



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *W. L. v Minister of Employment and Social Development*, 2019 SST 1411

Tribunal File Number: GP-18-1539

BETWEEN:

W. L.

Appellant (Claimant)

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by: George Tsakalis

Date of decision: October 29, 2019

CORRIGENDUM DATE: November 28, 2019

DECISION

[1] W. L. is the Claimant in this case. He alleges that the Minister of Employment and Social Development (the Minister) breached his rights under the *Canadian Charter of Rights and Freedoms* (the *Charter*). I disagree with the Claimant. I am dismissing his *Charter* challenge. I am also considering summarily dismissing the remainder of his appeal. These reasons explain why.

OVERVIEW

[2] The Claimant married his former spouse in June 1966. They separated in September 1986.¹ They divorced in May 2005.²

[3] The Claimant's former spouse applied for a division of unadjusted pensionable earnings (DUPE) or a pension credit split under section 55.1 of the *Canada Pension Plan* (CPP) in August 2005. The Minister granted her application to divide pension credits in November 2005, over the Claimant's objections. The Minister's decision resulted in reducing the Claimant's CPP retirement pension from \$544.11 to \$427.20 a month.³ The Claimant did not request a reconsideration of the Minister's decision or appeal this decision to the Social Security Tribunal (the Tribunal).

[4] The Claimant's former spouse died in February 2015. The Claimant applied for a return of the pension credits transferred to his former spouse in September 2015. He argued that his former spouse never applied for a CPP retirement pension at the age of 65. She continued to work full-time up to the time of her death. The Claimant wanted the pension credits returned to him because they "were no longer required to maintain a benefit to her."⁴ He asked for a recalculation of his retirement pension to March 2015, the month after his former spouse died.

[5] The Minister denied the Claimant's application. The Minister advised the Claimant that pension credit splits are permanent. Pension credits are not personal property that can be

¹ See GD2-22

² See GD2-23

³ See GD2-25

⁴ See GD2-21

borrowed and later returned to an owner. The CPP did not allow for a reversal of a DUPE after the death of a spouse. The CPP also did not provide the Minister with the power to make exceptions to this general rule.⁵

[6] The Claimant requested that the Minister reconsider its decision. The Minister denied the Claimant's reconsideration request. The Minister repeated its position that pension credit splits are permanent and cannot be reversed after a spouse dies.⁶

[7] The Claimant appealed the Minister's reconsideration decision to the Tribunal. He wrote to the Tribunal on May 9, 2016 advising that the Minister's decision not to restore his pension credits upon the death of his former spouse violated his *Charter* rights. He argued that not restoring his pension credits was unfair and violated the principles of natural justice. He argued that he lost a portion of his pension income because of the division of the pension credits that his former spouse did not require.⁷

[8] The Claimant advised the Tribunal on June 26, 2016 that the Minister breached his rights under sections 7 and 15 of the *Charter*. He argued that he experienced discrimination because he was the higher earning ex-spouse who was subject to a reduced pension, but the CPP did not address the issue of a return of pension credits. He argued that he was being deprived of an asset that he contributed to and earned because of the Minister's actions.⁸

[9] The Claimant drafted a notice of constitutional challenge on September 28, 2016. He argued that the Minister breached his section 7 and 15 *Charter* rights.⁹

Procedural History

[10] The Tribunal's General Division previously dismissed the Claimant's appeal on August 4, 2017.

⁵ See GD2-15

⁶ See GD2-12

⁷ See GD5

⁸ See GD7

⁹ See GD11

[11] The Claimant appealed this decision to the Tribunal's Appeal Division. The Appeal Division allowed his appeal because the General Division breached principles of natural justice by proceeding by teleconference despite the Claimant's hearing impairment and by summarily dismissing his appeal without notice. The Appeal Division referred the matter back to the General Division because the Claimant had not had the chance to address the merits of his claim. The Appeal Division also ruled that an oral hearing was appropriate because of the Claimant's hearing impairment. The Claimant requested that a different General Division Member hear the appeal because he had difficulty hearing soft voices, and that all communications be sent to him by e-mail.

[12] I decided that a further oral hearing was not required after receiving the appeal because of the extensive submissions that were already contained in the file. I decided that I could deal with the constitutional issues in this case by way of Questions of Answers. I found that a hearing by way of Questions and Answers did not cause prejudice to the Claimant because of his hearing impairment.

