



Citation: *AB v Minister of Employment and Social Development and MB*, 2020 SST 1087

Tribunal File Number: GP-19-1272

BETWEEN:

A. B.

Appellant (Claimant)

and

Minister of Employment and Social Development

Minister

and

M. B.

Added Party

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by: George Tsakalis

Claimant represented by: Trevor Black

Minister represented by: Peter Byskosz

Videoconference hearing on: October 16, 2020

Date of decision: November 16, 2020

DECISION

[1] I am partially allowing the appeal.

[2] The Division of Unadjusted Pensionable Earnings (DUPE) will apply from 1977 to 1984 and 2006 to 2010. This means that the Claimant and Added Party's pension credits will be divided equally between them for those years.

OVERVIEW

[3] The Added Party, M. B. applied for a DUPE on August 23, 2018. She filed documents that showed that she and the Claimant, A. B., were married on two occasions. She stated in her DUPE application that the first marriage lasted from 1977 until they separated in 1998. The second marriage lasted from November 17, 2006 to April 1, 2012.

[4] The Minister of Employment and Social Development (the Minister) awarded the Added Party a DUPE from 1977 to 1997 and from 2006 to 2011.

[5] The Claimant appealed the Minister's decision to the General Division of the Social Security Tribunal of Canada (the Tribunal).

[6] The Claimant submitted documents that showed that he did not cohabit with the Added Party from 1977 to 1998 and from 2006 to 2012.

[7] The Minister changed its position after reviewing the Claimant's documents. The Minister accepted that the DUPE between the Claimant and Added Party should include only the years from 1980 to 1984 and 2006 to 2010.¹

[8] We held a prehearing conference on September 24, 2020. The Claimant and his representative confirmed that their position was that the Claimant and Added Party cohabited 1980 to 1984 and that the second period of cohabitation began in 2009.

[9] The Added Party did not attend the prehearing conference or the hearing.

¹ See GD7-4

[10] The Claimant gave evidence that he lived with the Added Party before 1980. His son, who acted as his legal representative, confirmed that the Claimant and Added Party were together from 1977 to 1980.²

[11] The issue that I have to decide is when the Claimant and Added Party cohabited for the purposes of calculating the DUPE. The Claimant also requested that I award him costs for the Minister's conduct in the handling of this appeal.

PRELIMINARY MATTERS

[12] The Added Party did not attend the prehearing conference or the hearing. If a party fails to attend a hearing, I may proceed with a decision in a party's absence if I am satisfied that the party received notice of the hearing.³

[13] The Tribunal records show that the Added Party received a copy of the Notice of Hearing for both the prehearing and hearing. The Tribunal mailed the notices to her last known address. The Tribunal asked the Added Party to provide a telephone number where she could be reached, but she never provided one.

[14] I am satisfied that the Added Party received the notices of hearing. She never contacted the Tribunal to explain why she failed to attend the prehearing and hearing.

[15] I am prepared to make a decision based on the documents and submissions of all the parties, as well as the Claimant's testimony.

ISSUE

[16] When did the Claimant and Added Party cohabit for the purposes of calculating the DUPE?

[17] Does the Tribunal have jurisdiction to award the Claimant damages and costs related to the Minister's conduct in this appeal?

² See GD8-3

³ Subsection 12(1) *Social Security Tribunal Regulations*

ANALYSIS

[18] The *Canada Pension Plan* (CPP) provides for a DUPE for the years during which separated married or former common-law partners cohabited.⁴

[19] A DUPE involves an equal division of pension credits between two parties during their cohabitation period.⁵

[20] The CPP Regulations outlines how to split pension credits during the cohabitation period referred to in the CPP.⁶

[21] The CPP Regulations say that the cohabitation period starts with the first month of the year in which the parties marriage was solemnized or in which they started cohabiting in a conjugal relationship.⁷

[22] The CPP Regulations say that the parties are considered to have not cohabited at any time during the year in which they were divorced, or their marriage annulled or in which they started to live separate and apart.⁸

THE DUPE WILL APPLY FOR THE YEARS 1977 TO 1984 AND 2006 TO 2010

[23] I find that the Claimant and Added Party got married in 1977 and separated in 1985. They got married a second time in 2006 and separated in 2011. This means that the DUPE or pension credit split in this case will apply for the years 1977 to 1984 and 2006 to 2010.

