Citation: *LB v Minister of Employment and Social Development and EB*, 2023 SST 292

Social Security Tribunal of Canada
General Division – Income Security Section

Decision

Appellant:	L. B.
Respondent:	Minister of Employment and Social Development
Added Party:	E. B.
Decision under appeal:	Minister of Employment and Social Development reconsideration decision dated July 30, 2021 (issued by Service Canada)

Tribunal member:	Pierre Vanderhout
Type of hearing:	Teleconference
Hearing date:	February 8, 2023
Hearing participants:	Appellant Respondent's representative Added Party
Decision date:	March 20, 2023
File number:	GP-21-2205

Decision

[1] The appeal is dismissed.

[2] The Appellant, L. B., isn't eligible for a decrease in the period covered by the Canada Pension Plan ("CPP") division of unadjusted pensionable earnings ("DUPE", or "credit split"). This decision explains why I am dismissing the appeal.

Overview

[3] The Appellant and the Added Party are both 67 years old. They married on July 27, 1984.[1] They have since separated. However, for financial reasons, they continue to live in separate parts of the same house in X, Ontario (the "House"). They are not yet divorced, although there appear to be no prospects for reconciliation. They remain legally married so the Added Party can access benefits available through the Appellant's employer.

[4] The Added Party applied for a CPP credit split in August 2020. This was several years after the breakdown of her marriage to the Appellant.[2] The Minister granted a CPP credit split for the period from January 1984 to December 2015. This credit split was based on a July 1984 marriage and a January 2016 separation. The Minister upheld this decision after the Appellant asked the Minister to reconsider it.[3]

[5] The Appellant then appealed the Minister's decision to the Tribunal.

[6] The Appellant says he and the Added Party separated before January 2016. When he first appealed to the Tribunal, he said the separation was in 2009.[4] This was when they "separated" their joint bank account.[5] Soon after, he began to suggest that the separation was in 2005. This was when he and the Added Party began to use

[1] See GD2-42 and GD2-44.
[2] See GD2-36.
[3] See GD2-9.
[4] See GD1-3.
[5] See GD3-1.

separate bedrooms.[6] He said he only agreed to the January 2016 separation date for their family law proceedings as a "compromise". However, he said the compromise was based on bad information and a mistake by his lawyer.[7] He describes this as an "artificial" date. He also said he agreed to the January 2016 separation date out of fear and confusion. He later said he agreed to the 2016 separation date due to illness.

[7] The Minister says the Appellant and the Added Party separated in January 2016. The Minister added that the Appellant did not prove that the separation began in 2009.

[8] The Added Party says the Appellant initiated the separation in February 2016, but she agreed with the Appellant's request to set the date as January 1, 2016. This was the date set out in their signed separation documents. While she says the marriage was characterized by various forms of abuse by the Appellant, she sees a difference between a bad marriage and a separation. She also gave evidence that the marriage continued until 2016. This included signing joint wills in July 2014 and filing tax returns for 2015 that showed their marital status as "married". Finally, she says the Appellant continues to offer different dates for their separation but has not provided any tangible evidence in support of those dates.

What the Appellant must prove

[9] There is no debate that the Appellant and the Added Party married on July 27, 1984. Nor do I see any debate that they are now living separate and apart, although they both continue to live in the House. The only issue is when they started living separate and apart.

[10] For the Appellant to succeed, he must prove he and the Added Party started living separate and apart before January 1, 2016.[8]

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[6] See GD3-1, GD4-3, and GD5-1.
[7] See GD3-1 and GD8-3.
[8] See s. 55.1 of the *Canada Pension Plan*.

Matters I have to consider first

I accepted the documents sent in after the hearing

[11] At the hearing, I asked the Added Party whether the three unsigned letters of support from September 2022 were ever signed.[9] She said she had signed copies of those letters in front of her. She then filed the signed copies right after the hearing.[10] I gave both the Minister and the Appellant until March 3, 2023, to make any comments on the signed letters. Neither party responded.

