not have the authority to decide other issues falling outside the exercise of its jurisdiction.

[25] The Tribunal finds that the DUPE in this case was performed in accordance with section 55.1 of the CPP. The Tribunal also finds that the DUPE in this case is mandatory and permanent and cannot be withdrawn, cancelled or reversed.

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

CONCLUSION

[27] The appeal is summarily dismissed.

Freda Shamatutu
Member, General Division - Income Security