



Citation: *GH v Minister of Employment and Social Development and DA*, 2023 SST 224

**Social Security Tribunal of Canada
General Division – Income Security Section**

Decision

Appellant: G. H.

Respondent: Minister of Employment and Social Development
Respondent's representative: Anita Hoffman

Added Party: D. A.

Decision under appeal: Minister of Employment and Social Development
reconsideration decision dated March 8, 2022 (issued by
Service Canada)

Tribunal member: Shannon Russell

Type of hearing: Teleconference

Hearing date: January 19, 2023

Hearing participants: Appellant
Respondent's representative

Decision date: March 6, 2023

File number: GP-22-548

Decision

[1] The appeal is dismissed.

[2] The Appellant, G. H., wants to cancel a division of unadjusted pensionable earnings (sometimes called a DUPE, division of pension credits, or credit split). I can't give the Appellant what he wants. This decision explains why I am dismissing the appeal.

Overview

[3] The Appellant and the Added Party were married in June 1964.¹ They separated in February 2010 and divorced in May 2011.²

[4] For many years, the Appellant and the Added Party had their CPP retirement pensions shared. That stopped in November 2020. When the pension sharing stopped, the Appellant tried to restore the equalization by applying for a credit split. He says he was told to do this by Service Canada.

[5] The Minister received the Appellant's application for the credit split in January 2021. In that application, the Appellant reported that he and the Added Party lived together from June 20, 1964, to February 8, 2010.³

[6] The Minister confirmed the period of cohabitation with the Added Party, and then approved the application.⁴

[7] This is where things get a bit messy.

[8] When the Minister approves an application for a credit split, the Minister is required to send the parties a Notification of Division. This document is to include several pieces of key information about the division, including a statement of what each

¹ A copy of the marriage certificate is at page GD2-15.

² The Certificate of Divorce is at page GD2-45.

³ The application for credit splitting is at pages GD2-34 to GD2-37.

⁴ The Added Party's statement is at page GD2-11.

party's unadjusted pensionable earnings were before the division and what each party's unadjusted pensionable earnings are after the division. The Notification is also supposed to give appeal rights.⁵

[9] The Minister did not send a Notification of Division to the parties. Instead, the Minister wrote to the Appellant on July 6, 2021, and informed him that as of February 2021, his monthly CPP retirement pension was changing from \$665.19 to \$484.03. The Minister explained that the change was due to the credit split.⁶

[10] On July 14, 2021, the Appellant wrote to the Minister and expressed his dissatisfaction with the decision. He asked for the pension sharing to be restored. He added that if that was not possible, then he wanted to receive the pension he would have been entitled to had the credit split not been done.⁷

[11] The Minister received the Appellant's letter on July 19, 2021.⁸ However, for reasons that remain unclear, the Minister did not respond to that letter.

[12] The Appellant wrote to the Minister again in February 2022, and he pointed out that he was still waiting for a reply to his letter of July 14, 2021. The Minister responded by issuing a reconsideration decision of March 8, 2022 about the division of pension credits. The Minister explained that because the Appellant and the Added Party were divorced, the credit splitting was mandatory and could not be withdrawn.⁹

[13] The Appellant appealed the Minister's reconsideration decision to the Social Security Tribunal's General Division.

[14] The Appellant says that the credit splitting should be cancelled. He says the credit splitting is not mandatory because it was not done at the direction of a court. Instead, it was done at his personal request. He also suggests that the rule that a

⁵ Subsection 55.2(10) of the *Canada Pension Plan* and subsection 46(2) of the *Canada Pension Plan Regulations*.

⁶ The Minister's letter is at pages GD2-8 to GD2-9.

⁷ The Appellant's letter is at page GD2-10.

⁸ See page GD2-10 which shows the received stamp of July 19, 2021.

⁹ The Minister's reconsideration decision of March 8, 2022 is at pages GD2-4 to GD2-5.

divorced person cannot withdraw an application should not apply to him because the *Family Law Act* of British Columbia doesn't differentiate between common-law and marriage. He also points out that the credit split has resulted in a joint loss of benefits of more than \$120.00 per month.¹⁰

[15] The Minister says that because the relationship between the Appellant and the Added Party ended in divorce, the credit splitting is mandatory, and cannot be withdrawn.

What the issues are

[16] I must decide if I have jurisdiction to make findings about the division of pension credits. If I do, then I must decide

- If the division of pension credits was mandatory; and
- If the Appellant can withdraw his application for the division of pension credits.

Matters I have to consider first

The Added Party wasn't at the hearing

[17] The Added Party didn't attend the hearing. This didn't surprise me. The Added Party had informed the Tribunal prior to the hearing that she wouldn't be at the hearing.