[12] I decided to allow the signed letters into evidence. The substance of the letters had already been filed. The other parties would not have been prejudiced. As the letters had already been signed, the delay was minimal. The other parties were also aware that the signed letters might be filed, as they were both at the hearing. They did not respond to the signed letters, despite having time to do so.

Reasons for my decision

[13] A separated spouse can apply for and obtain a CPP credit split, if the spouses have been living separate and apart for one year or more.[11]

[14] The Added Party applied for the CPP credit split in August 2020. This was more than four years after the latest possible separation date. This means the only question in this appeal is the exact period covered by the credit split. As the marriage date is not disputed, I must only determine when the spouses started living separate and apart.

When did the Appellant and the Added Party start living separate and apart?

[15] I find that the Appellant and the Added Party started living separate and apart in January 2016.

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[9] These letters appear at GD6-4 to GD6-6.
[10] See GD12-2 to GD12-4.
[11] See s. 55.1(1)(b) of the *Canada Pension Plan*.

[16] The parties once agreed on their "legal" date of separation in their family law proceedings. In March 2019, the Added Party signed a document for the Appellant's workplace benefit program that confirmed the date of separation as January 1, 2016.[12] At the hearing, the Appellant admitted that he also signed this document, but didn't know what he was signing and "didn't have all the information". Other documents affirming a January 2016 separation date may have been signed too. The Appellant referred to signing such a document in 2020.[13]

[17] Later in 2020, however, the Appellant said he agreed to the 2016 separation date "out of fear and confusion".[14] In 2022, he said he agreed to the 2016 date because he was "ill and unable to think straight."[15] However, in 2022 he also said he agreed to the 2016 separation date as a compromise.[16] At the hearing, he said his lawyer refused to revisit the separation date issue.

[18] The Appellant has said he agreed to the January 2016 separation because he thought the Added Party had secretly accumulated assets during the marriage. He pointed to a letter addressed to the Added Party that he "accidentally" opened shortly before 2016, in which she appeared to have quietly amassed hundreds of thousands of dollars in investments (the "Financial Letter"). However, as it turned out, this was merely a solicitation that gave examples of the wealth the Added Party could one day attain. The Appellant did not realize this until several years later.[17] Had the Financial Letter been genuine, he likely would have benefited financially from a separation date after 2005 or 2009.[18]

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[12] See GD2-18 and GD2-19.
[13] The Appellant said this at the hearing. See also GD2-8, which appears to show that the Appellant agreed to the January 2016 date.
[14] See GD2-33.
[15] See GD8-3.
[16] See GD3-1.
[17] At the hearing, the Appellant said the Added Party had concealed information about this for several years. See also GD1-3, GD3-1 and GD8-3. The Added Party responded that the document was clearly for illustrative purposes only. In any case, she says he shouldn't have taken it as it was addressed to her. She said she couldn't clarify it earlier because it wasn't disclosed to her for many years. See GD7-1.
[18] The Added Party notes this at GD7-1.

[19] Later in 2019, the Appellant's family lawyer acknowledged the January 2016 separation date, but said it was "artificial" and the Appellant only agreed "in order to move the matter along".[19]

[20] The Added Party has been more consistent with her position on the separation date. She said the Appellant started the legal separation process in February 2016. This is borne out by a February 29, 2016, letter from the Appellant's family lawyer. The Added Party said she accepted the January 1, 2016, date as a concession to the Appellant.[20] At another time, however, the Added Party suggested that she received separation papers from the Appellant's lawyer on January 1, 2016.[21]

[21] In addition to the March 2019 document, the Added Party affirmed the January 2016 separation date in a declaration dated August 2020. She said they then resided separately, but at the same address.[22]

[22] I will now look at some other factors that could affect the separation date.

– **Other factors that could affect the separation date**

[23] It is unusual to see such different views on when the separation actually took place. As noted, the Appellant has already given at least two new dates (2005 and 2009), after previously agreeing that it was in 2016. He associates the two earlier dates with notable incidents affecting the marriage.

