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

Citation: *WJ v Minister of Employment and Social Development and AA*, 2021 SST 235

Tribunal File Number: GP-19-493

BETWEEN:

W. J.

Appellant (Claimant)

and

Minister of Employment and Social Development

Minister

and

A. A.

Added Party

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by: Pierre Vanderhout

Videoconference hearing on: April 21, 2021

Date of decision: April 29, 2021

Canada

DECISION

[1] The Added Party is entitled to a Canada Pension Plan ("CPP") credit split, due to her cohabitation with the Claimant between September 1976 and November 1986. However, the credit split only applies for the period from January 1976 to December 1985.

OVERVIEW

[2] The Claimant in this appeal is W. J. The Added Party in this appeal is A. A. The Added Party and the Claimant began cohabiting in September 1976. They signed a marriage contract on August 2, 1977 (the "1977 Marriage Contract")[1]. They married on August 6, 1977. They stopped cohabiting in November 1986. A court order about their separation was issued on November 20, 1986 (the "November 1986 Order").[2] A divorce judgment was issued on September 21, 1989 (the "September 1989 Divorce Judgment"), but did not address any property issues between the parties.[3] The November 1986 order addressed those issues.

[3] On June 5, 2017, the Added Party applied for a CPP credit split (also known as a "Division of Unadjusted Pensionable Earnings"). She wanted the credit split with respect to her period of cohabitation with the Claimant.[4] If granted, this would evenly split the CPP credits earned during her cohabitation with the Claimant, instead of leaving the credits with the person who earned them. A split would be favourable to the Added Party but not to the Claimant, as the Claimant earned more CPP credits than the Added Party at the material times. The Minister granted the application initially and on reconsideration. The Claimant appealed the reconsideration decision to the Tribunal.

[4] The Minister says it must perform a CPP credit split when it receives a copy of the divorce judgment and certain other information.[5] The Minister says there are only two exceptions to this rule, but neither one applies to the Claimant's situation.[6] The Claimant disagrees with the Minister's interpretation of the *Canada Pension Plan*, and raises several other arguments in

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[1] GD2-21
[2] GD2-16
[3] GD2-62
[4] GD2-45
[5] See s. 55.1(1)(a) of the *Canada Pension Plan* and s. 54(2) of the *Canada Pension Plan Regulations*.
[6] The Minister cites s. 55.1(5) and s. 55.2(3) of the *Canada Pension Plan*.

response. The Minister did not attend the hearing. The Added Party attended the hearing, but did not give any oral evidence. The Claimant attended the hearing and gave oral evidence.

ISSUES

[5] Did the Minister correctly allow the Added Party's application for a CPP credit split?

[6] If so, has the Claimant raised any grounds that ought to prevent the CPP credit split?

ANALYSIS

[7] The underlying facts of this appeal are not really in dispute. The Claimant accepts the Minister's finding that the Claimant and the Added Party cohabited from September 1976 to November 1986. Indeed, that finding was based largely on the Claimant's evidence, as the Added Party's documents did not accurately capture the period of cohabitation. Nor are the dates of the court orders and the 1977 Marriage Contract in dispute. The Claimant's real argument is about how the law applies to the facts.

Did the Minister correctly allow the Added Party's application for a CPP credit split?

[8] For the reasons set out in the following paragraphs, I find that the Minister correctly allowed the credit split. While this credit split recognized the cohabitation between September 1976 and November 1986, I am not certain that the Minister used the correct months when performing the credit split.

[9] The *Canada Pension Plan* governs credit splits. This legislation says the Minister shall perform a credit split when it receives a copy of the divorce judgment and the "prescribed information".[7] While the Added Party did not initially provide the applicable information, she ultimately did so.[8]

[10] The Claimant says the legislation did not come into force until January 1, 1987, so it should not apply to a November 1986 separation. However, the mandatory credit split applies to

[7] See s. 55.1(1)(a) of the *Canada Pension Plan* and s. 54(2) of the *Canada Pension Plan Regulations.* See also the judgment in *Conkin v. Canada (Attorney General)*, 2005 FCA 351, with respect to the applicable law.
[8] Many of the documents were filed in July 2017. See, for example, GD2-57 to GD2-65 and GD2-71 to GD2-72.

judgments after January 1, 1987, that grant a divorce or a "nullity of a marriage".[9] The parties divorced in 1989. The Claimant also suggests that the November 1986 Order was an "annulment," because he and the Added Party were no longer living together. I do not accept this interpretation. "Nullity of marriage" refers to invalidating a marriage that was void from the beginning.[10] This is a rare situation, usually arising only where the parties had lacked consent or capacity to marry in the first place. The November 1986 Order makes no such finding. Nor does the September 1989 Divorce Judgment.

