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

Citation: *C. S. v. Minister of Employment and Social Development*, 2017 SSTADIS 752

Tribunal File Number: AD-17-646

BETWEEN:

C. S.

Applicant

and

Minister of Employment and Social Development

Respondent

and

B. S.

Added Party

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Leave to Appeal Decision by: Nancy Brooks

Date of Decision: December 19, 2017

Canada

REASONS AND DECISION

INTRODUCTION

[1] On June 2, 2015, the Added Party (the Applicant's former spouse) applied for a division of unadjusted pensionable earnings (DUPE) under the *Canada Pension Plan* (CPP).

[2] The Respondent carried out the DUPE based on a period of cohabitation from June 1981 to December 1995, a decision that it maintained upon reconsideration. The Applicant appealed to the General Division of the Social Security Tribunal of Canada (Tribunal). Her appeal was dismissed on July 4, 2017.

[3] In this application, the Applicant seeks leave to appeal the General Division decision.

THE LAW

[4] In accordance with s. 56(1) of the *Department of Employment and Social Development Act* (DESDA), an appeal to the Tribunal's Appeal Division may be brought only if leave to appeal is granted. Subsection 58(1) sets out the following grounds of appeal:

> 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.

Pursuant to s. 58(2), the Appeal Division must refuse leave to appeal if it is satisfied that the appeal has no reasonable chance of success.

[5] The leave to appeal proceeding is a preliminary step to an appeal on the merits. It presents a different and appreciably lower hurdle to be met than the one presented at the appeal stage: at the leave to appeal stage, the Applicant is required to establish that the appeal has a reasonable chance of success on at least one of the grounds in s. 58(1) of the DESDA; whereas at the appeal stage, the Applicant must prove his or her case on the balance of probabilities:

Kerth v. Canada (Minister of Human Resources Development), 1999 CanLII 8630 (FC). In the context of an application for leave to appeal, having a reasonable chance of success means having some arguable ground upon which the proposed appeal might succeed: *Osaj v. Canada (Attorney General)*, 2016 FC 115; *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41.

[6] Under s. 55.1 of the CPP, a former spouse may apply for a DUPE, which triggers an equitable sharing of CPP credits after a separation or divorce. Pursuant to s. 55.1(1)(*a*), a DUPE is mandatory in the case of spouses following a judgment granting a divorce after January 1, 1987. In accordance with s. 55.1, all that is required for a division to take place is for the Respondent to be informed of the spouses' divorce judgment and to receive the prescribed information. The credit split is based on the period of cohabitation of the spouses: s. 55.1(4).

[7] Under s. 55.2(3) of the CPP, a written agreement between spouses entered into on or after June 4, 1986 is binding on the Respondent, who shall not make a DUPE where (i) the written agreement expressly mentions the CPP and the parties' intention that no division be made; (ii) such a provision is expressly permitted under the provincial law governing the agreement; and (iii) the provision of the agreement has not been invalidated by a court order.

[8] There is no provision in the CPP permitting the Respondent to avoid the application of a DUPE on the basis of a verbal agreement between the parties.

SUBMISSIONS

[9] The Applicant pleads that the General Division member erred because para. 21 of the General Division reasons incorrectly states that she and her former spouse were divorced on July 13, 1988.

[10] Secondly, while the Applicant concedes there was no written agreement between her and her former spouse, she states there was a verbal agreement between the parties not to split CPP contributions. She also submits that although the province of Manitoba does not permit the waiving of a credit split, all persons should be allowed this right regardless of where they happen to reside.

[11] Finally she submits that there has not been any contact between her and her former spouse for 20 years. In her view, his application for credit splitting "is somewhat suspect".

DISCUSSION

Incorrect divorce date stated in para. 21

[12] In para. 21 of her reasons, the General Division member made findings that the parties were married on June 27, 1981, divorced on July 13, 1988, and there was no written agreement concerning the division of pension credits. The Applicant correctly notes that the reference in this paragraph to "1988" is incorrect.