[24] I accept that there was an incident in 2005. The Appellant said he was "forcibly removed" from the marital bedroom by the Added Party and her now-deceased sister. He also said the police were called in. He said he slept in his own bedroom from that time forward.[23] The Added Party said the Appellant chose to sleep in their son's former room because he wanted to sleep alone. However, she did not oppose this as it meant

[19] See GD3-2.
[20] This letter is at GD2-31.
[21] See GD2-38 and GD2-40.
[22] See GD2-43. Although this declaration was not made before a Commissioner of Oaths, this was in the middle of the COVID-19 pandemic before vaccines were available. The Added Party said she was told that declaring the form in front of a Commissioner was not necessary. See also GD2-41.
[23] The Appellant described these events at the hearing.

she "finally had some peaceful nights free of verbal abuse."[24] In any case, I find that the parties began using separate bedrooms around this time.

[25] I also accept that there was another incident in either 2005 or 2009. The Appellant said he dissolved their joint bank account in 2009. He said he also started paying the mortgage by himself at that time.[25]

[26] At the hearing, the Added Party said the Appellant took away her chequing capacity in 2005, but said she was stuck with the bills. She said he had previously agreed to support her financially but would "cut her off" if she ever worked outside the home. She said he did this in 2005 when she started working again. She has said they no longer have shared accounts "due to his financial neglect".[26] She said they went bankrupt in 2007.

[27] After the Added Party's evidence that the financial changes took place in 2005, the Appellant then adopted the 2005 date (instead of 2009) for those changes.

[28] The Appellant suggested that the Added Party's lawyer sent him a letter about a separation in 2013.[27] In response, the Added Party said the Appellant's violence against her prompted the letter. She said the letter warned the Appellant to fix his behaviour or she would pursue a separation.[28] However, the alleged 2013 request for a separation contradicts his position that a separation took place in 2005 or 2009.[29]

[29] There also appears to have been a change, if only temporary, in 2014. At that time, the Added Party was physically limited and vulnerable due to knee replacement surgery. The Appellant helped her out during this time and a sexual relationship resumed. They had wills prepared by Mr. Maggio (lawyer), in which they named each

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[24] See GD7-2.
[25] The Appellant said this at the hearing. See also GD4-3.
[26] See GD2-14.
[27] See GD3-1 and GD4-3. He also said this at the hearing.
[28] The Added Party said this at the hearing. See also GD7-2.
[29] See GD7-2.

other as beneficiaries.[30] The Appellant does not dispute this. However, he says he can name any beneficiary in a will. He said he could even name an enemy if he wanted.[31]

[30] The parties also filed income tax returns giving their marital status as "married" in 2014 and 2015.[32] The Added Party filed income tax returns with a marital status of "separated" in 2016.[33]

[31] At the hearing, I asked the Appellant how he and the Added Party were separated before 2016. He set out several reasons:

- He couldn't cross the internal house "boundary" from 2005 onward.
- He didn't do any housework on her side of the House, although he cleaned the kitchen.
- She trained her dog not to like him.
- They ignored each other.
- The kids were brainwashed.
- In 2012, his friend asked her at a concert if she had a boyfriend and she said "possibly".
- They went to that concert in separate cars.
- They didn't intentionally attend social activities together, although they might have attended a wedding or gone to church.
- He didn't go out and buy food for her.
- They only ate meals together when other family members were present.
- Any communication between them was "on the run" and depended on her mood.
- The sexual relationship that resumed in 2014 ended again "once the drugs wore off."

[32] At the hearing, I asked the Added Party how she and the Appellant were not separated before 2016. She set out several reasons:

- She felt they were married until 2016, even though it was a bad marriage
- She wasn't dating anyone else.
- They went to marriage counselling, and she kept going even after he stopped.
- She was spiritually married and never considered pursuing any other relationships besides friendship.
- They attended some social activities together, when necessary for the children.
- They prepared meals for each other in 2014, and occasionally in 2015.
- They resumed a sexual relationship for a time starting in 2014.

