Citation: *RC v Minister of Employment and Social Development and BC*, 2022 SST 665

Social Security Tribunal of Canada
General Division – Income Security Section

Decision

Appellant:	R. C.
Respondent:	Minister of Employment and Social Development
Added Party:	B. C.

Decision under appeal:	Minister of Employment and Social Development reconsideration decision dated November 2, 2021 (issued by Service Canada)

Tribunal member:	Pierre Vanderhout
Type of hearing:	Teleconference
Hearing date:	August 30, 2022
Hearing participants:	Appellant Appellant's observer Respondent's representative Added Party
Decision date:	September 12, 2022
File number:	GP-21-2591

Decision

[1] The appeal is dismissed.

[2] The Appellant, R. C., has not established that the Canada Pension Plan ("CPP") Division of Unadjusted Pensionable Earnings ("DUPE") between him and the Added Party was performed incorrectly. This decision explains why I am dismissing the appeal.

Overview

[3] The Appellant was nearly 78 years old on the hearing date. He started receiving a CPP retirement pension in February 2007, when he was 62 years old.

[4] The Added Party was nearly 59 years old on the hearing date. The Appellant and the Added Party began living together in July 1983. They married on February 1, 1986. They had some brief separations over the years, and finally separated permanently on January 14, 2019. Their divorce was effective August 14, 2020.

[5] The Added Party applied for a DUPE on November 19, 2020. A DUPE is also known as a CPP "credit split." On September 3, 2021, the Minister of Employment and Social Development (the "Minister") split the CPP contributions of the Appellant and the Added Party during the applicable periods of their cohabitation. This resulted in a reduction of the Appellant's monthly CPP retirement pension from $557.00 to $463.61, as of December 2020. It also increased the CPP retirement pension that the Added Party will eventually receive. The Minister upheld that decision on reconsideration. The Appellant now appeals to the Tribunal.

[6] The Appellant says the DUPE ought to exclude the periods of separation. In particular, he notes that they separated shortly after starting their first period of cohabitation in 1983. He says the DUPE should not apply to this period of cohabitation. The Appellant also questions the fairness of the DUPE generally. For example, the Added Party had higher earnings in the years after 2007. However, these years were excluded from the DUPE. He also disagreed with how the Minister sometimes performed the DUPE by year, but sometimes performed it by month.

[7] The Minister says the DUPE was performed correctly. The dates of division are from January 1983 to December 2018, reflecting the periods of cohabitation. For the included periods, the Minister applied the statutory provisions to the Appellant's situation. The Minister adds that periods of temporary separation followed by a reconciliation do not interrupt the continuous period of cohabitation. The Minister also says no DUPE was performed after January 2007 because the Appellant started to receive his CPP retirement pension.

What the Appellant must prove

[8] For the Appellant to succeed, he must prove that the Minister incorrectly divided the pensionable earnings of himself and the Added Party.

Reasons for my decision

[9] The Appellant is not alleging a calculation error. Instead, he says the DUPE included periods that should not have been included. As a result, the key factual issue in this appeal is when the Appellant and Added Party cohabited.

When did the Appellant and Added Party cohabit?

[10] When the Added Party applied for the DUPE, she said she cohabited with the Appellant from July 15, 1983, to January 14, 2019. She didn't identify any periods when they lived apart.[1] In a subsequent Statutory Declaration, she said they started cohabiting on July 20, 1983.[2]

[11] The Appellant broadly agreed that he lived together with the Added Party from July 1983 to January 2019. However, he said they lived apart for parts of that period.[3]

[12] The Appellant later found calendars that his father had kept. Those calendars were almost like a diary, as they recorded key events of each day. The Appellant now

[1] GD2-6
[2] GD2-22
[3] GD2-21

relies on the calendars, rather than his previous estimates about the periods of separation. According to the calendars, the following events are relevant:[4]

July 16, 1983	Added Party moves in
December 15, 1983	Added Party leaves
April 5, 1984	Added Party moves back (112 days later)
September 13, 1984	Added Party leaves
October 3, 1984	Added Party moves back (20 days later)
July 1, 1989	Added Party leaves
October 22, 1989	Added Party moves back (113 days later)

[13] I asked the Added Party about these dates. She said she never left for more than 3-4 months at a time. She thought the periods of separation might have been slightly shorter than recorded in the calendars. For example, she thought she moved back in March 1984 rather than on April 5, 1984, although she wasn't sure. She also thought the 1989 separation might have lasted from mid-July 1989 to September 1989, rather than from July 1, 1989, to October 22, 1989.

[14] I prefer the dates stated on the calendars to the dates suggested by the Added Party. The Appellant's father created the calendars at the time in question and it would have been impossible to foresee how they might be used in the future. In my view, this makes them much more reliable than evidence given at the hearing more than 30 years later. The Added Party did not provide any objective evidence to support her dates. Nor did she provide any periods of separation when she originally applied for the DUPE.

[15] Now that the periods of cohabitation have been established, I need to determine the period(s) for which the DUPE ought to be performed.

For which period could the DUPE be performed?

[16] The Minister <u>must</u> perform a DUPE when it learns of a divorce judgment. The Added Party included a copy of the Divorce Certificate when she applied for the DUPE.[5]

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[4] GD2-30 to GD2-44

[5] See s. 55.1(1)(a) of the *Canada Pension Plan*. See also GD2-4 and GD2-23

[17] The DUPE can only be performed for months during which the Appellant and the Added Party cohabited. The *Canada Pension Plan Regulations* (the “Regulations”) set out the rules for determining cohabitation.[6]

[18] The Regulations say that the DUPE period starts with the first month of the year that the parties married or started to cohabit in a conjugal relationship.[7] As the parties started to cohabit in a conjugal relationship in July 1983, and married in February 1986, the DUPE must start with January 1983.