[11] The Claimant also argues that a 36-month limitation period applies to credit split applications. He says it prevents the Added Party's application, because she filed it 28 years after they divorced. While such a limitation period does exist, it only applies to divorces (or "nullities of a marriage") taking place before January 1, 1987.[11] The parties did not divorce until 1989. No nullity was ever granted. As a result, the 36-month limitation period does not apply.

[12] The mandatory credit split is generally subject only to the exceptions set out in the *Canada Pension Plan*. The potentially applicable exceptions are the "Minister's Discretion" and the "Spousal Agreement" exceptions.[12] I will look at each of these in turn.

The "Minister's Discretion" exception

[13] The Minister may refuse to make the credit split if it would decrease both benefits.[13] However, in this case, the credit split causes an increase of the Added Party's CPP pension. The Minister confirmed this in its initial decision[14], and nobody suggests that the Added Party's CPP pension decreased due to the credit split. As a result, the Minister cannot apply this exception.

The "Spousal Agreement" exception

[14] Two potential spousal agreements could affect the credit split: the 1977 Marriage Contract and the November 1986 Order. However, I will consider the 1977 Marriage Contract

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[9] See 55.11(a) of the *Canada Pension Plan*. See also the persuasive Pension Appeals Board decision in *MHRD v. Jackman*, (2001) CP 16276.
[10] *The Dictionary of Canadian Law*, Second Edition, by Daphne Dukelow and Betsy Nuse (Carswell: 1995).
[11] S. 55(1) of the *Canada Pension Plan*.
[12] See *Canada (Minister of Human Resources Development) v. Wiemer*, 1998 CanLII 7963 (FCA), at paragraph 17.
[13] S. 55.1(5) of the *Canada Pension Plan*.
[14] GD2-73

separately, as I find that the "Spousal Agreement" exception potentially applies only to the November 1986 Order.

[15] The November 1986 Order is based on a settlement between the parties, following their separation earlier that month.[15] For written agreements or court orders made on or after June 4, 1986, the Minister cannot make a credit split if the following four conditions are all met:

(a) The written agreement contains a provision that specifically mentions the *Canada Pension Plan* and indicates the intentions of the persons that there be no pension split,
(b) That provision is expressly permitted under the provincial law that governs the agreement,
(c) The agreement was entered into before the divorce or nullity judgment, and
(d) The agreement has not been invalidated by a court order.[16]

[16] The last two conditions are met for the November 1986 Order. The November 1986 Order preceded the September 1989 Divorce Judgment. I see no evidence that a later court order invalidated the November 1986 Order.[17] However, the first two conditions are not met for the November 1986 Order. Nothing in that order specifically mentions the *Canada Pension Plan*. Furthermore, I see no Ontario legislation that expressly permits an agreement to pre-empt a CPP pension split. Ontario's legislation would apply in this case, as the marriage and the November 1986 Order are rooted in Ontario.[18] As a result, the November 1986 Order cannot trigger the "Spousal Agreement" exception. I will now consider the 1977 Marriage Contract.

The 1977 Marriage Contract

[17] The 1977 Marriage Contract took effect long before June 4, 1986. This means the "Spousal Agreement" exception in the *Canada Pension Plan* does not apply to it. Nor does the *Canada Pension Plan* necessarily preclude it.

[18] The Claimant said there were many reasons for the 1977 Marriage Contract. The 1977 Marriage Contract confirmed that he owned a property, although it had a mortgage at the time. He also had a business partnership. The Added Party had a significant pending inheritance. Both

[15] GD2-16
[16] See s. 55.2(3) of the *Canada Pension Plan.*
[17] The Claimant affirmed this at the hearing.
[18] See, for example, *Dominie v. Canada (Minister of Social Development)*, 2005 FCA 242.

parties had their own bank accounts. They wanted to protect these specific assets in the event of a marital separation or dissolution.[19]

[19] In a 1983 decision called *Preece*, the Pension Appeals Board said that marriage agreements (at least those made before June 4, 1986), could prevent an ex-spouse from obtaining a credit split. The Board said parties should not be allowed to use a statute to avoid the contract they made.[20] The *Preece* decision relied on Supreme Court of Canada authority.[21] As Supreme Court of Canada precedents cannot be ignored, it appears that the *Preece* decision ultimately led to legislative changes in the *Canada Pension Plan*.