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[30] The Added Party described these events at the hearing. See also GD6-3.
[31] See GD8-3.
[32] The Appellant's tax returns are at GD2-20 (2014) and GD2-21 (2015). The Added Party's tax assessment is at GD27 (2015).
[33] The Added Party's tax assessment is at GD2-25 (2016).

- She was misled by her prior beliefs; she now believes that a good God doesn't expect her to stay in a bad marriage.

[33] The Added Party admitted that they did not often eat meals together. They rarely attended social activities that didn't involve the children. She also admitted that they would both clean the "neutral zone" of the House (the kitchen and dining area). She said their conversations would often lead to cursing, so she would often avoid them to "keep the peace."

[34] The Added Party made many references to spousal abuse. Before the hearing, the Added Party said her marriage had been a very challenging and unhappy relationship with physical, emotional, and verbal abuse.[34]

[35] At the hearing, the Added Party said she was co-dependent and suffered from PTSD. She said the Appellant abused her financially, physically, and verbally, and she should have left the marriage. She said a healthy person would have left. She said she didn't stand up for herself or the children. She was afraid that the children would be in danger if she left. She also said she had spiritual reasons for staying in the marriage.

[36] A September 2022 letter from B. T. affirmed that the Appellant and the Added Party attended a "marriage weekend" through their mutual church in 2007. B. T. said there had been physical, financial, emotional, and mental abuse in the marriage, but the Added Party still considered herself married until receiving the February 2016 letter from the Appellant's lawyer. Before then, the Added Party would ask B. T. for prayers and advice about the marriage.[35]

[37] Pastor A. B. and Pastor M. B. wrote similar letters in September 2022. The pastors knew the parties through their church. I place much less weight on these letters because they were written after B. T.'s letter and emphasize many of the same points. Their format is also quite similar. Nonetheless, the B. letters are consistent with an ongoing intention by the Added Party to remain in the marriage.[36]

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[34] See GD7-1.
[35] See GD12-2.
[36] See GD12-3 and GD12-4.

[38] The Appellant admitted attending at least one "marriage weekend" with the Added Party. He also said he took an anger management course. He said he learned that it was okay to express himself as long as it was non-violent.[37]

– **Interpreting the evidence and the law**

[39] I accept that the marriage between the Appellant and the Added Party was a poor one. The Appellant didn't significantly contradict the Added Party's account of it. However, when deciding the separation date, I can't look only at the marriage quality. To assist with this, I have looked at previous decisions that considered similar issues.

[40] While sharing a home is a factor to consider, it does not decide the case. Parties may not be living separate and apart even though they live in different cities.[38] However, parties can also live separate and apart (with the intent to do so), despite living under the same roof.[39] In this case, both parties accept that is what happened in the House from 2016 forward. The only question is whether it started earlier.

[41] In determining whether parties have separated, courts have considered various factors. Such factors have included occupying separate bedrooms, absence of sexual relations, little (if any) communication between the spouses, performing no domestic services for each other, eating separately, and having no social activities together.[40]

[42] However, the courts have also confirmed that all relationships are different. Some or all of the criteria may have existed within the relationship in a state of normalcy. In other words, the criteria may very well be the usual pattern of married life for the parties. Thus, to determine what would constitute a departure, I must decide what was "normal".[41]

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[37] See GD8-2.
[38] See *Schlaepfer v. MHRD*, (2003) CP 12615. This is a Pension Appeals Board decision. Such decisions are not binding but can be persuasive.
[39] See *R.H. v. MHRSD*, (2008) CP 25329, and *MEI v. Blais*, (1996) CP 4003. These are both Pension Appeals Board decisions. Such decisions are not binding but can be persuasive.
[40] See *R.H. v. MHRSD*, *ibid*.
[41] *Taylor v. Taylor*, (1999) 5 R.F.L. (5th) 162 (Ont. S.C.), at para. 13. This decision is still cited today. See, for example, *Taylor v. Oliver*, 2022 ONSC 7186 (Ont. S.C.J.). These Ontario decisions are not binding, but their reasoning is persuasive.