[19] The Regulations also say that the parties are considered not to have cohabited at any time during the year in which they started to live separate and apart.[8] As the parties separated in January 2019, the DUPE period cannot extend beyond December 2018.

[20] I find that the DUPE could potentially apply from January 1983 to December 2018. This is what the Minister did, except for the years 1996 and 1997. The Minister also did not perform the DUPE after January 2007. I will discuss these exclusions in more detail below. First, however, I will look at the periods of separation.

Do the brief periods of separation affect the DUPE?

[21] The first separation lasted for 112 days and ended in April 1984. The Appellant and the Added Party then reconciled for 161 days. The second separation lasted for 20 days and ended in October 1984. They then reconciled for nearly five years. The third separation lasted for 113 days. They then reconciled for just over 29 years.

[22] These separations each lasted less than one year. Each separation was followed by an immediate resumption of living together for a period longer than 90 days. Thus, the periods of temporary separation are deemed not to have interrupted the period of

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[6] See s. 55.1(4) of the *Canada Pension Plan* and s. 78.1 of the *Canada Pension Plan Regulations*.
[7] S. 78.1(1)(a) of the *Canada Pension Plan Regulations*.
[8] S. 78.1(1)(b) of the *Canada Pension Plan Regulations*.

continuous cohabitation.[9] This means that the DUPE applies to all of 1983, 1984 and 1989, despite the brief periods of separation in those years.

[23] The Appellant advanced an argument based on s. 78(2)(b) of the Regulations. He said he had not cohabited with the Added Party for at least 36 months before their first separation. As a result, he said the Minister should exclude 1983 from the DUPE.

[24] While the Appellant's argument appears sound on the surface, it cannot succeed. Section 78 of the Regulations only applies to a DUPE under s. 55 of the *Canada Pension Plan*. However, s. 55 of the *Canada Pension Plan* only applies for marriages ending between January 1, 1978, and December 31, 1986. This marriage ended in 2019. For marriages ending in 1987 or later, the DUPE is governed by s. 55.1 of the *Canada Pension Plan*.

[25] As the present DUPE is under s. 55.1 of the *Canada Pension Plan*, s. 78.1 (rather than s. 78) is the applicable section of the Regulations. Section 78.1 of the Canada Pension Plan is not the same as section 78. Any confusion about this is not surprising: the Minister's submissions also incorrectly named s. 55 of the *Canada Pension Plan* when they actually were referring to s. 55.1 of the *Canada Pension Plan*.[10]

Fairness of the DUPE

[26] The Appellant did not think the DUPE operated fairly in his case. For example, the Added Party's CPP contributions were much higher after 2007. However, no DUPE took place after January 2007. This was because the Appellant started to get his CPP retirement pension in February 2007. No DUPE can be performed once one of the spouses starts getting a CPP retirement pension.[11]

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[9] See ss. 55.1(1) and (2) of the *Canada Pension Plan* and s. 78.1(1) of the *Canada Pension Plan Regulations*. See also the persuasive reasoning of the Pension Appeals Board in *Ministry of Social Development v. Holmes*, (2005) CP 23407.
[10] See, for example, paragraph 17 of the Minister's submissions at GD5-8. A similar error appears in paragraph 25 of the Minister's submissions at GD5-10 to GD5-11.
[11] See s. 55.2(8)(c) of the *Canada Pension Plan*.

[27] A similar situation arose for 1996 and 1997. The Appellant had no earnings or CPP contributions in those years. The Added Party had some minimal contributions, as her earnings were just barely above the Year's Basic Exemption.[12] However, a DUPE could not apply to those contributions. This is because the Minister cannot perform a DUPE when the total annual earnings of the parties are not more than twice the Year's Basic Exemption.[13] This is why 1996 and 1997 were excluded from the DUPE.

[28] More generally, the nature of the DUPE is that some years will be favourable to one party but not to the other. In this case, it appears that most of the DUPE years are favourable to the Added Party. However, the DUPE in 1998, 2000, 2002, 2003, 2004, and 2006 was favourable to the Appellant. The biggest impact on the Appellant appears to be his decision to receive a CPP retirement pension at age 63, as that removed some of the Added Party's best-earning years from the DUPE process.[14] In any case, no DUPE could be performed for any period after which the Appellant reached age 70.[15]

[29] Finally, the Appellant wonders why the DUPE sometimes operates by calendar year and sometimes by calendar month. This is a legislative decision. I note that the Tribunal was created by statute. The Tribunal can only apply the legislation as drafted, and it can only grant remedies that it has the specific statutory authority to grant.[16] I cannot overrule the statute just because it may impact the parties differently.

Conclusion

[30] I find that the Minister performed the DUPE correctly for the Appellant and the Added Party.

[31] This means the appeal is dismissed.

Pierre Vanderhout

Member, General Division – Income Security Section

[12] GD2-18 and GD10-2
[13] See s. 55.2(8)(a) of the *Canada Pension Plan*.
[14] GD2-18 and GD10-2
[15] See s. 55.2(8)(b) of the *Canada Pension Plan*.
[16] See *R. v. Conway*, 2010 SCC 22, at paragraph 82.