[18] I can go ahead with a hearing in the absence of a party, so long as I am satisfied that the party got the notice of hearing.¹¹ I am satisfied the Added Party got the notice of hearing. It was sent to her by email on December 8, 2022. When the Tribunal sends a document to a party by email, the document is deemed to have been received the next business day after it was sent.¹²

¹⁰ The Appellant says that after the pension sharing was stopped and before the credit splitting took effect, his retirement pension was \$658.60 and the Added Party's pension was \$508.21, for a total of \$1166.81. After the credit split took effect, his pension was \$484.03 and the Added Party's pension was \$556.41, for a total of \$1040.44 (page GD7-2).

¹¹ Section 12 of the *Social Security Tribunal Regulations*.

¹² Section 19 of the *Social Security Tribunal Regulations*.

I allowed the parties to submit documents after the hearing

[19] I allowed the parties to submit documents after the hearing. The documents relate to two preliminary issues I raised at the beginning of the hearing.

[20] The first issue was about a reconsideration decision that the Minister said it sent the Appellant on January 27, 2021.¹³ I explained that I was unable to find a copy of that decision in the file. The Minister's representative said she would send a copy of that decision to the Tribunal after the hearing.

[21] The second issue was about the Notification of Division that the Minister is required to send parties after an application for a division of pension credits has been approved.¹⁴ I said I did not see a copy of the Notification in the file, and I explained that I had hoped to see it because I wanted to make sure that my jurisdiction to hear and decide the Appellant's arguments is sound.

[22] The Minister's representative acknowledged during the hearing that the Minister may not have sent the Notification to the parties. She then offered to send the parties a letter identifying the date the division was done and showing what each party's earnings were before and after the division. She added that she would not send the parties a Notification because the form explains that the parties can ask for a reconsideration, and she said the reconsideration had already been done.

[23] I raised concerns about the proposed approach. I explained that it would not meet the requirements of the legislation. Upon hearing my concern, the Minister's representative said she planned on consulting another unit within her organization to see what they recommend.

[24] In light of these preliminary issues, and in particular the concerns about jurisdiction, I asked the Appellant if he wanted to continue with the hearing or if he

¹³ The Minister said this at page GD6-5, paragraph 9.

¹⁴ The requirement is set out in subsection 55.2(10) of the *Canada Pension Plan*, and subsection 46(2) of the *Canada Pension Plan Regulations*.

would prefer an adjournment. The Appellant said he wanted to continue with the hearing. This is what we did.

[25] On January 26, 2023, the Minister's representative filed documents in response to the two preliminary issues.¹⁵

[26] With respect to the first preliminary issue, the Minister said that the letter of January 27, 2021 was never sent to the Appellant. Instead, the Minister made a correction to the letter and then re-dated it for February 2, 2021.

[27] With respect to the second preliminary issue, the Minister confirmed that the Minister did not send a Notification of Division to the parties. The representative explained that this was likely due to the complexity of the situation. She also explained that instead of sending the Notifications, the Minister sent letters to each party on July 6, 2021 and those letters contained the applicable reconsideration rights. The representative also explained that she was attaching a document showing what each party's unadjusted pensionable earnings were before and after the division.

[28] The Minister's representative concluded by asking for a decision about a request for abeyance (request to put the appeal on hold).

[29] On February 1, 2023, I wrote to the parties. In my letter,

- I summarized the preliminary issues discussed during the hearing;
- I invited the Appellant and the Added Party to comment on the Minister's written response of January 26, 2023; and
- I asked the Minister's representative to clarify what she meant by her abeyance request, as no such request had been discussed during the hearing.¹⁶

[30] Neither the Appellant nor the Added Party replied to the Minister's documents.

¹⁵ The Minister's response is at pages GD11-1 to GD11-7.

¹⁶ My letter of February 1, 2023 is at pages GD12-1 to GD12-5.

[31] The Minister's representative replied to my letter of February 1, 2023 by saying she was consulting others within her organization and would contact the Tribunal once that process was done.¹⁷

[32] On February 14, 2023, the Minister filed a copy of a letter it sent to the Appellant that day.¹⁸ The letter was not accompanied by a cover letter or any submissions. I will say more about this letter shortly.

Reasons for my decision

What this appeal is not about

– This appeal is not about the pension sharing

[33] The Minister says that one of the issues in this appeal is whether the pension sharing was correctly stopped.¹⁹ This appeal is not about the pension sharing. The Minister issued a reconsideration decision about the pension sharing in February 2021. The Appellant did not appeal that decision to the Tribunal.²⁰

[34] However, insofar as it may be helpful, I will repeat what I said at the hearing – that is, that the application for pension sharing should never have been approved.