[13] The Tribunal sent both parties a Notice of Question and Answer Hearing on September 21, 2018. I asked the Claimant if he had any further submissions on the constitutional issues arising from his appeal that were not already contained in the Tribunal file.¹⁰

[14] I received submissions from the Claimant on November 14, 2018 and the Minister on January 17, 2019. I asked the parties to attend a videoconference on January 19, 2019 to clarify the issues on this appeal. The issued a directions letter on January 29, 2019, which set out a timetable for the parties to file records and make further submissions. I advised the Claimant "to put his best foot forward because the Tribunal has the ability to dismiss his appeal if it finds that the arguments put forth by him have no merit."¹¹

[15] I received extensive submissions from both parties after the January 29, 2019 directions letter.¹²

¹⁰ See IS0

¹¹ See IS8-1

¹² See IS 9, 10, 11, 12, 13, 14, and 18

[16] I have decided to issue a decision dismissing the Claimant's *Charter* challenge based on the documents and written submissions.

[17] I now turn my attention as to why I am dismissing the Claimant's *Charter* appeal.

THE PARTIES SUBMISSIONS

[18] The Claimant argued that his original appeal focused solely on the constitutionality of the DUPE. He now shifted the focus of his appeal to the Child Rearing Drop Out (CRDO) provision and its interaction with the DUPE provision. He argued that the DUPE and the CRDO discriminated against the higher earning spouse in a marriage breakdown. He then divided the higher earning spouse into two sub-groups: marital status and family status. He argued that the CRDO did not apply to married couples ~~with~~ [without] children, but it applied to married couples with children. If the CRDO was not applied when the pension credits are split, the higher earning spouse who does not have access to the CRDO is unfairly penalized. The Claimant argued that he was unfairly penalized because the Minister did not apply the CRDO when it calculated the pension credit splits. He argued that the CPP provided no direction about where the pension credits go in the event of the death of a spouse. He argued that the higher earning spouse is denied the pension they earned and that the CPP was unjustly enriched with no validity and authority in law. He cited sections 7 and 15 of the *Charter* in his arguments.¹³

[19] The Minister provided submissions to the Tribunal on January 17, 2019. The Minister argued that the Federal Court of Appeal (FCA) considered the DUPE and its interaction with the CRDO in a case called *Runchey*.¹⁴ The Appellant in *Runchey* argued that the interaction with the DUPE and the CRDO discriminated against men, contrary to the constitutional guarantee of equality contained in section 15 of the *Charter*. The Minister argued that one of the differences in this case is that the Claimant alleged marital and family status as grounds of discrimination, as opposed to sex. However, the *Runchey* decision that upheld the constitutionality of the DUPE and the CRDO was highly persuasive in this case.¹⁵

¹³ See IS4

¹⁴ See *Runchey v. Canada (Attorney General)*, 2013 FCA 16

¹⁵ See IS7-6

[20] The Claimant in a February 1, 2019 e-mail requested calculations from the Minister relating to the credit split that resulted in the reduction of his CPP retirement pension. He asked the Minister to confirm his former spouse's eligibility for the CRDO and that the Minister recalculate the credit split after applying the Child Rearing Drop-In (CRDI) provision.¹⁶

[21] In response to the Claimant's e-mail of February 8, 2019, the Minister provided the Claimant with a copy of materials related to the calculation of the pension credit splits. The Minister took the position that the application of the CRDO to the pension credit split was not relevant. It also took the position that the CRDI came into effect after the death of the Claimant's former spouse so it did not apply.

[22] The Claimant also submitted on March 11, 2019 that there was no doubt that the introduction of the CRDI on January 1, 2019 was to remedy the injustice of not applying the CRDO before calculating the credit split. He argued that couples who separate before January 1, 2019 faced discrimination if the CRDI is not made retroactive. He asked for the rescission of the November 2005 credit split. He asked that the credit split include the CRDO and the CRDI.¹⁷

[23] The Minister requested the dismissal of the Claimant's appeal after receiving the March 11, 2019 submission. The Minister took the position that the Federal Court of Appeal (FCA) had already ruled that the intersection between the CRDO and the DUPE was constitutionally valid in *Runchey*. The Minister argued that the CRDI provision was not in force at the time of the pension credit split between the Claimant and his former spouse. The Minister also argued that a "higher earning spouse" is not an enumerated or analogous ground under section 15 of the *Charter*.¹⁸

[24] The Claimant submitted on May 19, 2019 that the new CRDI provisions are applied before a credit split and that the FCA's decision in *Runchey* is obsolete. He argued that the Minister would breach the *Charter* if it only applied the CRDI after January 1, 2019. He asked

¹⁶ See IS10

¹⁷ See IS12

¹⁸ See IS 13 and 14

that the CRDI be applied retroactively “to satisfy equality for everyone victimized before the enactment of the drop-in provision.”¹⁹

[25] I have decided to issue a decision dismissing the Claimant’s *Charter* challenge based on the documents and written submissions.

