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

Citation: *W. D. v Minister of Employment and Social Development and D. D.*, 2019 SST 611

Tribunal File Number: AD-18-739

BETWEEN:

W. D.

Appellant

and

Minister of Employment and Social Development

Respondent

and

D. D.

Added Party

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Kate Sellar

DATE OF DECISION: June 26, 2019

Canada

DECISION AND REASONS

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] W. D. (Claimant) and his ex-spouse (Added Party) were both receiving retirement pensions under the Canada Pension Plan. The Added Party applied for a division of unadjusted pensionable earnings (DUPE). A DUPE is also commonly called a "credit split". A DUPE allows ex-spouses to add their unadjusted pensionable earnings together, and then attribute them equally to each person for the years that they were living together. The Minister allowed the Added Party's application for that credit split. The Minister adjusted the retirement pensions accordingly. After the credit split, the amount by which the Claimant's retirement pension benefits decreased is greater than the amount by which the Added Party's retirement pension benefits increased.

[3] The Claimant received the Minister's decision granting the credit split in October 2016. The Claimant requested reconsideration of the decision because he did not understand the calculation the Minister provided. He wanted an explanation. The Minister upheld its decision on reconsideration. The Claimant appealed to this Tribunal, arguing that there was an issue with the calculation of his retirement pension after the Minister applied the DUPE. The General Division dismissed his appeal on August 13, 2018. The Claimant filed an application for leave to appeal to the Appeal Division.

[4] The Appeal Division granted leave to appeal. I must now decide whether the Claimant has proven that it is more likely than not that the General Division made an error under the *Department of Employment and Social Development Act* (DESDA).

[5] I find that the Claimant has not proven that the General Division made an error. The appeal is dismissed.

ISSUES

[6] The issues are:

1. Did the General Division fail to provide a fair process by failing to ensure that the Claimant had the documents he needed in order to have a meaningful opportunity to present his case?

2. Did the General Division fail to provide a fair process by failing to hold an oral hearing and/or by failing to give reasons to support that decision?

ANALYSIS

Appealing a General Division Decision

[7] The Appeal Division does not provide a chance for the parties to re-argue their case in full at a new hearing. Instead, the Appeal Division reviews the General Division's decision to decide whether it contains errors. The DESDA sets out the grounds of appeal for cases at the Appeal Division.[1]

[8] One of the grounds of appeal is that the General Division failed to observe a principle of natural justice, or otherwise acted beyond or refused to exercise its jurisdiction.[2]

[9] Failing to observe a principle of natural justice is basically about failing to provide a fair process. What fairness requires depends on the context of each case. The Supreme Court of Canada set out a list of factors to consider when deciding whether a process was fair.[3] At the heart of this question about fairness is whether, considering all the circumstances, the people who are affected by the process had a meaningful opportunity to present their case fully and fairly.

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[1] DESDA, s 58(1).
[2] DESDA, s 58(1)(a).
[3] *Baker v Canada (Citizenship and Immigration)*, 1999 CanLII 699 (SCC).

The Credit Split (DUPE)

[10] A credit split is mandatory when either spouse makes an application that the Minister approves.[4] Applying the credit split requires that the unadjusted pensionable earnings for each person be added together, divided equally, and then attributed equally to each person.[5] After the Minister applies the credit split, the Minister uses the adjusted record of earnings for each person to calculate the amount of the retirement pension each person gets. The Minister uses a complex formula.[6] The calculation of average monthly pensionable earnings may include various deductions and may affect the calculation of a retirement pension.[7]

Issue 1: Did the General Division fail to provide a fair process by failing to ensure that the Claimant had the documents he needed?

[11] In the circumstances of this case, the Claimant had the documents he needed in order to have a meaningful opportunity to present his case. The General Division did not deny the Claimant a fair process.

[12] To decide what documents the Claimant needed to present his case, I first need to clarify what the issue was at the General Division.

[13] The issue was not whether the DUPE resulted in a proper split of pension credits between the Claimant and his ex-spouse. In the reconsideration decision, the Minister stated to the Claimant, "You state in your letter that you do not believe that the allocation of pension credits is correct."[8] This suggests that for the Claimant to be able to present his case, he would need a detailed calculation as to how the Minister split the pension credits between him and the Added Party. However, the Claimant confirmed during the hearing at the Appeal Division that he did have a chart showing his unadjusted pensionable earnings before and after the credit split for each year.[9] He also confirmed that he had a chart with the same information about the Added

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[4] *Canada Pension Plan*, s 55.1.
[5] *Canada Pension Plan*, s 55.2(5).
[6] *Canada Pension Plan*, s 46.
[7] *Canada Pension Plan*, s 48.
[8] GD2-4.
[9] GD1-11.