Comments regarding evidentiary findings

[24] The Claimant and Added Party filed documents. The Claimant gave evidence at the hearing. The Added Party does not appear to have participated in this proceeding after the

⁴ Subsection 55.1(4) *Canada Pension Plan*

⁵ Subsection 55.2(5) *Canada Pension Plan*

⁶ Subsection 78.1(1) *Canada Pension Plan Regulations*

⁷ See paragraph 78.1(1)(a) *Canada Pension Plan Regulations*

⁸ See paragraph 78.1(1)(b) *Canada Pension Plan Regulations*

Claimant filed his appeal with the Tribunal. The Minister sent a representative to the hearing and filed submissions.

[25] The law does not require me to refer to each submitted document. I am not required to refer to all the hearing evidence or answer every submission. The law requires me to identify the path that I made in reaching my decision.⁹

[26] This case has some factual complexity because we are dealing with events that ran from 1977 to 2012. To try to make my decision clearer, I will subdivide my findings into two periods:

- a) November 1977 to October 1998. This period includes the date the Claimant and Added Party first became married to the date their first divorce came into effect¹⁰; and
- b) November 2006 to May 2012. This period includes the date of the Claimant and Added Party's second marriage and the date their second divorce came into effect.¹¹

November 1977 to September 1998

[27] I find that the Claimant and Added Party cohabited from 1977 to 1985. The Claimant and Added Party got married in 1977 and the CPP Regulations require that the year of marriage be included in the DUPE. I find that the parties separated in 1985. Under the CPP Regulations, the year of separation (1985) is not included in the DUPE. This means that the DUPE will apply for the years 1977 to 1984.

[28] The Added Party submitted documents in support of her declaration that she was married to the Claimant from 1977 to 1998. These documents included:

- A marriage certificate that showed that she and the Claimant got married in November 1977¹²;

⁹ See *Connolly v. Canada (Attorney General)*, 2014 FCA 294

¹⁰ See GD2-28

¹¹ See GD2-10

¹² See GD2-25

- Joint declarations with the Canada Revenue Agency (CRA) regarding a joint election by her and the Claimant to split pension income from 1977 to 1987¹³;
- A certificate of divorce showing that the divorce between the Claimant and Added Party took effect on October 10, 1998.¹⁴

[29] However, I find that the Claimant submitted documents that showed that he and the Added Party did not cohabit from 1977 to 1998.

[30] The Claimant swore an affidavit.¹⁵ He stated that he and the Added Party separated in February 1985. He moved out of the matrimonial home to another address. He attached a driver's licence address history that showed that he moved in February 1985.¹⁶

[31] The Claimant started a relationship with another woman, L.W. in 1986. He had a child with L.W. in 1990.¹⁷ He lived in a common-law relationship with L.W. until 1996.

[32] The Claimant met D.P. in or around 1996. The Claimant filed a document that showed he married D.P. on October 15, 1998.¹⁸

[33] The Minister changed its position about the first cohabitation period after reviewing the Claimant's affidavit. It took the position that the DUPE should only be applied from 1980 to 1984 and not from 1977 to 1997.¹⁹

[34] The Claimant confirmed at the hearing that he married the Claimant in 1977. But they had only lived together for one year before 1980. The Minister's representative stated that one year should be added to the cohabitation period in 1978.

¹³ See GD2-106-132

¹⁴ See GD2-28

¹⁵ See GD5

¹⁶ See GD5-7

¹⁷ See GD5-14. The Claimant filed a Statement of Live Birth that identified him as the father of the child and L.W. as the mother.