[26] I now turn my attention as to why I am dismissing the Claimant’s *Charter* appeal.

ISSUES

[27] Did the Minister breach the Claimant’s equality rights under section 15 of the *Charter*?

[28] Did the Minister deprive the Claimant of his right to life, liberty and security of the person under section 7 of the *Charter*?

ANALYSIS

[29] Subsection 48(2) of the CPP contains the CRDO provision. The CRDO affects the amount of a person’s retirement pension because the Minister has to drop months out of a person’s contributory period when the person has low or no earnings while caring for a child under the age of 7. When the Minister drops months out of a person’s contributory period this generally increases the amount of a person’s retirement pension.

[30] Section 55.1 of the CPP contains the DUPE provision. The DUPE provision provides that, in the case of spouses, a division of pension credits shall take place following a judgment granting a divorce, or the Minister being informed of the judgment and receiving the prescribed information. The result of a division of pension credits is that both spouses’ pension credits are added together and split evenly between them so one spouse may then have fewer credits than before.

[31] He also argued that the interaction between the CRDO and the DUPE violated his section 7 *Charter* rights.

¹⁹ See IS18

[32] Subsection 15(1) of the *Charter* provides that every individual is equal before or under the law and has the right to equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability.

[33] The Supreme Court of Canada (SCC) has set out a test to determine whether a law violates subsection 15(1) of the *Charter*.²⁰ I must ask the following questions to determine whether a violation of subsection 15(1) of the *Charter* took place:

1. Does the law create a distinction based on an enumerated or analogous ground?
2. Does the distinction create a disadvantage by perpetrating prejudice or stereotyping?

[34] If the answer to each of these questions is yes, I can conclude that the impugned legislative provision violates the equality guarantees that are set out in subsection 15(1) of the *Charter*.

[35] The Claimant has the burden of proving that a section 15 *Charter* violation took place. It is up to the Claimant to prove that either the purpose or effect of the law is discriminatory.²¹ While the evidentiary burden need not be onerous, the evidence must amount to more than a web of instinct.²²

[36] Section 7 of the *Charter* provides that everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

[37] Section 7 of the *Charter* involves a two-step analysis:

1. Is there an infringement of one of the three (3) protected interests, that is to say a deprivation of life, liberty or security of the person?
2. Is the deprivation in accordance with the principles of fundamental justice?

²⁰ See *Withler v. Canada (A.G.)*, 2011 SCC 12 (CanLII).

²¹ See *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497

²² See *Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30 (CanLII)

[38] The SCC has held that there is no independent right to fundamental justice. A violation under section 7 of the *Charter* cannot take place if there is no deprivation of life, liberty or security of the person.²³

The Claimant failed to prove that the DUPE and CRDO provisions violate his equality rights under section 15 of the Charter.

[39] The Claimant's argued that the CRDO provisions are not applied when the pension credits are split under the DUPE. By not applying the CRDO, this resulted in his former spouse having fewer pension credits. Therefore, more of the Claimant's pension credits were unnecessarily transferred to his former spouse. This interaction of the DUPE and the CRDO violated his section 15 *Charter* rights. He argued that the his equality rights were violated because transferring pension credits from a higher earning spouse to a lower earning spouse without a reversal of the credit split after the death of the lower earning spouse amounted to discrimination on the basis of marital and family status.

[40] In order to establish a section 15 *Charter* violation, a party must show that they fall under either an enumerated or analogous ground. I find that a higher earning spouse cannot be considered an enumerated or analogous ground under section 15(1) of the *Charter*. The focus of equality rights under the *Charter* is "to remedy or prevent discrimination against groups subject to stereotyping, historical disadvantage and political and social prejudice in Canadian society".²⁴ Higher earning spouses have not been subject to stereotyping, historical disadvantage and political and social prejudice in Canadian society.

[41] The Claimant has failed to show that the interaction of the DUPE and the CRDO creates a disadvantage by perpetuating prejudice or stereotyping based on cases decided by the SCC and the FCA that I am obligated to follow.

