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

Citation: *R. B. v. Minister of Employment and Social Development and V. H.*, 2018 SST 957

Tribunal File Number: AD-17-395

BETWEEN:

R. B.

Appellant

and

Minister of Employment and Social Development

Respondent

and

V. H.

Added Party

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Neil Nawaz

DATE OF DECISION: September 28, 2018

Canada

DECISION AND REASONS

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] The Appellant, R. B., and the Added Party, V. H., were formerly married. In May 2013, many years after the end of their relationship, the Added Party 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 the Appellant that his Canada Pension Plan (CPP) credits would be divided with his former wife for the period during which they lived together.

[3] The Appellant disputed the Minister's decision, arguing that his pension should not have been divided until the Added Party was also receiving a CPP retirement pension. In August 2015, the General Division of the Social Security Tribunal summarily dismissed the Appellant's appeal on the ground that it did not raise an arguable case. Another member of the Tribunal's Appeal Division overturned that decision, and the matter was returned to the General Division.

[4] On August 24, 2016, the General Division held a hearing by videoconference and dismissed the Appellant's appeal again, 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, the Appellant again returned to the Appeal Division, alleging that the General Division had

- erred when it found that the Minister divided the Appellant's unadjusted pensionable earnings in accordance with the law;
- erred when it found that it lacked jurisdiction to provide equitable remedies;
- breached a principle of natural justice by failing to properly record the videoconference hearing; and
- breached a principle of natural justice by refusing to address his questions about the credit splitting process during the hearing.

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

[5] In December 2016, the Appeal Division refused leave to appeal because it found that the Appellant had not presented an arguable case. The Appellant 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 when rendering its decision. Mr. Justice Locke granted the application and returned the matter to the Appeal Division for redetermination by a different member.

[6] In a decision dated December 7, 2017, I granted leave to appeal because I saw an arguable case that the General Division had applied the incorrect provision of the CPP and failed to provide adequate reasons for its decision to uphold the Minister's approval of the credit split. On April 23, 2018, I adjourned a teleconference hearing when it became clear that the Minister had not received notice of the scheduled time and date. Later, I suspended the proceedings for three months to allow the Appellant additional time in which to pursue a federal access to information request, which he believed would produce useful evidence for his case.

[7] The hearing reconvened on September 5, 2018. Having considered the parties' submissions and reviewed the General Division's August 2016 decision against the evidentiary record, I have concluded, on balance, that none of the Appellant's submissions can succeed.

ISSUES

[8] According to s. 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.

[9] The issues before me are as follows:

Issue 1: Did the General Division err when it found that the Appellant's pension credits were split in accordance with the law?

Issue 2: Did the General Division err when it found that it lacked jurisdiction to provide equitable remedies?

Issue 3: Did the General Division breach a principle of natural justice by failing to record the videoconference hearing?

Issue 4: Did the General Division breach a principle of natural justice by refusing to address the Appellant's questions about the credit splitting process?

Issue 5: Does the Appeal Division have jurisdiction to consider alleged misconduct and bias among its staff?

ANALYSIS

Issue 1: Did the General Division err when it found that the Appellant's pension credits were split in accordance with the law?

[10] It is clear that the Appellant disagrees with the General Division's determination of the effective DUPE date. In my leave to appeal decision, I identified several potential errors in the General Division's interpretation of the law governing credit splits. Although the Appellant did not specifically argue these grounds, I find that they are serious enough to justify voiding the General Division's decision.

[11] In paragraphs 22 and 23 of its decision, the General Division invoked s. 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, s. 55 applies only to DUPE applications for divorces that occurred before January 1, 1987. As the Appellant and the Added Party separated in 1998, they are properly governed by s. 55.1 of the CPP, which covers divorces and separations after December 31, 1986.

[12] This error by itself was not fatal to the General Division's decision. In *Canada v. Leer*,[1] the fact that a decision may have been erroneously based on s. 55 rather than s. 55.1 was not in

[1] *Canada (Attorney General) v. Leer*, 2012 FC 932.

itself grounds for granting leave to appeal, where, the Federal Court determined, the outcome would have been the same.

[13] A larger problem is in the General Division's analysis, which does not adequately address the main issue—whether the Appellant's pension was adjusted in compliance with the CPP credit splitting provisions. While the General Division referred to s. 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 the Appellant'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.

