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

Citation: *M. E. v Minister of Employment and Social Development*, 2019 SST 1071

Tribunal File Number: GP-19-176

BETWEEN:

M. E.

Appellant (Claimant)

and

Minister of Employment and Social Development

Minister

and

P. E.

Added Party

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Income Security Section

Decision by: Raymond Raphael

Date of decision: August 29, 2019

Canada

DECISION

[1] I have decided that the principles of *res judicata* (the matter has been decided), abuse of process, and rule against a collateral attack apply. This means the Added Party (P. E.) is not allowed to take the position that he and the Claimant (M. E.) separated as of April 2007.

OVERVIEW

[2] This appeal involves the determination of the period of cohabitation between M. E. and P. E. for the purposes of a division of unadjusted pensionable earnings (DUPE).

[3] In April 2014, M. E. applied for a DUPE with respect to her period of cohabitation with P. E..[1] She stated she and P. E. were married in September 1995, and separated in December 2012 when she moved out of the matrimonial home. P. E. took the position that they separated in April 2007, after which M. E. "kept a totally separate life" from him and moved to a basement apartment in the matrimonial home.[2] The Minister agreed with P. E., and approved the DUPE for the period from 1995 to 2006. M. E. requested reconsideration of the period of cohabitation. The Minister denied this request, and M. E. appealed to the Social Security Tribunal.

[4] In May 2017, the Ontario Superior Court of Justice ordered P. E. to notify the CPP that the date of separation was December 14, 2012.[3] P. E. has not complied with this order.

[5] In December 2017, the General Division allowed the appeal and determined that the correct period of cohabitation was from September 1995 to December 2012. The hearing proceeded by teleconference, and P. E. did not attend the hearing. P. E. appealed to the Appeal Division.

[6] On January 16, 2019, the Appeal Division allowed the appeal and referred this matter back to the General Division for reconsideration. The Appeal Division determined that the General Division failed to observe a principle of natural justice when it held the hearing without P. E..

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[1] GD2-25 to 29
[2] GD2-36
[3] GD9-3

[7] In March 2019, I requested submissions on, amongst other issues, whether the principles of *res judicata*, abuse of process, and the rule against collateral attack apply because of the May 2017 Superior Court order.[4] M. E.'s and the Minister's position is that they do. P. E.'s position is that they do not. Since I have determined that these principles apply, it is not necessary for me to hear oral evidence as to the date of separation.

[8] I have decided this appeal on the basis of the documents and submissions filed since a further hearing is not required.

ISSUE

[9] I must decide if the principles of *res judicata* (the matter has been decided), abuse of process, and the rule against collateral attack preclude P. E. from taking the position that the date of separation was April 2007.

ANALYSIS

[10] I have determined that those principles apply. Since the Minister was not a party to the Superior Court proceeding, *res judicata* applies only to M. E. and P. E.. However, the principles of abuse of process and the rule against collateral attack apply to all parties.

The principle of res judicata applies to M. E. and P. E.

[11] If there was already a final decision on a matter, the principle of *res judicata* prevents the matter from being heard or argued again.

Pre-conditions

[12] There are three pre-conditions for the principle of *res judicata* to apply:

a) the issue must be the same as the one decided in the prior decision;

b) the prior decision must have been final, and

c) the parties to both proceedings must be the same.

[4] M. E.'s submissions are at IS5. P. E.'s submissions are at IS3 & IS9. The Minister's submissions are at IS11.

[13] Applying those factors to the present case:

a) The issue decided by the Superior Court and the issue before me are the same: namely, the date P. E. and M. E. separated. P. E. was ordered to notify the CPP that the date of separation was December 4, 2012.

b) The decision was final. The decision was made pursuant to Minutes of Settlement and there is no evidence that either party appealed.

c) Both M. E. and P. E. were parties to the proceeding before the Superior Court and they are parties to this proceeding.

[14] I find that all of the three pre-conditions for *res judicata* have been met for M. E. and P. E..

Special Circumstances

[15] However, even though all three preconditions are met, I must still determine a second step, whether as a matter of discretion, *res judicata* should be applied.[5]

[16] There is an open list of discretionary factors to consider when deciding whether or not to exercise the discretion. These may include:

a) the wording of the statute from which the power to issue the administrative order derives;

b) the purpose of the legislation;

c) the availability of an appeal;

d) the safeguards available to the parties in the administrative procedure;

e) the expertise of the initial decision-maker;

f) the circumstances giving rise to the first proceedings; and

g) any potential injustice.

