Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

Citation: *R. B. v. Minister of Employment and Social Development*, 2017 SSTADIS 712

Tribunal File Number: AD-17-395

BETWEEN:

R. B.

Applicant

and

Minister of Employment and Social Development

Respondent

and

V. H.

Added Party

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Leave to Appeal Decision by: Neil Nawaz

Date of Decision: December 7, 2017

Canada

DECISION AND REASONS

DECISION

Leave to appeal is granted.

OVERVIEW

[1] The Applicant, R. B., and the Added Party, V. H., were formerly married. In May 2013, many years after the end of their relationship, Ms. V. H. applied for a division of unadjusted pensionable earnings (DUPE or credit split) under the *Canada Pension Plan* (CPP). The Respondent, the Minister of Employment and Social Development (Minister), subsequently approved the application and notified Mr. R. B. that his CPP credits would be divided with his former wife for the period during which they cohabited.

[2] In August 2015, the General Division of the Social Security Tribunal of Canada (Tribunal) summarily dismissed Mr. R. B.'s appeal on the ground that it conveyed no arguable case. Another member of the Tribunal's Appeal Division overturned that decision, finding that Mr. R. B. had raised justiciable issues. The matter was returned to the General Division.

[3] On August 24, 2016, the General Division, having held a hearing by videoconference, again dismissed Mr. R. B.'s appeal, finding, on balance, that the Minister had correctly applied the law in approving the DUPE. In his request for leave to appeal, filed on September 23, 2016,[1] Mr. R. B. again returned to the Appeal Division, alleging that the General Division

- erred in finding that the Minister divided Mr. R. B.'s unadjusted pensionable earnings in accordance with the law;
- erred in finding that it lacked jurisdiction to provide equitable remedies;
- breached a principle of natural justice by failing to properly record the videoconference hearing;

[1] Mr. R. B. supplemented these submissions with a brief dated July 21, 2017, which I have taken into consideration.

- breached a principle of natural justice by refusing to address his questions about the credit splitting process during the hearing.

Mr. R. B. also accused the Appeal Division's staff of misconduct and suggested that their actions displayed bias against him.

[4] In December 2016, the Appeal Division refused leave to appeal because it found that Mr. R. B. had not presented an arguable case. Mr. R. B. then applied for judicial review of the Appeal Division's refusal. In a judgment dated April 19, 2017, the Honourable Mr. Justice George Locke of the Federal Court noted that the respondent in the proceeding, the Attorney General of Canada, had conceded that the presiding Appeal Division member had committed errors in rendering its decision. Mr. Justice Locke granted the application and returned the matter to the Appeal Division for redetermination by a different member.

[5] Having considered Mr. R. B.'s submissions and reviewed the General Division's August 2016 decision against the evidentiary record, I have decided to grant leave to appeal.

ISSUES

[6] According to section 58 of the *Department of Employment and Social Development Act* (DESDA), there are only three grounds of appeal to the Appeal Division: The General Division (i) failed to observe a principle of natural justice; (ii) erred in law; or (iii) based its decision on an erroneous finding of fact made in a perverse or capricious manner or without regard for the material. An appeal may be brought only if the Appeal Division first grants leave to appeal,[2] but the Appeal Division must first be satisfied that it has a reasonable chance of success.[3] The Federal Court of Appeal has held that a reasonable chance of success is akin to an arguable case at law.[4]

[7] I must determine whether there is an arguable case for any of the grounds of appeal that Mr. R. B. has put forward.

---

[2] DESDA at subsections 56(1) and 58(3).
[3] Ibid. at subsection 58(1).
[4] *Fancy v. Canada (Attorney General)*, 2010 FCA 63.

ANALYSIS

[8] At this juncture, I do not find it necessary to address each and every one of Mr. R. B.'s allegations, but I will address the one issue that I believe offers his best chance of success on appeal.

[9] As the General Division noted, Mr. R. B. has not disputed the essential facts—that he and Ms. V. H. began living together on December 1, 1986, married on July 11, 1992, and separated on September 9, 1998. However, he obviously feels that he has never been given an adequate explanation for why and how the Minister divided his CPP credits and reduced his retirement pension.

