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

Citation: *C. V. v Minister of Employment and Social Development and D. S.*, 2020 SST 376

Tribunal File Number: AD-20-72

BETWEEN:

C. V.

Appellant

and

Minister of Employment and Social Development

Respondent

and

D. S.

Added Party

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Neil Nawaz

DATE OF DECISION: April 28, 2020

Canada

REASONS AND DECISION

DECISION

[1] The appeal is allowed. The Minister is directed to consider the Appellant's late request for reconsideration according to the four criteria outlined in sections 74.1(3) and (4) of the *Canada Pension Plan Regulations* (CPPR).

BACKGROUND

[2] The Appellant and the Added Party were married from 1977 to 1995. In November 2008, the Minister approved the Added Party's application to split their Canada Pension Plan (CPP) credits.[1] At that time, the Minister sent the Appellant a notice advising him that he had 90 days to request a reconsideration of the credit split.[2]

[3] More than a decade passed. In March 2019, the Appellant asked the Minister to reconsider his approval of the credit split. The Minister refused the request, since it had come well after the specified deadline.[3]

[4] The Appellant appealed the Minister's refusal to the General Division of the Social Security Tribunal. He argued that the November 2008 credit split notice had invited him to request reconsideration only if he disagreed with the Minister's determination of the period in which he and his former wife had lived together. He acknowledged that he and his former wife had lived together from May 1977 to April 1994, but he alleged that the credit split had not taken into account a benefit that his former wife had derived from the child rearing provision (CRP).

[5] The General Division decided that an oral hearing was unnecessary and instead decided the appeal based solely on a review of the documentary record. In a decision dated January 4, 2020, the General Division dismissed the appeal. It found that the Minister had exercised his

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[1] The CPP provision governing credit splitting is called "Division of Unadjusted Pensionable Earnings."
[2] See Minister's Notice of Division dated November 20, 2008, GD2-8. I note that the General Division referred throughout its decision to a Minister's decision letter dated "May 12, 2009," apparently reproducing the Minister's mislabelling of the letter in his written submissions dated November 18, 2019 (GD4). The file contains no such letter bearing that date, as the Minister acknowledged in a subsequent Observation Sheet (GD6).
[3] Minister's letter refusing Appellant's request for reconsideration dated August 21, 2019, GD2-30.

discretion judicially when he refused the Appellant an extension of time in which to request a reconsideration of the credit split.

[6] On January 30, 2020, the Appellant requested leave to appeal from the Tribunal's Appeal Division. He submitted that, when it dismissed his appeal, the General Division committed the following errors:

- It ignored evidence that he had not replied to the Minister's November 2008 credit split notice because it was misleading; and
- It failed to address his claims that he did not get a share of the "credits" derived from the Added Party's CRP application.

[7] I granted leave to appeal on an issue that the Appellant did not explicitly raise in his leave to appeal application. I saw an arguable case that the General Division erred in law when it found that the Minister had properly refused the Appellant an extension of time to request reconsideration.

[8] At that point, I called a hearing. I decided to proceed by teleconference because, in my view, the format respects the requirement under the *Social Security Tribunal Regulations* to proceed as informally and as quickly as circumstances, fairness, and natural justice permit.

[9] In a letter dated April 2, 2020, the Minister conceded that the General Division committed an error of law when it found that the Minister had judicially exercised its discretion to refuse the Appellant an extension of time. It recommended that the Appeal Division give the decision that the General Division should have given and return the matter back to the Minister for reconsideration.

ISSUES

[10] Under the *Department of Employment and Social Development Act* (DESDA), there are only three grounds of appeal to the Appeal Division. An appellant must show that the General

Division acted unfairly, interpreted the law incorrectly, or based its decision on an important error of fact.[4]

[11] I had to consider the following questions:

Issue 1: Did the General Division err by ignoring the Appellant's reason for not replying to the Minister's May 2009 credit split notice?

Issue 2: Did the General Division err by ignoring the Appellant's argument that the credit split denied him his fair share of the Added Party's CPP credits?

Issue 3: Did the General Division err by finding that the Minister judicially exercised its discretion to refuse the Appellant an extension to request reconsideration?

ANALYSIS

[12] Having reviewed the record and considered the parties' written submissions, I have concluded that the General Division erred when it found that the Minister judicially exercised its discretion to refuse the Appellant an extension to request reconsideration. Since the General Division's decision falls for this reason alone, I do not think it necessary to address the remaining issues.