[5] *Danlyuk v. Ainsworth Technologies Inc.,* [2001] 2 S.C.R. 460

[17] P. E. states that he misinterpreted the meaning of "date of separation" when he filled out the family law court documents. He interpreted this to mean the date the Claimant physically left the basement apartment, not the date she moved to it. He made this mistake because he was strained emotionally, mentally, and financially by the divorce proceedings. He did not comply with the court order because he did not want to tell the Tribunal something that was wrong.[6]

[18] P. E.'s position is not persuasive. He was represented by a lawyer at the court proceedings. The order was made pursuant to Minutes of Settlement to which he agreed. The order requires him to notify the CPP that the date of separation was December 4, 2012. If he believed that this date was not the date of separation for CPP purposes, there is no plausible reason for the CPP to be notified. He has accepted the benefits of the Minutes of Settlement and but now wants to renege on one of the terms.

[19] Further, P. E. indicated on several places in the Court documents that the date of separation was December 2012:

- ***Trial management conference brief:*** carried all costs and expenses from date of separation, namely December 4, 2012 to date matrimonial home sold.[7]
- ***Trial management conference brief:*** separated on December 14, 2012 without any possibility of reconciliation.[8]
- ***Evidence plans to present at trial:*** carried all costs and expenses for matrimonial home from date of separation December 14, 2012 until December 18, 2015.[9]
- ***Undisputed facts:*** Parties were married on September 23, 1995 and separated on December 14, 2012.[10]

[6] IS3-5 and 6
[7] GD9-7
[8] GD9-9
[9] GD9-11
[10] GD9-17

- ***Offer to settle***: will notify CPP that the parties' date of separation was December 14, 2012 within 15 days of acceptance.[11]

[20] The objective of the exercise of discretion is ensure that the operation of *res judicata* promotes the orderly administration of justice, but not at the cost of real injustice in the particular case.

[21] Parties to family disputes are urged to resolve their outstanding issues, and their doing so promotes the orderly administration of justice. In the absence of special circumstances, P. E. should not be allowed to ignore a court order made pursuant to an agreement that he entered into with the benefit of legal advice. If he were allowed to do so in this case, the injustice would be to M. E., not him.

[22] I find there are no special circumstances that would bring the appeal within the exception to the doctrine of *res judicata*.

The principles of abuse of process and rule against collateral attack apply to all parties

[23] The principle of *res judicata* does not apply to the Minister since it was not a party to the Superior Court proceedings. However, the principle of abuse of process and the rule against a collateral attack apply to all parties. They preclude P. E. from taking the position that the date of separation is April 2007 and not December 2012.

[24] The principle of abuse of process prevents the misuse of the Tribunal procedure in a way that would bring the administration of justice into disrepute. I have a residual discretion to prevent re-litigation even though the three requirements of res judicata have not been met. I should do this when a proceeding would violate principles of economy, consistency, finality, and the integrity of the administration of justice.[12]

[25] The rule against collateral attack protects the finality of litigation. A judicial order pronounced by a court of competent jurisdiction should not be brought into question in a

[11] GD9-23
[12] *Toronto (City) v. Canadian Union of Public Employees (C.U.P.E.), Local 79*, [2003], S.C.R. 77 at paras 35 to 38

subsequent proceeding.[13] The appropriate procedure to challenge a judicial order is by appeal or by application for judicial review. There is no dispute that the Superior Court is a court of competent jurisdiction. There is no evidence that P. E. challenged the Superior Court order by way of appeal or judicial review.

[26] I find that it would be an abuse of the Tribunal process if P. E. were allowed to argue that the date of separation was April 2007, after he consented to a court order to notify the Tribunal that the date of separation was December 2012. He would be making a collateral attack on an order from a court of competent jurisdiction. To allow such a collateral attack would bring the administration of justice into disrepute.[14]

CONCLUSION

[27] The period of cohabitation for the purposes of conducting the DUPE is from September 1995 to December 2012.

[28] The appeal is allowed.

Raymond Raphael
Member, General Division - Income Security

[13] *Danyluk*, above, at para 20
[14] *Toronto v. C.U.P.E,* above at paras 35 to 37