[10] On first inspection, I detect at least one error of law in the General Division's decision, although I am not yet certain whether it had any bearing on the outcome. In paragraphs 22 and 23, the General Division invoked subsection 55(4) of the CPP to find that the adjustment of a monthly retirement pension occurs upon application for a credit split by one's former spouse. In fact, section 55 applies only to DUPE applications made pursuant to divorces that occurred prior to January 1, 1987. As Mr. R. B. and Ms. V. H. separated in 1998, they are properly governed by section 55.1 of the CPP, which covers divorces and separations after December 31, 1986.

[11] Moreover, a case can be made that the General Division's analysis does not adequately address the main issue—whether Mr. R. B.'s pension was adjusted in compliance with the CPP credit splitting provisions. While the General Division referred to subsection 55.2(9) of the CPP, it is not clear to me that it actually *applied* that provision to the facts at hand. Subsection 55.2(9) provides that, where there is a credit split and a benefit is payable under the CPP, the benefit will be adjusted and paid effective the month following the month in which the "division takes place." In this case, the General Division concluded at paragraph 25 that the Minister correctly adjusted Mr. R. B.'s retirement pension, but it failed to identify the date on which that event occurred and whether that date coincided with the month following the month in which the division took place.

[12] The date on which a credit split "takes place" is dictated by the CPP and the *Canada Pension Plan Regulations* (CPP Regulations) and depends on the status of the former spouses.

In the case of separated spouses, which appears to be the case here, paragraph 55.1(1)(*b*) of the CPP provides that a credit split shall take place "following the approval by the Minister of an application."[5] In accordance with paragraph 54.2(1)(*b*) of the CPP Regulations, a credit split will be approved effective the last day of the month in which the application is received. If, as it appears in this case, the credit split application was received on May 29, 2013,[6] then the approval was effective May 31, 2013. Once the date of approval was established, subsection 54.2(2) of the CPP Regulations provides that the pension credits would be accredited effective the first day of the month following the month in which the effective date of approval of the division falls. Based on the example above, the pension credits would be attributed effective June 1, 2016. The date the pension credits are accredited under subsection 54.2(2) of the CPP Regulations coincides with the date the benefit is adjusted under subsection 55.2(9) of the CPP.

[13] In this case, the General Division does not appear to have applied the relevant provisions of the CPP and the CPP Regulations, nor did it establish certain facts necessary to apply those provisions, in particular:

- The General Division did not make a finding as to the status of the former spouses, i.e. whether they were divorced or separated, which would dictate the provision to be applied under subsection 55.1(1) of the CPP;
- The General Division did not make a finding as to the date that the Minister received the credit split application, which is important to determine the date of approval and the date the credit split took place;
- The General Division did not make a finding on the date Mr. R. B.'s pension was adjusted, which was necessary to determine whether it was adjusted the month following the month in which the credit split took place.

[14] There is also the issue of natural justice, which demands that a decision be accompanied by an intelligible explanation. In *R. v. R.E.M.*,[7] the Supreme Court set out the test for

---

[5] By contrast, in the case of a divorced couple, paragraph 55.1(1)(*a*) of the CPP provides that a credit split shall take place following a judgment of divorce.
[6] This is the date on which Ms. V. H. signed the application.
[7] *R. v. R.E.M.*, [2008] 3 SCR 3, 2008 SCC 51.

sufficiency of reasons in the context of criminal law, quoting with approval an earlier Ontario Court of Appeal decision[8]:

> In giving reasons for judgment, the trial judge is attempting to tell the parties what he or she has decided and why he or she made that decision" (emphasis added). What is required is a logical connection between the "what"—the verdict—and the "why"—the basis for the verdict. The foundations of the judge's decision must be discernable, when looked at in the context of the evidence, the submissions of counsel and the history of how the trial unfolded.

[15] This logic also applies to decisions of administrative tribunals. There must be a chain of fact, law and logic that leads the reader to conclude that the outcome is defensible. I am unsure whether the General Division's reasons meet this standard.

CONCLUSION

[16] I am granting leave to appeal on all grounds that the Applicant has claimed. Should the parties choose to make further submissions, they are free to offer their views on whether a further hearing is required and, if so, what format is appropriate.

[17] This decision granting leave to appeal does not presume the result of the appeal on the merits of the case.

Member, Appeal Division

[8] *R. v. Morrissey*, 1995 CanLII 3498 (ON CA).