[42] The Minister argued that the Federal Court of Appeal (FCA) considered the DUPE and its interaction with the CRDO in a case called *Runchey*.²⁵ The Appellant in *Runchey* argued that the interaction with the DUPE and the CRDO discriminated against men, contrary to the

²³ See *R. v. Pontes*, [1995] 3 SCR 44

²⁴ See *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497

²⁵ See *Runchey v. Canada (Attorney General)*, 2013 FCA 16

constitutional guarantee of equality contained in section 15 of the *Charter*. The Minister argued that one of the differences in this case is that the Claimant alleged marital and family status as grounds of discrimination, as opposed to sex. However, the *Runchey* decision that upheld the constitutionality of the DUPE and the CRDO was highly persuasive in this case.²⁶

[43] I agree with the Minister that the FCA's decision in *Runchey* is highly persuasive in this case.

[44] The FCA analyzed the interaction of the DUPE and the CRDO in *Runchey*. The FCA decided that the interaction between the DUPE and the CRDO created a subtle distinction based on gender. It was easier for women to gain access to the CRDO than men. The DUPE provision aimed at transferring pension credits from a higher earning spouse to a lower earning spouse on divorce or separation. In many cases, the lower earning spouse is the woman. However, the interaction between the DUPE and CRDO only affected some men in certain circumstances. The DUPE and the CRDO did not single out men for different treatment. The FCA in *Runchey* decided that the DUPE and the CRDO did not perpetuate prejudice or stereotyping that demonstrated discrimination against men, and did not violate equality rights guaranteed under the *Charter*.

[45] I agree with the Minister that I must follow the FCA's decision in *Runchey* because the facts in *Runchey* are similar to this case. The claimant in *Runchey* challenged the constitutionality of the DUPE and CRDO provisions and failed. The Claimant in this case raised a slightly different argument based on a different ground, but his argument also fails because a higher earning spouse is not enumerated or analogous under section 15 of the *Charter*.

The Claimant failed to prove a breach of his section 7 Charter rights.

[46] The Claimant argued that he was unfairly, unjustly and unreasonably assessed a loss of credits without having the CRDO applied when the credits were split in November 2005. He requested a re-instatement of his lost pension value to that date. He argued that the Minister committed offences in administering CPP benefits by denying the higher earning spouses the appropriate amount of benefits they earned and justly deserved. He also argued that the Minister

²⁶ See IS7-6

was unjustly enriched because pension credits taken from the higher earning spouse are not restored following the death of the lower earning spouse.²⁷

[47] The Claimant argued that property that belonged to his spouse upon her death actually belonged to him, namely the pension credits she received in November 2005. But that is not the case. The pension credits became his former spouses when they were transferred to her in November 2005. The Claimant did not experience a deprivation of property. Even if he has experienced a deprivation of property, property and economic rights are not generally included under section 7 of the *Charter*. The SCC suggested that section 7 might protect against the deprivation of protection of “economic rights fundamental to human . . . survival.”²⁸ I do not see how the Claimant’s loss of pension credits deprives him of economic rights that are fundamental to human survival.

The Claimant failed to provide any evidence to establish a Charter breach.

[48] The Claimant’s submissions included various articles, the *Annual Report of the Canada Pension Plan* for the fiscal year 2015-16, and a background paper from the Department of Finance. The Claimant also referred to the child rearing drop-in (CRDI) provision. The CPP was amended to include the CRDI, which came into effect in 2019.²⁹ The CRDI helps parents who stop working or reduce their work hours when they become the primary caregiver to their young children. In certain circumstances, the CPP would “drop in” an amount equal to the parent’s average earnings for the five years prior to the birth of or adoption of the child, if that amount is higher than their actual earnings during that period. This would increase the pensions of parents who reduce their income to take care of their children.

[49] The Claimant argued that there was “no doubt” that the introduction of the CRDI was to remedy the injustice of not applying the CRDO before calculating the DUPE. The Claimant provided no evidence to support this argument. The articles and papers that he submitted do not support a finding for a *Charter* breach. The evidence that the Claimant submitted failed to show

²⁷ See IS4-3

²⁸ See *Gosselin v. Quebec (Attorney General)*, 2002 SCC 84 (CanLII) and *Irwin Toy Ltd. v. Quebec (Attorney General)*, 1989 CanLII 87 (SCC)

²⁹ See sections 53.3-53.6 of the CPP

that the CRDO and the DUPE created a disadvantage to him that perpetuated prejudice or stereotyping.

