



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *W. K. v. Minister of Employment and Social Development*, 2017 SSTGDIS 174

Tribunal File Number: GP-16-2968

BETWEEN:

W. K.

Appellant

and

Minister of Employment and Social Development

Respondent

and

H. Z.

Added Party

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

DECISION BY: George Tsakalis

DATE OF DECISION: November 17, 2017

REASONS AND DECISION

OVERVIEW

[1] The Appellant requests that this Tribunal overturn a decision of the Respondent allowing the Division of Unadjusted Pensionable Earnings (DUPE) under the *Canada Pension Plan* (CPP) between him and his former spouse, the Added Party.

[2] The hearing of this appeal was made on the basis of the documents and submissions filed for the following reasons:

- a) There are no gaps in the information in the file and/or 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.

[3] The Tribunal must decide if the DUPE was conducted in accordance with the requirements set out in the CPP.

[4] The Tribunal has decided that the DUPE was conducted in accordance with the requirements set out in the CPP.

[5] The Tribunal is dismissing this appeal for the reasons that follow.

EVIDENCE AND SUBMISSIONS

Appellant's Submissions

[6] The Appellant, in his Notice of Appeal, stated that the Added Party applied for a DUPE with "unclean hands". He asserted that the Added Party had worked for cash for many years and had undeclared income with the Canada Revenue Agency (CRA). The Appellant also advised the Respondent, in correspondence dated July 21, 2016, that a fraud investigation had been opened concerning the Appellant for undeclared income and failing to contribute to the CPP for many years.

Reconsideration Decision

[7] The Respondent, in its August 5, 2016 reconsideration decision, referred the Appellant to subsection 55.2(5) of the CPP which states that:

55.2(5) Where there is a division under section 55.1, the unadjusted pensionable earnings for each person subject to the division for the period of cohabitation attributable to contributions made under this Act, determined in the same manner as the total pensionable earnings attributable to contributions made under this Act are determined in section 78.1, shall be added and divided equally, and the unadjusted pensionable earnings so divided shall be attributed to each person.

[8] The Respondent also referred the Appellant to subsection 78.1(1) of the *CPP Regulations* that outlines the manner upon which the credit splitting or DUPE range is to be applied in relation to the period of cohabitation referred to in the CPP.

[9] Subsection 78.1(1) of the *CPP Regulations* reads as follows:

78.1(1) In determining, for the purposes of subsections 55.1(4) and 55.2(7) of the Act, the months during which the spouses, former spouses or former common-law partners cohabited,

(a) those months shall, subject to paragraphs (b) and (c), be reckoned as beginning with the first month of the year in which the marriage of the persons subject to the division was solemnized or in which they commenced to cohabit in a conjugal relationship, whichever is applicable;

(b) the persons subject to the division shall be considered not to have cohabited at any time during the year in which they were divorced or their marriage annulled or in which they commenced to live separate and apart; and

(c) where, after having lived separate and apart for one year or more, the persons subject to the division resumed cohabitation for at least one year, the period of that separation shall be considered to have begun with the first month of the year in which

they commenced to live separate and apart and to have ended with the last month of the year immediately preceding the year in which they resumed cohabitation.

[10] The Respondent advised the Appellant that under section 55.1 of the CPP, the Appellant and the Added Party were to each receive one half of the couple's earned pension credits in relation to the period that they lived together.

[11] The Respondent advised the Appellant that the credit splitting range must begin with the latest of one of the following events taking place:

- (a) January of the year in which the Appellant and the Added Party started living together; or
- (b) the month in which the youngest of two spouses turned 18 years of age; or
- (c) from January 1966 (the year the CPP came into effect)

[12] The Respondent determined that the Appellant and the added party were married on July 26, 1997. Therefore, the range of credit splitting or DUPE had to begin in January of the year that the Appellant and the Added Party started living together. The Respondent therefore started the credit splitting or DUPE from January 1, 1997.

[13] The Respondent also advised the Appellant that the credit splitting or DUPE range had to end with the earliest of one of the following events taking place:

- (a) December of the year before the date that the Appellant and Added Party separated;
or
- (b) the month before either the Appellant or Added Party started receiving a CPP benefit;
or
- (c) the month in which either the Appellant or Added Party turned 70 years of age.