[13] Sections 74.1(3) and (4) of the CPPR require the Minister to follow a detailed procedure when a claimant files a late reconsideration request. A claimant who is dissatisfied with a credit split ordinarily has 90 days to ask the Minister to reconsider his decision.[5] The Minister may allow a longer period to request reconsideration if it is satisfied that (i) there is a reasonable explanation for requesting a longer period and (ii) the person has demonstrated a continuing intention to request a reconsideration.[6]

[14] If the reconsideration request comes more than 365 days after the claimant was notified of the decision, the Minister must also be satisfied that (i) the request has a reasonable chance of success and (ii) no prejudice would be caused to any party by allowing a longer period to make

[4] The formal wording for these grounds of appeal is found in section 58(1) of the DESDA.
[5] *Canada Pension Plan*, section 81(1).
[6] CPPR, section 74.1(3).

the request.[7] The Minister must consider all four criteria and be satisfied that all of them have been met.[8]

[15] These restrictions aside, the Minister retains some degree of discretion in deciding whether to grant an extension. However, case law requires the Minister to exercise his discretion judicially.[9] The Federal Court has held that a discretionary power is not exercised judicially if the decision-maker (i) acted in bad faith; (ii) acted for an improper purpose or motive; (iii) took into account an irrelevant factor; (iv) ignored a relevant factor; or (v) acted in a discriminatory manner.[10]

[16] In this case, no one disputed that the Appellant's request for reconsideration was more than 365 days late. The issue for the General Division was whether the Minister considered that late request in the way required by the law.

[17] The Minister has conceded that it may have ignored the four criteria outlined in sections sections 74.1(3) and (4) of the CPPR. I think that it did. I also think that the General Division misinterpreted the law and failed to hold the Minister to the appropriate standard. In its decision, the General Division wrote:

> **The Minister considered each of the four criterion [*sic*].** He was not satisfied that three of the criteria were met. He was not satisfied the [Appellant] provided a reasonable explanation for requesting a longer period to request a reconsideration, demonstrated a continuing intention to request a reconsideration, or that the request for reconsideration had a reasonable chance of success [emphasis added].[11]

However, the when I look at the analysis that precedes this passage, I see that it was the General Division, and not the Minister, who determined that Appellant had failed to meet three of the four criteria. I am not saying that the General Division analyzed the four criteria incorrectly; it may well have done so. However, the General Division was not allowed to undertake such an analysis itself **unless** it had first made a finding about the Minister considered the four criteria.

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[7] CPPR, section 74.1(4).
[8] *Lazure v Canada (Attorney General)*, 2018 FC 467.
[9] *Canada (Attorney General) v Uppal*, 2008 FCA 388.
[10] *Canada (Attorney General) v Purcell*, [1996] 1 FCR 644.
[11] General Division decision, paragraph 22.

[18] For her part, the Added Party seemed surprised, perhaps understandably so, that the Appellant may still have a chance of reopening an issue that she believed had been settled more than 10 years ago. As I explained to her at the hearing, a CPP applicant gets only so much time in which to ask the Minister for reconsideration, but the prescribed 90-day and one-year limitations are hardly "drop-dead" deadlines. Rather, the limitations were designed to be flexible and enforceable by the Minister only after following a procedurally fair process.

REMEDY

[19] During the hearing, I talked about what to do if I were to find an error in the General Division's decision. I told the parties that there were essentially two options: (i) I could return the matter back to the General Division for another hearing on whether the Minister considered the Appellant's late request judicially and judiciously or (ii) I could substitute my decision for the General Division's and make my own assessment about the Minister's conduct.[12] I indicated to the parties that, in my view, the record was complete enough to do the latter. The Appellant and the Added Party indicated that they understood and agreed with my preference to give the decision that the General Division should have given. The Minister, echoing its letter of April 2, 2020, conceded that the General Division had erred and urged me to refer the matter back to the Minister with instructions to reconsider the Appellant's request for an extension of time in compliance with sections 74.1(3) and (4) of the CPPR.

[20] I find that, if the General Division had applied the law, it would have had found that the Minister failed to fulfill its duty under sections 74.1(3) and (4) of the CPPR. I have reviewed the record, including the August 2019 letter refusing reconsideration, and I see no indication that the Minister considered any of the four criteria when it refused the Appellant an extension of time. Indeed, the Minister seems to have based his decision on nothing more than the fact that the Appellant's request for reconsideration was filed well over a year after the initial approval of the credit split.

[12] See DESDA, sections 59(1) and 64.

CONCLUSION

[21] Since the General Division committed a legal error, the appeal is allowed. My own assessment of the record satisfies me that the Minister refused the Appellant an extension of time to request reconsideration without regard to the four criteria listed sections 74.1(3) and (4) of the CPPR.

[22] I am therefore directing Minister to consider the Appellant's late request in compliance with the law.

Member, Appeal Division

HEARING DATE:	April 23, 2020
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	C. V., the Appellant Viola Herbert, representative for the Respondent D. S., the Added Party