[50] I am dismissing the Claimant's *Charter* appeal.

I am considering summarily dismissing the remainder of the Claimant's appeal.

[51] I must summarily dismiss an appeal if I am satisfied that it has no reasonable chance of success.³⁰ There is no reasonable chance of success where it is plain and obvious on the record that the appeal is clearly bound to fail.³¹

[52] The Claimant in his initial Notice of Appeal requested that the Minister reverse the pension credit split in November 2005 on the grounds of fairness. His pension was reduced to satisfy a credit split for his former spouse, who never ended up using these credits prior to her death.³²

[53] Paragraph 55.1(a) of the CPP states that a DUPE is mandatory in the case of married couples after the Minister is informed of a judgment granting a divorce and receives the information prescribed in subsection 54(2) of the CPP *Regulations*.

[54] The Claimant's former spouse provided the Minister with the information that she was required to provide under subsection 54(2) of the CPP *Regulations*. She provided the Minister with a certificate of divorce.³³ She provided the Minister with a copy of a certificate of marriage, the dates where both parties lived together, and the dates where they separated.³⁴

[55] The DUPE in this case as performed in accordance with paragraph 55.1(1)(a) of the CPP. The FCA recognized the mandatory nature a DUPE performed under paragraph 55.1(1)(a) of the CPP. A DUPE performed in accordance with the CPP is mandatory. The credits are split

³⁰ See Subsection 53(1) of the DESD Act.

³¹ See *The Estate of J.B. v. Minister of Employment and Social Development*, 2018 SST 564

³² See GD2-5

³³ See GD2-107

³⁴ See GD2-82

permanently and cannot be withdrawn.³⁵ Individuals are not entitled to cancel a DUPE after the death of their former spouse.³⁶

[56] The Tribunal's jurisdiction is limited to the powers granted to it by statute. I can only grant remedies under the Tribunal's enabling legislation.³⁷

[57] The powers of the Tribunal relating to CPP appeals are set out in the *Department of Employment Social Development Act* (DESD Act).³⁸ I have jurisdiction to deal with the issue of the amount of the DUPE.³⁹ I must also follow decisions of the SCC and the FCA.

[58] The Claimant asked that the CRDO be applied before the application of the DUPE, but the FCA ruled that the CPP does not allow this.⁴⁰

[59] The Claimant asked for a recalculation of the credit split encompassing the CRDI provision. The new CRDI provision is applied at the time of a DUPE in certain circumstances.⁴¹ But the CPP does not allow me to apply the CRDI in this case. The CRDI came into effect on January 1, 2019 well after the November 2005 pension credit split in this case. The SCC decided that the general rule is that statutes do not apply retroactively, unless that statute says that it does or by necessary application.⁴² I do not see anything in the CRDI provisions that says that it can apply to circumstances before January 1, 2019.

[60] I will give the Claimant the opportunity to explain in writing why his appeal has a reasonable chance of succeeding under the SST Regulations.⁴³ He will receive a separate letter from the Tribunal that will provide him with a deadline for making submissions.

³⁵ See *Conkin v. Canada (Attorney General)*, 2005 FCA 351 (CanLII)

³⁶ See *Cornwell v. MHRD* (2003)(CP 19665) (PAB)

³⁷ See *R. v. Conway*, 2010 SCC 22 (CanLII)

³⁸ See subsections 64(1) and (2) of the DESD Act

³⁹ See paragraph 64(2)(b) of the DESD Act

⁴⁰ See *Upshall v. Canada (Attorney General)*, 2013 FCA 174

⁴¹ See subsection 55.2(8.1) and (8.2) of the CPP

⁴² See *Dell Computer Corporation v. Union Des Consommateurs*, 2007 SCC 34

⁴³ See section 22 of the *Social Security Tribunal Regulations*

CONCLUSION

[61] I am dismissing the Claimant's appeal relating to his challenge that the interaction between the CRDO and the DUPE violate section 7 and 15 of the *Canadian Charter of Rights and Freedoms*.

[62] I am considering summarily dismissing the remainder of the Claimant's appeal. I will provide the Claimant with an opportunity to explain in writing why his appeal has a reasonable chance of succeeding. He will receive a separate letter from the Tribunal that will provide him with a deadline

George Tsakalis
Member, General Division - Income Security