¹⁸ See GD5-18

¹⁹ See GD7-4

[35] After the hearing, the Claimant's son provided submissions to the Tribunal. He confirmed that the Claimant and Added Party were together from 1977 to 1980.²⁰

[36] After reviewing the evidence, I find that the Claimant and Added Party were not married from 1977 to 1998, as stated by the Added Party in her DUPE application.²¹ The Claimant produced documentation to show that he cohabited with the Added Party only from 1977 to 1985. The Claimant provided his driver's licence address history that showed that he moved in February 1985. He provided documentation to show that he had a child with L.W. in 1990 and married another woman in 1998. I accept the Claimant's evidence that he formalized the divorce with the Added Party in 1998, so that could legally marry D.P. I also accept the Claimant's hearing evidence that he lived separate and apart from the Added Party after 1985 and had no real contact with her. The Added Party did not file documentary evidence or give testimony that contradicted the Claimant's affidavit and his hearing evidence. I also do not give weight to the joint declarations with the CRA regarding a joint election to split pension income from 1977 to 1987. I do not see the Claimant's signature on these CRA documents. I also note that the years on these declarations have been crossed out with new years inserted and the Added Party's signature line on these documents is dated July 18, 2018, well after she separated from the Claimant.

November 2006 to May 2012

[37] I find that the Claimant and Added Party cohabited from 2006 to 2011 during their second cohabitation period. This means that the DUPE will apply for the years 2006 to 2010. The CPP Regulations require that the year of marriage (2006) be included in the DUPE. I find that the parties separated in 2011. Under the CPP Regulations, the year of separation (2011) is not included in the DUPE. This means that the DUPE will apply for the years 2006 to 2010.

[38] The Added Party stated in her DUPE application that she married the Claimant for a second time in November 2006 and they lived together until April 2012. Their marriage ended in May 2012.²²

²⁰ See GD13-2-3

²¹ See GD2-86

²² See GD2-86

[39] The Added Party submitted documents in support of her position that she was married to and lived with the Claimant from 2006 to 2012. These documents included:

- A marriage certificate that showed she married the Claimant on November 17, 2006²³;
- Two statutory declarations signed by the Added Party, where she stated that she and the Claimant separated on April 16, 2012²⁴;
- Joint declarations with the Canada Revenue Agency (CRA) regarding a joint election by her and the Claimant to split pension income from 2006 to 2012.²⁵

[40] The Claimant swore in his affidavit that he had to leave Canada for Jamaica in 1999 at the request of Immigration Canada. He met the Added Party in Jamaica in or around 2005. They began a relationship and they remarried in Jamaica in November 2006. However, the Claimant and the Added Party did not live together. He could not return to Canada until 2009, after he received a pardon. He lived with Claimant after returning to Canada in 2009. But they separated in April 2011 and they divorced in May 2012.

[41] The Claimant and his son argued that the second cohabitation period did not begin in 2006 when he married the Added Party for a second. They argued that it began in 2009, when he was finally able to live with the Added Party in Canada.

[42] The Claimant testified that he did not see much of the Added Party from 2006 to 2009. He lived in Jamaica and the Added Party lived in Canada. They spoke on the telephone. She visited him in Jamaica on several occasions from 2006 to 2009. She would stay at her father's home in Jamaica, while he lived with his brother. She generally spent just a few days in Jamaica when she visited from 2006 to 2009. Her longest visit lasted a few weeks.

²³ See GD2-32

²⁴ See GD2-70 and 71

²⁵ See GD2-106-132

[43] The Claimant testified that he did not share a life with the Added Party from 2006 to 2009. They did not provide financial support to each other.

[44] I find that the Claimant and Added Party's second cohabitation period started in 2006. The CPP Regulations state that a cohabitation period begins when the marriage is solemnized.²⁶ A marriage certificate shows that the Claimant and Added Party solemnized their marriage in 2006.²⁷ I must therefore include 2006 in the second cohabitation period.