Party's unadjusted pensionable earnings.[10] The Claimant acknowledged at the Appeal Division hearing that he was satisfied that the DUPE was split evenly as the law requires.

[14] The issue at the General Division was the amount of the Claimant's retirement pension after the Minister applied the credit split. The Claimant's appeal cannot be about the Added Party's retirement pension benefits after the Minister applied the credit split, as that is not his issue to appeal.

[15] The Minister provided a detailed document to the Claimant about how his retirement pension was calculated,[11] but it did not provide the same calculation to the Claimant about the Added Party. The Minister stated, "there is no longer authorization on file" to give that information to the Claimant.[12]

[16] The Claimant has tried to get (through the Minister, and then later as part of the appeal process at the Tribunal), a detailed calculation about how the Added Party's retirement pension was calculated after the Minister applied the credit split. At the General Division level, the Claimant was clear that his issue with his retirement pension calculation was about the difference between what he expected the total retirement pension for him and for the Added Party would be after the credit split, versus what it actually was. He based his calculation on his assumption that his retirement pension benefit would decrease and the Added Party's would increase, but that the sum of his retirement pension benefit and the Added Party's retirement pension benefit would remain the same after the credit split.

[17] The Claimant argues at the Appeal Division that he wanted access to a detailed calculation of the Added Party's retirement pension after the credit split. The credit split resulted in a $179 per month shortfall in the sum retirement benefit issued to them as a couple. The Claimant argues that this is not pocket change. He seeks to understand how, as a couple, they are now receiving roughly $2,148 less per year in retirement pension benefits as a result of the credit split. The Claimant argues that he understands the explanation provided by the Minister "as far

[10] GD1-12.
[11] GD11-2 to 4.
[12] GD10.

as it goes", but that without the detailed calculation of the Added Party's retirement pension, he is prevented form filing a complete submission in support of his appeal.[13]

[18] The record shows that the Minister informed the Claimant that the change between the Claimant's calculation and the Minister's calculation was "partially" a result of applying the "child rearing provision" to the Added Party for January 1966 to October 1981. [14]

[19] The Minister argues that the Claimant has failed to provide a reasonable basis for requiring a copy of the Added Party's calculation. The Claimant has failed to show how the calculation of the Added Party's retirement pension was relevant to the calculation of his retirement pension or the reconsideration of the decision the Minister made about the Claimant's pension.

I find that the General Division did not fail to provide a fair process to the Claimant. The General Division did not fail to ensure that the Claimant had access documents that he needed in order to support his case. The Claimant has confirmed that he was not appealing whether the Minister applied the credit split evenly between the parties as is required by law. He cannot appeal the Added Party's post-DUPE pension benefit calculation for her, without her say so. He had a detailed calculation of his own post-DUPE retirement pension calculation. The Claimant is not entitled to the Added Party's information, and it is not relevant to the calculation of his retirement pension. The Claimant is interested in understanding more about the calculation of the Added Party's retirement pension, but he was not appealing her calculation for her.

[20] I find that the General Division did not take any action (or fail to take any action) that resulted in the Claimant lacking the documentation he needed to in order to fully and fairly present his case. The Claimant had the information he needed to present the part of the case the General Division could decide.

Issue 2: Did the General Division fail to provide a fair process by failing to hold an oral hearing and/or by failing to give reasons to support that decision?

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[13] AD6-3.
[14] GD1-4.

[21] The General Division chose not to hold a hearing, and in the circumstances of this case, that is not an error. The General Division did not explain its reasons for reaching its decision in the case without holding a hearing. It would have better for the General Division member to explain why they chose not to hold an oral hearing. However, given all the circumstances, it is not an error to have left that explanation out of the decision. If the General Division had held an oral hearing, it is hard to see how the outcome would have been different. The General Division did not have the power to decide the question the Claimant was most interested in resolving at a hearing. In that situation, ensuring that the General Division describes why the oral hearing was not held becomes less important.

Failing to provide an oral hearing did not make the process unfair

[22] Failing to provide an oral hearing for the Claimant in this case did not make the process unfair.

[23] The SST Regulations and the case law explain more about the choice the General Division makes about holding an oral hearing.