[13] The record before the General Division included a copy of the divorce judgment issued by the Manitoba Court of Queen's Bench on July 13, 1998. [1] I note that the General Division member referred to the correct date of the parties' divorce at two other places in the reasons (paras. 11 and 20). Based on my reading of the entire decision, the divorce date referenced in para. 21 appears to be a mere typographical error.

[14] In order for s. 58(1)(*c*) to be triggered, the General Division must have based its decision on an erroneous finding of fact made in a perverse or capricious manner or without regard to the material before it. Even though the member misstated the divorce date in para. 21 of the reasons, this had no impact on the outcome of the appeal as the date of divorce has no impact on how the credit split is carried out. Rather, the CPP bases the credit split on the period of cohabitation.

[15] In correspondence provided by the Applicant to the Respondent, she confirmed that she and her former spouse stopped cohabiting in 1995.[2] The General Division member concluded that the Respondent was correct to use the year 1995 as the end date of the parties' cohabitation. The date of divorce was irrelevant to the period of cohabitation.

[16] Accordingly, the General Division member did not base her decision on this erroneous statement of the divorce date (which appears to have been a mere typographical error, in any

[1] A copy of the divorce judgment is in the record before the General Division at GD2-9.
[2] GD2-14.

event) and s. 58(1)(*c*) of the DESDA is not engaged. I find this argument does not have a reasonable chance of success.

Verbal Agreement

[17] The Applicant says that she and her former husband had a verbal agreement that there would be no credit split of their CPP benefits. I note that there was no evidence before the General Division that the former spouse agreed that there was such a verbal agreement. In any event, the CPP does not permit the Respondent to avoid carrying out a credit split on the basis of a verbal agreement.

[18] Even where a written agreement has been entered into by the parties, the provisions of the CPP are clear that such agreement must, among other requirements, be expressly permitted under the provincial law governing such agreements. The Applicant argues that notwithstanding the legislation, all persons should be entitled to agree to waive the credit split no matter where they reside, and she would have signed a waiver had the right existed in Manitoba.

[19] The Applicant's argument has no reasonable chance of success. In this case, as there was no written agreement, there has been no determination of which provincial law would be applicable. Regardless, the legislation is clear that the credit split may be avoided only where a written agreement between the parties meets all of the conditions of s. 55.2(3), including that the applicable provincial law must expressly permit such written agreements. The General Division had no authority to ignore the terms of the statute. Moreover, even though the Applicant says she would have entered into a written agreement if Manitoba law had expressly permitted such agreements, this is irrelevant to the General Division's decision: there was no written agreement and the Respondent was mandated to carry out the DUPE.

[20] Given the unambiguous statutory provisions, I find these arguments do not raise an arguable ground upon which the proposed appeal might succeed.

No contact with former spouse−lapse of time

[21] The Applicant's final submission is that there has been no contact between her and her former spouse for 20 years. She argues that his application for a DUPE "is somewhat suspect".

[22] Paragraph 55.1(*a*) of the CPP says that a DUPE shall take place, in the case of spouses, following a judgment granting a divorce upon the Respondent's being informed of the judgment and receiving the prescribed information. The Respondent was made aware of the parties' divorce judgment by the Applicant's former spouse and received the prescribed information; accordingly, the division of pension credits mandatorily followed.

[23] The fact that there was a long period where the parties had no contact is irrelevant to the question of whether a DUPE must take place. Furthermore, the Applicant's former spouse was entitled to make an application when he did. I conclude that these arguments do not raise an arguable ground upon which the proposed appeal could succeed.

DISPOSITION

[24] As the Applicant has not raised any ground upon which the proposed appeal might succeed, in accordance with s. 58(2) of the DESDA, the application for leave to appeal is refused.

Nancy Brooks
Member, Appeal Division