[45] The Claimant argued that the years 2006 to 2008 should not be included in the second cohabitation period because he did not live with the Added Party. The Claimant could not live with the Added Party in Canada from 2006 to 2009 for reasons beyond his control. However, the CPP Regulations recognizes that couples can be involuntary separated, but these periods do mean that cohabitation is interrupted.²⁸ I am satisfied that the Claimant cohabited with the Added Party from 2006 to 2009. Many married couples do not live in the same countries and the Supreme Court of Canada has recognized that couples can cohabit with one another even when they do not share a residence.²⁹

[46] The Added Party stated that the second cohabitation period ended in 2012. But I accept that it ended in 2011. The Tribunal file contains a divorce order that the divorce became final in May 2012. Parties generally have to wait for a certain period from the date of separation to divorce. If the Claimant and Added Party finalized their divorce in 2012, it would make sense that they separated in 2011.

[47] I also do not give weight to the joint declarations with the CRA regarding a joint election by the Added Party and the Claimant to split pension income from 2006 to 2012. I do not take these documents to show that the Added Party and Claimant separated in 2012. As stated above, I do not see the Claimant's signature on these documents. Years have been crossed out of these documents and new years have been inserted, and the Added Party's signature line on these CRA documents is dated July 18, 2018, well after she separated from the Claimant.

²⁶ Paragraph 78.1(1)(a) *CPP Regulations*

²⁷ See GD2-32

²⁸ Subsection 78.3 *CPP Regulations*

²⁹ *Hodge v. Canada (Minister of Human Resources Development)*, 2004 SCC 65

[48] The Claimant testified that he finds himself in difficult financial circumstances. He did not believe that the DUPE should apply before 2009. The Claimant is anxious about the DUPE in this appeal because he has other relationships and dependants. But I note that my finding that the DUPE also applied from 2006 to 2008 does not affect the Claimant financially because he had no unadjusted pensionable earnings in 2006, 2007, and 2008.³⁰ There were no pension credits available to split in those years.

I CANNOT AWARD THE CLAIMANT DAMAGES AND COSTS RELATED TO THE MINISTER'S CONDUCT IN THIS APPEAL

[49] The Tribunal is created by law. My jurisdiction is limited to the powers granted by the Tribunal's enabling legislation.³¹ The Tribunal's enabling legislation gives me jurisdiction to decide whether a party is eligible for a DUPE.³² It does not give me jurisdiction to award the Claimant damages and costs.

[50] The Claimant and his son are upset about the Minister's conduct in this appeal. The Claimant does not believe that the Minister gave him an appropriate opportunity to respond to the Added Party's DUPE application. The Minister's decision to award the Added Party a DUPE from 1977 to 1997 and 2006 to 2011 caused him significant stress. It affected his CPP retirement pension amount. It also upset him that the Minister awarded the Added Party a DUPE for periods when he had common-law relationships and was married to other women.

[51] The Claimant and his son were also not pleased with the Minister by its delay in changing its position on when the DUPE should apply. The Minister did not change its position until after the Claimant launched his appeal to the Tribunal.

[52] The Claimant is asking for costs in the amount of \$16,238.00. This includes compensation for the undue hardship that he suffered during the entire process. He is asking for the costs of having to retain a lawyer who helped him with his affidavit, as well as expenses, and his son asked for compensation for time spent on this matter.³³

³⁰ See GD2-4

³¹ *R. v. Conway*, 2010 SCC 22, *Canada (Minister of Social Development) v. Kendall* (June 7, 2004), CP 21960 (PAB) and *S.S. v. Minister of Employment and Social Development*, 2018 SST 705

³² See paragraph 64(2)(b) *Department of Employment and Social Development Act*

³³ See GD13-6

[53] I sympathize with anybody who has to go through the stress of an appeal. The Claimant and his son displayed tremendous courtesy and professionalism during the prehearing and the hearing. But I do not have the power to award them costs.

CONCLUSION

[54] I am partially allowing this appeal.

[55] The DUPE will apply for the periods 1977 to 1984 and 2006 to 2010.

George Tsakalis
Member, General Division - Income Security