[14] The Respondent confirmed that the Appellant and Added Party separated on May 24, 2011. The CPP required that the credit splitting range ended with December of the year before the date of separation of the Appellant and Added Party. The Respondent therefore took the position that the credit splitting or DUPE range had to end on December 31, 2010.

[15] The Respondent took the position that it determined the DUPE in accordance with the CPP. Therefore, the Respondent maintained its decision to allow the DUPE for the period from January 1, 1997 to December 31, 2010.

DUPE Application of the Added Party

[16] The Added Party completed a DUPE application on January 28, 2016. She stated that the parties began living together in a common law union on June 15, 1993. They were married on July 26, 1997. They last resided together on May 24, 2011, and were divorced on September 23, 2013.

Appellant's Statement

[17] The Appellant provided a statement to the Respondent indicating that he lived with Respondent from August 1, 1995 to September 22, 2011.

Record of Marriage and Certificate of Divorce

[18] The Record of Marriage confirmed that the marriage was solemnized on July 26, 1997.

[19] The Certificate of Divorce from the Ontario Superior Court of Justice confirmed that the divorce took effect on September 22, 2013.

Respondent's Submissions to the Tribunal

[20] The Respondent submitted that it approved the DUPE on the basis of the couple's cohabitation between July 1997 and 2011. The range of the DUPE allowed for the period from January 1, 1997 to December 31, 2010 was in accordance with the CPP.

[21] Pension credits that married couples accumulate during their period of cohabitation are subject to a division outlined under section 55.1 of the CPP when a marriage ends in divorce that occurs on or after January 1, 1987.

[22] Paragraph 55.1(a) of the CPP states that a division of unadjusted pensionable earnings is mandatory in the case of married couples after the Minister is informed of a judgment granting a divorce and receives the information prescribed in subsection 54(2) of the CPP *Regulations*.

[23] The Appellant's allegation that the Added Party was employed and did not contribute to CPP during part of the cohabitation period is not relevant to the circumstances of this appeal. Under subsection 97(1) of the CPP, a contributor's Record of Earnings (ROE) "shall be conclusively presumed to be accurate and may not be called into question after four years have elapsed from the end of the year in which the entry was made." The accuracy of an individual's earnings and CPP contributions falls within the jurisdiction of the CRA. The Respondent directed the Appellant to contact the CRA about his objections related to the accuracy of the Added Party's earnings and CPP contributions.

[24] The Added Party provided the information required under subsection 54(2) of the CPP *Regulations* and the Respondent therefore performed the DUPE in accordance with paragraph 55.1(1)(a) of the CPP.

[25] The DUPE is mandatory in nature and it cannot be reversed as requested by the Appellant.

ROE Information

[26] The Tribunal Member requested that the Respondent provide the Tribunal with a copy of the ROE of both parties with respect to their respective CPP contributions before the division of pension credits occurred and a copy of their ROE after the division of pension credits was applied.

[27] The Respondent provided the Tribunal with a copy of the ROE of both parties on October 20, 2017.

[28] The ROE revealed that the DUPE period was 1995 to 2010 and not 1997 to 2010, as stated by the Respondent in its submissions.

ANALYSIS

Does the Tribunal have jurisdiction to deal with the issue of the Added Party's Alleged Undeclared Income?

[29] The Tribunal does not have the jurisdiction to deal with the issue of the Added Party's alleged undeclared income.

[30] The Respondent is correct in asserting that a contributor's ROE under subsection 97(1) of the CPP is presumed to be true. The accuracy of a ROE falls within the jurisdiction of the CRA under subsection 97(2) of the CPP and not this Tribunal.

[31] The Tribunal's jurisdiction is limited by powers granted to it by statute. The Tribunal can only grant such remedies as it is empowered by its enabling statute to provide (*R. v. Conway*, 2010 SCC 22).