[20] I accept that the *Preece* decision could support the Claimant's position, depending on the terms of the 1977 Marriage Contract. However, there is an important distinction between the contracts in the *Preece* case and the 1977 Marriage Contract. The *Preece* contracts were not marriage contracts made at the outset of a marriage: instead, they were separation agreements, minutes of settlement, and/or divorce decrees. The *Preece* contracts specifically tried to resolve all potential future property claims between the spouses. The 1977 Marriage Contract does not do this. The 1977 Marriage Contract does not refer to the *Canada Pension Plan*, or to a CPP credit split. Nor does it refer to the resolution of all potential future claims between the parties. It only aims to protect certain specific assets that already existed before the marriage.

[21] The Claimant urges me to adopt a broad interpretation of the 1977 Marriage Contract. In particular, he points to paragraphs 3 and 4. He says these paragraphs prevent the parties from making any claims against the other in the event of a marital separation or dissolution. However, the language in those sections pertains only to the Claimant's partnership property (in paragraph 3) and their respective separate bank accounts (in paragraph 4). I cannot reasonably interpret these provisions to apply to all potential assets of the marriage.

[22] I conclude that the 1977 Marriage Contract cannot prevent the application of the CPP credit split. I will now look at whether the Minister used the correct months in the credit split.

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[19] GD2-21
[20] *The Minister of National Health and Welfare v. Preece* et al., (1983) CEB & PG (TB) 8914 (Pension Appeals Board). Decisions of the Pension Appeals Board are not binding on the Tribunal, but can be persuasive.
[21] *Stern v. Sheps*, [1968] S.C.R. 834.

Did the Minister use the correct months in performing the credit split?

[23] I agree that a credit split should be applied, based on the parties' cohabitation from September 1976 to November 1986. However, it is not clear that the Minister used the correct months when applying the credit split.

[24] The *Canada Pension Plan*, together with the *Canada Pension Plan Regulations*, confirms that credit splits can only apply to full calendar years. In this case, the period of cohabitation begins and ends with partial calendar years. The regulations make it clear that the credit split begins with the January of the year that cohabitation started. However, the credit split stops immediately before the year that cohabitation ended.[22] As a result, the credit split in this case only applies to the period from January 1976 to December 1985.

[25] I cannot tell whether the Minister applied the credit split from January 1976 to December 1985. In the Tribunal file, the precise amounts are missing from the Minister's initial letters granting the credit split. Those letters describe the period of cohabitation (September 1976 to November 1986) but do not indicate the months of the credit split.[23] The reconsideration decision, which upholds the Minister's initial decision, is also silent about the months used in the credit split calculation.[24]

[26] The Minister ought to review the credit split, to ensure it only applies for the period from January 1976 to December 1985. The Minister's submissions suggest it applied the credit split that way, but its decisions in this matter are not clear on that point.[25] I will now consider some other grounds raised by the Claimant that the above analysis does not address.

Has the Claimant raised any grounds that ought to prevent the CPP credit split?

[27] The Claimant suggests that Ontario's *Limitations Act, 2002* binds the Added Party. He says that statute gives a maximum limitation period of 15 years to initiate a "claim". Under that statute, a claim is to "remedy an injury, loss or damage that occurred as a result of an act or

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[22] See s. 55.1(4) of the *Canada Pension Plan* and s. 78.1(1) of the *Canada Pension Plan Regulations*.
[23] GD2-73 and GD2-98.
[24] GD2-8
[25] See paragraph 7 on GD3-4.

omission."[26] It is debatable that a credit split application meets that definition. In any case, that statute is provincial. The *Canada Pension Plan* is federal legislation. Federal legislation is paramount to provincial legislation, and cannot be changed by provincial legislation. The *Canada Pension Plan* requires a credit split when the Minister is informed of a divorce judgment rendered on or after January 1, 1987. Former spouses can ask for a credit split at any time afterward. No time limit applies.[27]