[14] A credit split "takes place" on a date specified by the CPP and the *Canada Pension Plan Regulations* (CPP Regulations). In the case of separated spouses, s. 55.1(1)(*b*) of the CPP provides that a credit split shall take place "following the approval by the Minister of an application." In accordance with s. 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. 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, that is, whether they were divorced or separated, which would dictate the provision to be applied under s. 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 the Appellant'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.

[15] The Minister argued that this information was plainly evident in the record, but a reader should not have to search through the file to ensure that a decision's basic factual premises are correct. 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.*,[2] the Supreme Court set out the test for sufficiency of reasons in the context of criminal law, quoting with approval an earlier Ontario Court of Appeal decision:[3] "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.

[16] 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. In my view, the General Division's reasons did not meet this standard.

[17] Although the General Division's decision falls on this issue alone, I will nevertheless briefly address the remaining issues raised by the Appellant.

Issue 2: Did the General Division err when it found that it lacked jurisdiction to provide equitable remedies?

[18] The heart of the Appellant's complaint lies in what he sees as the law's unfairness. He notes that, when his former spouse's DUPE application was approved, his CPP retirement pension was immediately reduced, but the Added Party did not see a corresponding benefit because she had not yet reached the age of 60.[4] The Appellant argues that approximately $1,200 in effect "disappeared" from his account in the interim. He believes that he should have received the unadjusted amount until the Added Party was eligible to receive a retirement pension.

[19] While the General Division erred in applying the CPP, it correctly determined that it had no authority to restore the Appellant's pension. As administrative tribunals, both the General Division and the Appeal Division are limited to the powers conferred by their enabling

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[2] *R. v. R.E.M.*, [2008] 3 SCR 3, 2008 SCC 51.
[3] *R. v. Morrissey*, 1995 CanLII 3498 (ON CA).
[4] The Added Party turned 60 in September 2014—16 months after the Minister approved her DUPE application.

legislation—in this case, the DESDA. We lack the authority to simply ignore the letter of the law and order a solution that we think is fair. Such power, known as "equity," has traditionally been reserved for the courts, although even they typically exercise it only if there is no adequate remedy at law. *Canada v. Tucker*,[5] among many other cases, has confirmed that an administrative tribunal is not a court but a statutory decision-maker and, therefore, is not empowered to provide any form of equitable relief.

Issue 3: Did the General Division breach a principle of natural justice by failing to record the videoconference hearing?

[20] Contrary to the Appellant's allegation, a recording of the hearing before the General Division exists; the presiding General Division member's voice can be clearly heard, although the Appellant's voice is only faintly audible.

[21] Still, a compromised or non-existent recording is not a ground for setting aside a decision, unless it effectively denies a party their right of appeal before the Appeal Division.[6] The Appellant has alleged that the General Division member repeatedly cut him off during the hearing and curtailed his right to present his case, but I was able to hear enough of the recording to make an informed assessment that he was given a full and fair hearing.

Issue 4: Did the General Division breach a principle of natural justice by refusing to address the Appellant's questions about the credit splitting process?

[22] My review of the audio recording confirms that, on at least five occasions,[7] the presiding General Division member admonished the Appellant for asking him questions. At 12:05, for instance, the Appellant asked, "Where did the missing money go?" After a pause, the member replied, "You have to understand that the purpose of the hearing is not to ask me questions. I'm not a witness." However, the member's tone was measured, and I heard nothing to indicate that he intended to intimidate the Appellant or to deter him from making submissions. More to the point, the member was right: a hearing is not a conversation but a tool to enable the General Division to gather information. The member was under no obligation to share his views about the

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[5] *Canada (Minister of Human Resources Development) v. Tucker*, 2003 FCA 278.
[6] *S.C.F.P., Local 301 v. Québec (Conseil des services essentiels)*, [1997] 1 S.C.R. 795; *Canada (Attorney General) v. Scott*, 2008 FCA 145; and *Patry v. Canada (Attorney General)*, 2007 FCA 301.
[7] Audio recording at 12:05, 17:15, 27:10, 33:20 and 34:30.

fairness of the CPP or its proper application until, having considered the evidence and the law, he was ready to issue the written reasons for his decision.

Issue 5: Does the Appeal Division have jurisdiction to consider alleged misconduct and bias among its staff?