[24] The *SST Regulations*[15] are clear: there is no right to an oral hearing. The General Division has the discretion to decide how an appeal will be heard. The General Division can hold a hearing in writing, by teleconference or videoconference, or in person. However, the General Division must exercise that discretion in a way that is consistent with fair process.

[25] In *Robbins*[16], the Claimant argued that the Appeal Division should not have decided his case without holding an oral hearing. The Federal Court of Appeal decided that the decision not to hold a hearing was reasonable in light of the *SST Regulations*[17], which allow the General Division to make that choice. The Federal Court of Appeal noted that the General Division gets some leeway in making that choice because it is often based on "its appreciation of the issues,

[15] *SST Regulations*, s 21; *Parchment v Canada (Attorney General)*, 2017 FCA 24.
[16] *Robbins v Canada (Attorney General)*, 2017 FCA 24, paras 21 and 22.
[17] SST Regulations, s 43 which allows the General Division to select the form of hearing, and section 3(1)(a) which requires the tribunal to conduct its proceedings as informally and quickly as the considerations of fairness and natural justice permit.

the evidence before it, and the circumstances of the case." The Federal Court of Appeal in *Robbins* decided that

> [e]ven if we afforded the Appeal Tribunal no leeway and assessed its decision to proceed on the basis of written material with exactitude, we are satisfied that Mr. Robbins had a full opportunity to offer evidence and make submissions and that an oral hearing would not have changed the result: *Mobil Oil Canada Ltd. v. Canada-Newfoundland Offshore Petroleum Board*, 1994 CanLII 114 (SCC), [1994] 1 S.C.R. 202, 111 D.L.R. (4th) 1. At the hearing, Mr. Robbins fairly conceded that he would have largely reiterated what was in the written material.

[26] The Claimant had notice that he might not have a hearing. The Tribunal wrote to the Claimant on March 26, 2018, stating that the General Division member assigned to the case would: either issue a decision on the appeal based on the documents on file, or send a notice of hearing. In April 2018, the Claimant and the Minister provided additional documents and argument to the General Division.

[27] The Claimant contacted the Tribunal with questions about the process. However, the fact that he asked these questions and did not get all the answers he wanted does not mean the General Division was required to hold a hearing.

[28] At the leave to appeal stage, I found it was arguable that the Claimant did not receive a fair process if he was never able to access answers to his questions about the process. If such information was missing, then arguably the General Division member should have provided a hearing to give the Claimant a chance to present evidence in support of his case.

However, I am now satisfied that the Claimant understood the process enough that he was able to participate, even though there was no oral hearing. At the Appeal Division hearing, I allowed the Claimant to testify under oath and explain more about how the General Division denied his right to a fair process. The Claimant testified that he thought there might be a hearing because he did ask for one. He testified that without a hearing, he was not able to access the detailed retirement pension calculation for the Added Party.

[29] In his written materials at the Appeal Division, the Claimant says he wanted an opportunity at an oral hearing at the General Division to question a representative of the Minister

about how his retirement pension was calculated. He also wrote to the Appeal Division stating that he had questions about the way the "general drop-out provision" worked in his case that he had wanted answers to at the General Division. He stated (but did not describe) what other questions he had about the calculation of his retirement pension.

[30] The Minister argues that the failure to hold a hearing was not a violation of natural justice. The decision about whether to hold a hearing is discretionary, so there must be "palpable or overriding error" (a high standard) in order to review that decision.[18]

[31] The Minister argues that the evidence and the circumstances did not warrant a hearing: there was no disagreement about the facts, the Claimant had the detailed calculation of his retirement pension, and the Claimant did not dispute that his pension credits were split evenly with the Added Party. The Minister also argues that the Claimant could have asked any further questions in writing.

[32] I find that the General Division did not have to hold an oral hearing in this case in order to provide a fair process. The Claimant contacted the Tribunal in advance stating that he had questions. However, in light of all the evidence, it is clear that failing to provide an oral hearing did not take away the Claimant's right to make submissions on the issue that was properly before the General Division: the calculation of the Claimant's retirement pension after the credit split. The General Division had all of the evidence it needed on that question without holding a hearing, because the Claimant made it clear that he believed the error had to do with the total of his pension and the Added Party's pension together, not some other error with the calculation.

[33] I find that the Claimant's understanding of the process was sufficient for the General Division to proceed without an oral hearing. At the Appeal Division level, the Claimant's evidence made it clear to me that the Claimant's interest in having a hearing was focussed on accessing the Added Party's retirement pension calculation, not on any wider procedural issues that the General Division failed to assist him with. The Claimant has explained at the Appeal

[18] *Imperial Manufacturing Group Inc. and Home Deport of Canada Inc. v Décor Grates Incorporated*, 2015 FCA 100, at paras 38 to 41; *Budlakoti v Canada (Citizenship and Immigration)*, 2015 FCA 139, paras 37 to 39.