[32] The powers of the Tribunal relating to CPP appeals are set out in subsections 64(1) and (2) of the *Department of Employment and Social Development Act (DESD Act)*, which reads as follows:

- 64(1) The Tribunal may decide any question of law or fact that is necessary for the disposition of any application made under this Act.
- (2) Despite subsection (1), in the case of an application relating to the Canada Pension Plan, the Tribunal may only decide questions of law or fact as to
 - (a) whether any benefit is payable to a person or its amount;
 - (b) whether any person is eligible for a division of unadjusted pensionable earnings or its amount;
 - (c) whether any person is eligible for an assignment of a contributor's retirement pension or its amount; and
 - (d) whether any penalty should be imposed under Part II of that Act or its amount.

[33] The Tribunal clearly has jurisdiction under paragraph 64(2)(b) of the *DESD Act* to deal with the issue of whether the Added Party is eligible for a DUPE or its amount.

Is the Added Party Eligible for a DUPE and did the Respondent correctly calculate the amount of the DUPE?

[34] The Tribunal finds that the Added Party is eligible for a DUPE and the Respondent correctly calculated the amount of the DUPE based on the ROE of both parties.

[35] Paragraph 55.1(a) of the CPP states that a DUPE is mandatory in the case of married couples after the Minister is informed of a judgment granting a divorce and receives the information prescribed in subsection 54(2) of the *CPP Regulations*.

[36] The Tribunal finds that the Added Party provided the Respondent with a judgment granting a divorce and the information that she was required to provide under subsection 54(2) of the *CPP Regulations*. The Added Party provided the Respondent with a copy of a Certificate of Divorce issued by the Ontario Superior Court of Justice certifying that the marriage was dissolved and the divorce took effect on September 22, 2013. She provided the Respondent a copy of a marriage certificate, the dates where both parties lived together in a conjugal relationship and the date that both parties commenced to live separate and apart. The DUPE in this case was performed in accordance with section 55.1(1)(a) of the CPP. The Federal Court of Appeal in *Conkin v. Canada (Attorney General)*, 2005 FCA 351 has recognized the mandatory nature of a DUPE performed under paragraph 55.1(1)(a) of the CPP. A DUPE performed in accordance with paragraph 55.1(1) of the CPP, such as in this case, is mandatory and the credits are split permanently and cannot be withdrawn.

[37] The Tribunal also finds that the Respondent correctly calculated the amount of the DUPE after reviewing the ROE.

[38] The Respondent in its submissions stated that it approved the DUPE on the basis of the couple's cohabitation between July 1997 and 2011 and that the range of the DUPE was allowed for the period from January 1, 1997 to December 31, 2010 in accordance with the CPP. However, the ROE indicates that the range of the DUPE was actually from January 1, 1995 to December 31, 2010.

[39] The Tribunal finds that the Respondent did not err in calculating the range of the DUPE period to be from January 1, 1995 to December 31, 2010. Subsection 55.1(4) of the CPP states

that only those months in which spouses cohabited can be used in determining the DUPE period and refers to the *CPP Regulations* in defining the period of cohabitation. Paragraph 78.1(1)(a) of the *CPP Regulations* states that in determining the months in which spouses cohabited for the purposes of calculating the DUPE under subsection 55.1(4) of the CPP, the cohabitation period starts in the first month of the year in which the marriage was solemnized or in which the parties commenced to cohabit in a conjugal relationship. In this case, the Appellant advised the Respondent that he lived with the Added Party from August 1, 1995 to September 22, 2011. The Respondent was therefore correct in beginning the DUPE period at January 1, 1995. Paragraph 78.1(1)(b) of the *CPP Regulations* states that parties subject to a DUPE “shall be considered not to have cohabited at any time during the year in which they were divorced or their marriage annulled or in which they commenced to live separate and apart. . .” The Appellant and Added Party both stated that they separated in 2011. The Respondent was therefore correct in ending the DUPE period at December 31, 2010.

[40] The Tribunal also finds that the Respondent correctly calculated the amount of the DUPE. Under subsection 55.2(5) of the CPP, the Appellant and Added Party were to each receive one half of the couple’s earned pension credits in relation to the period that they lived together. The ROE of the Appellant and the Added Party confirms that they have both received one half of the earned pension credits for the period that they lived together.

CONCLUSION

[41] The appeal is dismissed.

George Tsakalis
Member, General Division - Income Security