[23] The Appellant suggests that the Tribunal is biased against him, pointing to what he describes as a "threatening" letter addressed to him from the Appeal Division's operations manager. I note that the letter in question dated May 6, 2016,[8] concerned the Appellant's attempt, during a previous phase of his proceeding, to contact another member of the Appeal Division at her private residence.

[24] In my view, I have no jurisdiction to pronounce on this matter, which involves the conduct of the Appeal Division's staff. Since an adjudicative body cannot sit in judgement of itself, this issue is better left to the courts.

DISPOSITION

[25] Having found an error in the General Division's decision, I must now decide what to do about it. The DESDA sets out the Appeal Division's remedial powers. Under s. 59(1), I may give the decision that the General Division should have given; refer the matter back to the General Division for reconsideration in accordance with directions; or confirm, rescind, or vary the General Division's decision.

[26] I am satisfied that this is an appropriate case for the Appeal Division to give the decision that the General Division should have given. The General Division's error was purely the result of a misinterpretation of the law, and no material finding of fact was at issue. The record before me is sufficiently complete to allow me to make an informed decision on the merits of the appeal. Moreover, the Federal Court of Appeal has held that a decision-maker should consider the length of time an application for CPP benefits has taken, as well as the additional delay that would be incurred if the matter were referred back for a new hearing.[9] This proceeding has its origins in an appeal filed nearly five years ago. If this matter were referred back to the General

[8] ADN1-24.
[9] *D'Errico v. Canada (Attorney General)*, 2014 FCA 95.

Division, there would be further delay, leading to an outcome that is easily foreseen, if the law is correctly applied to these facts. There is also the Tribunal's mandate, which requires it to conduct proceedings as quickly as the circumstances and the interests of fairness and natural justice permit.

[27] Although the General Division's decision was flawed, it ultimately arrived at the correct outcome. It is not disputed that the Appellant and the Added Party began living together on December 1, 1986, married on July 11, 1992, and separated on September 9, 1998. This means that the parties were governed by the provisions of s. 55.1 of the CPP.

[28] Under s. 55.1(1)(*b*) of the CPP, a credit split shall take place "following the approval by the Minister of an application."[10] Subsection 55.2(9) of the CPP 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." The date on which a credit split "takes place" is dictated by the CPP and the CPP Regulations and depends on the status of the former spouses. For separated spouses, as in this case, s. 54.2(1)(*b*) of the CPP Regulations requires that a credit split be approved effective the last day of the month in which the application is received. Here, the Added Party's credit split application was received on May 29, 2013, which means that the approval, when it came, was effective May 31, 2013. Subsection 54.2(2) of the CPP Regulations provides that pension credits must be divided as of the first day of the month following the month of approval. The Appellant's pension credits would therefore be attributed and adjusted effective June 1, 2013.

[29] The Appellant pointed to the letter, dated August 23, 2013,[11] in which the Minister first informed him of its decision to split his pension credits. Although it did not refer to a specific section of the CPP, it included a passage that closely paraphrased s. 55.2(8) of the CPP. The Appellant argued that, since he was receiving a retirement pension when his credits were split, he fell under the exception set out in s. 55.2(8)(*c*),[12] which bars credit splits "for the period when

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[10] By contrast, in the case of a divorced couple, s. 55.1(1)(*a*) of the CPP provides that a credit split will take place following a judgment of divorce.
[11] GD1-22-23.
[12] A similarly-worded series of exceptions is contained in s. 55(6) of the CPP, which apply to pre-1987 married relationships.

one of the persons [spouses, former spouses, or former common-law partners] was a beneficiary of a retirement pension under this Act…"

[30] I cannot agree with the Appellant on this point. A close reading of the text, and the context in which it occurs, makes it clear that s. 55.2(8)(*c*) is intended to exclude years, for the purpose of DUPE calculations, in which parties have received retirement pensions; it is not intended to exempt current retirement pension recipients from division of credits that they earned in the past. The key words are "for the period": in this case, the parties lived together from 1986 to 1998, but in none of those years was the Appellant receiving a CPP retirement pension. As a result, s. 55.2(8)(*c*) is not applicable.

CONCLUSION

[31] Although the General Division misapplied the relevant provisions of the CPP, it ultimately arrived at the correct outcome. I agree with the Minister's decision to attribute the Appellant's pension credits as of June 2013.

[32] The appeal is dismissed.

Member, Appeal Division

HEARD ON:	September 5, 2018
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	R. B., Appellant Carole Vary, Representative for the Respondent