[43] In this case, I find that the parties had a marriage characterized by traditional religious beliefs and the Appellant's control. The Added Party referred to her religious faith keeping her in the marriage. Evidence of this included the attempts at church marriage counselling, her oral evidence about her beliefs, and the obvious importance of religion in her life. Letters of support from two pastors and a friend from her church showed that importance.[42] It was even evident in her stationery, which has traditional religious images.[43]

[44] The financial discrepancies also reinforce that this was a controlling marriage. The Appellant earned an annual salary of about $100,000.00 and had a benefits package through work, while the Added Party worked and earned far less.[44] Even before the alleged 2005 separation, he appears to have dictated that he'd limit his financial support of the Added Party if she worked outside the home.

[45] Further, the Added Party's allegations of abuse are not seriously disputed. I note that the Appellant engaged in an anger management program.

[46] In this context, a lot of the conduct in this marriage could be considered "normal" even though it would likely constitute separation in a more equitable relationship.

[47] Given the control wielded by the Appellant, it is significant that he took no steps to pursue separation until he told his lawyer to do so in early 2016.

[48] I also find it significant that the Added Party mooted a potential separation in 2013. This strongly suggests that the parties had not yet separated. Nor do I see evidence that the Appellant agreed to a separation then. In fact, the next year saw the physical aspect of their relationship intensify. The Appellant also took a more active role in caring for the Added Party.

[49] Furthermore, in the context of the financial control exerted by the Appellant, I find his income tax declarations in 2014 and 2015 to be significant. In both years, he

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[42] See GD6-4 to GD6-6.
[43] See GD6-2 and GD7-2
[44] See GD2-18, GD2-19, and GD7-1 to GD7-2.

declared that his marital status was "married". "Separated" was an option on the tax form, but he didn't choose it.[45] The Added Party selected the same "married" status in 2015. She selected "separated" in 2016.[46]

[50] On a balance of probabilities, I find that the parties separated in January 2016. I make this finding because, until then, their relationship continued in a way that was "normal" for them. They also represented themselves as fully married to friends, family, and government authorities.

[51] This finding disposes of the appeal. I will now briefly look at some other concerns that arose.

– Other concerns

[52] The Appellant placed a lot of weight on the alleged misinformation contained in the Financial Letter. He said the letter vastly overstated the Added Party's real wealth. In essence, he says he agreed with a 2016 separation because he thought the Added Party had more money than she let on. In fact, he still suspects she has money hidden somewhere and has earned great profits from it. He said he is still investigating this.[47]

[53] I have difficulty with this position. It suggests that the Appellant is simply seeking the "best" separation date. He prefers an early date if he has more assets than the Added Party, and a later date if she turns out to have more assets. This concern was reinforced during the hearing. The Appellant quickly adopted the 2005 date (instead of the 2009 date to which he had just attested) for the dissolution of the chequing account and the changes to bill-paying arrangements. He only did this after the Added Party suggested that the financial changes happened in 2005.

[54] The Appellant's reasoning for agreeing to the 2016 separation date has also varied. He said it was originally an "artificial date" and a "compromise", albeit based on misinformation and his lawyer's error. He then said he agreed to the date anyway out of

[45] See GD2-20 and GD2-21.
[46] See GD2-27 (2015) and GD2-25 (2016).
[47] See GD8-3.

"fear and confusion", but later said being "ill and unable to think straight" was the reason. These submissions do not persuade me. The lack of consistency is again problematic. The Added Party's evidence has been much more consistent.

Conclusion

[55] I find that the Appellant isn't eligible for a decrease in the period covered by the CPP credit split. The Appellant and the Added Party began living separate and apart in January 2016.

[56] This means the appeal is dismissed.

Pierre Vanderhout
Member, General Division – Income Security Section