Division level that he also wanted an opportunity to ask questions about how his retirement pension was calculated, but that was not clear at the General Division level.

[34] As was the case in *Robbins*, I cannot see how an oral hearing would have changed the result for the Claimant. The evidence before me suggests that the General Division concluded that the Claimant wanted an oral hearing because he wanted to continue to ask the Minister about how his retirement benefit was calculated only in so far as it related to how the Added Party's benefit was calculated. It was not until the Appeal Division level that the Claimant made it clear that he was interested in asking questions about how the Minister calculated his retirement pension.

[35] The General Division can decide whether the DUPE was split equally, and the Claimant agrees that it was. The General Division can decide all issues related to whether a benefit is payable and the amount of that benefit, including retirement pension benefits.[19]

[36] The General Division member could not, in this case, decide questions about the post-DUPE retirement pension calculations for the Added Party. She did not appeal or authorize an appeal of that calculation. The Claimant raised in writing only at the Appeal Division level that he had other questions about his own retirement pension benefit calculation. He had the chance to make that clear at the General Division before the General Division decided about whether to hold a hearing, but did not do that.

[37] The General Division did not make an error here by failing to hold an oral hearing.

Failing to explain why there was no hearing did not make the process unfair

[38] It would have been better for the General Division to explain why there was no hearing. However, the failure to give that explanation did not make the process unfair.

[39] I granted leave to appeal because I found that arguably, the General Division member should have explained why they did not hold a hearing.

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[19] *Canada Pension Plan*, s 81 and 82.

[40] The Minister argued that the failure to provide reasons as to why the General Division did not hold an oral hearing is also not an error under the DESDA. The Minister argues that the General Division is not required to explain fully every action it takes.[20]

[41] I find that it would have been better for the General Division member to explain specifically in the decision why they decided not to hold an oral hearing. The Claimant did not have a lawyer, and he had asked for a hearing.

[42] However, in this case, the failure to provide reasons in the decision for proceeding without an oral hearing does not mean that the General Division made an error. The decision as a whole makes it clear why the General Division did not provide a hearing: the General Division had all the information it needed to make a decision about the Claimant's case given the way he presented that case at the time.

[43] The General Division member did not make an error by failing to explain specifically why they chose not to hold an oral hearing.

IN CLOSING

[44] The Claimant was under the impression that the impact of the DUPE on him and the Added Party as a unit would be different. He has spent real time and energy trying to learn more about how his retirement pension was calculated after the DUPE. He did eventually receive a detailed calculation of his own retirement pension benefits. He has been interested in having access to the same information for the Added Party. The Claimant wants to understand fully all the rules that the Minister applied and how they affected the Added Party's retirement pension as well.

[45] In my view, the Claimant has always just wanted someone in government to be accountable to him and answer questions about these calculations. The Claimant's interest in understanding how his retirement pension was calculated is understandable. Accountability is important in public programs. However, the General Division gave the Claimant a fair process.

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[20] In support of that argument, the Minister cites *Simpson v Canada (Attorney General)*, 2012 FCA 82.

The General Division could not achieve some of the Claimant's goals in light of what the Tribunal does and does not have the ability to decide (the Tribunal's "jurisdiction").

[46] The Minister argued that as part of the appeal process, the Claimant was free to put any questions he had to the Minister about his own retirement pension calculation in writing. The Claimant may wish to ask: (a) the question about his retirement pension benefit calculation that he outlined at the Appeal Division and (b) any of the other questions he alluded to having at the Appeal Division level. He may wish to put his questions in writing to the Minister outside of the Tribunal process, so that he gets the answers he needs.[21]

[47] The Claimant's quest for answers about the Added Party's retirement pension calculation (other than just knowing that the credit split was applied properly first) are likely to remain unanswered. The Added Party's retirement pension is a matter relating to her own finances so it is for her to deal with as she sees fit.

CONCLUSION

[48] The appeal is dismissed.

Kate Sellar
Member, Appeal Division

HEARD ON:	May 7, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	W. D., self-represented Appellant Viola Herbert, Representative for the Respondent

[21] See AD6-2, where the Claimant asks a question about his lowest earning years and his reference to GD3-7 and 8 of the Minister's submissions, which contains information about how the Claimant's retirement pension benefit is calculated.