[28] The Claimant also submits that the *Canada Pension Plan* mandates penalties for false or misleading statements. He says the cohabitation dates provided by the Added Party in her application were incorrect. He previously described them as fraudulent.[28] I acknowledge that the *Canada Pension Plan* permits a penalty for false or misleading statements.[29] However, the Tribunal is a statutory creation and its powers are limited to those set out in its governing legislation. The Tribunal is not empowered to levy penalties for false or misleading statements. That power lies with the Minister. In addition, the Minister did not impose any penalties against the Added Party. The Tribunal cannot address issues unless they are in the reconsideration decision. For these reasons, the Tribunal cannot make a finding on whether the Added Party made false or misleading statements in her application.

The specific language of the November 1986 Order

[29] The Claimant points to paragraph 7 of the November 1986 Order. That paragraph says "the parties waive all rights to maintenance from the other party, and to claim a share in the other party's estate in particular with respect to Section 6 of the Family Law Act."[30] I see similar language in paragraph 3 of the November 1986 Order. That paragraph sets out the allocation of various assets, and describes it as "a full and final division of net family property." Paragraph 3 adds that "each party shall be entitled to retain in his or her possession, all items currently held by him or her, free of any claim by the other party." The list of assets assigned to the Claimant includes "his current Pension," which he shall retain "free of any claim by the [Added Party]".

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[26] Section 1 of the *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B.
[27] *Conkin v. Canada (Attorney General)*, 2005 FCA 351, at para. 3. See also ss. 55.11(a) and 55.1(1)(a) of the *Canada Pension Plan*.
[28] GD1-9
[29] See s. 90.1(1) of the *Canada Pension Plan*.
[30] GD2-19

[30] At first glance, the November 1986 Order looks like it could protect the Claimant from a credit split. The November 1986 Order seeks generally to avoid any further claims between the parties. More specifically, it seeks to avoid any further claim against the Claimant's "current Pension". This may well have been an attempt to describe the Claimant's CPP contributions up to that point. However, as previously noted, the *Canada Pension Plan* prevents this interpretation. In this case, the Minister must apply the credit split unless the court order specifically refers to the CPP and Ontario's laws permit avoidance of a credit split by virtue of that court order. Neither of those conditions apply in this case. The November 1986 Order does not specifically name the *Canada Pension Plan*, and credit split avoidance in the Claimant's position is not possible in Ontario.[31]

[31] Many of the Claimant's submissions focus on the law's apparent unfairness. This is entirely understandable. He and the Added Party made a settlement that led to the November 1986 Order. They both appear to have had legal advice, and the District Court of Ontario implemented their agreement. The Claimant expected that any of his obligations to the Added Party had been satisfied. He had custody of their two young daughters, and described many difficulties in obtaining the required financial support from the Added Party over the years. He said he contributed more than one million dollars to the children's upbringing and education, amounting to more than 95% of the total cost. He asserts that he has devoted most of his adult life to his children and his second wife (to whom he has now been married for about 30 years).[32] No evidence contradicts his assertion.

[32] The Claimant urged me to decide this appeal on moral grounds. However, the Tribunal must apply the law: it cannot create moral remedies or apply equity. I note that the Claimant is far from the first person to face an unexpected CPP credit split long after the end of a relationship. As long ago as 1998, the Federal Court of Appeal commented on the *Canada Pension Plan*'s credit split provisions and their apparent harshness:

> "I can understand the anger and frustration of the [Claimant] who had entered into an agreement with [the Added Party] to definitively settle the consequences of the breakdown of their relationship. He is not the first and only one to experience the rigour of the [*Canada Pension Plan*]. However, the intent of Parliament clearly was to install a

[31] See s. 55.2(3) of the *Canada Pension Plan.*
[32] GD1-13

> regime of compulsory credits splitting to protect spouses or former spouses in case of a failure of their marriage…"[33]

[33] The Federal Court of Appeal's 1998 wording appears just as relevant today. Despite the apparent finality of November 1986 Order, the credit split cannot be prevented.

CONCLUSION

[34] The appeal is allowed in part. The Minister must ensure that the credit split applies only to the period from January 1976 to December 1985.

Pierre Vanderhout
Member, General Division - Income Security

[33] *Canada (Minister of Human Resources Development) v. Wiemer*, 1998 CanLII 7963 (FCA), at para. 22.