[35] Here's what happened.

[36] The Appellant and the Added Party both signed the application for the pension sharing on March 15, 2010. In that application, they declared they were married and that they were still living together and that there were no periods when they did not live together.²¹

[37] Based on that information, the Minister approved the application. What the Minister didn't know is that on the same day the parties signed the application for the

¹⁷ The Minister's reply is at GD13.

¹⁸ The letter is at pages GD15-1 to GD15-4.

¹⁹ The Minister says this at page GD6-10, paragraph 15.

²⁰ The Appellant appealed the Minister's decision to stop the pension sharing (page GD2-39). The Minister issued a reconsideration decision on February 2, 2021 (page GD2-32). The Appellant did not appeal that decision to the Tribunal.

²¹ The application is at pages GD2-12 to GD2-14.

pension sharing, they also signed a Separation Agreement in which they declared they had been living separate and apart since February 8, 2010.²²

[38] In the year 2020, the Minister learned that the Appellant and the Added Party had divorced in 2011. On November 16, 2020, the Minister sent the Appellant a letter informing him that, because of the divorce, the Minister had stopped the pension sharing.²³

[39] The Minister's letter doesn't say that it cancelled the pension sharing retroactive to April 2010 (when it began). But that's what the Minister did. This resulted in overpayments on the Appellant's account and on the Added Party's account. However, the Minister decided not to require either party to repay their overpayment to the government.²⁴

[40] All this to say that had the Minister known that the parties were separated, the Minister never would have approved the application for pension sharing. This is because pension sharing is not available to couples who have separated or divorced.²⁵

The division of pension credits

[41] The Appellant wants to cancel the division of pension credits. I can't give the Appellant what he wants. Here's why.

– I don't have jurisdiction to make findings about the credit split

[42] I don't have jurisdiction to make findings about the credit split. This is because the Minister didn't issue the parties a Notification of Division. The Notification of Division is the document that starts the appeals process for a division of pension credits.²⁶

²² The Separation Agreement is at pages GD2-18 to GD2-29.

²³ The Minister's letter is at page GD2-40.

²⁴ This is explained at page GD6-5 at paragraph 8.

²⁵ Subsection 65.1(1) of the *Canada Pension Plan*.

²⁶ Subsection 46(2) of the *Canada Pension Plan Regulations* says that a Notification of Division must include a statement of the right to request a reconsideration.

[43] The Minister's initial decision letter of July 6, 2021 is about the calculation of the Appellant's **retirement pension**. It is not a decision **about** the division of pension credits.

[44] As I said earlier, I raised my concern about my lack of jurisdiction during the hearing. The Minister's representative said she planned on consulting another unit within her organization for advice. In the end, the Minister filed a letter dated February 14, 2023 that it sent to the Appellant. This letter:

- reminds the Appellant about the letter the Minister sent him on July 6, 2021 informing him of the changes to his retirement pension.
- explains what happens to a person's pension credits when a division takes place.
- explains that the Minister is now providing the Appellant with the Notification of Division that he should have received in July 2021. The Minister enclosed the Notification of Division, which is titled *Canada Pension Plan Credit Split Approval*. The document is dated July 6, 2021.

[45] In essence, the Minister has simply back-dated a Notification of Division that should have been sent to the Appellant (and Added Party) in July 2021. I can't see how this resolves my jurisdiction issue. I can't deem the Appellant's request for reconsideration of July 14, 2021 to be in respect of a decision he didn't receive until February 2023.

– **The division of pension credits was mandatory, and the application cannot be withdrawn or cancelled**

[46] If I am wrong, and I do have jurisdiction to make findings on the division of pension credits, then I find that the division was mandatory and that the application cannot be withdrawn or cancelled.

The division was mandatory

[47] The CPP legislation says that if a couple divorces on or after January 1, 1987, then a division of pension credits is mandatory.²⁷ Contrary to what the Appellant believes, it doesn't matter that he applied for the division personally or that the division was not done upon the order of a court.

[48] There is an exception to this rule. The Minister has the discretion not to perform a credit split if the Minister is satisfied that the credit split would leave **both** former spouses worse off.²⁸ Worse off means that the division reduced the amount of benefits payable to both former spouses. There is no evidence of this happening here. In fact, the Appellant acknowledged that the Added Party's retirement pension increased after the division was done.²⁹

– The separation agreement doesn't affect the division of pension credits

[49] The CPP legislation allows parties to opt out of the mandatory division regime. But the requirements to do so are strict. To opt out of a mandatory division, the parties must have entered into a separation agreement that:³⁰

- was signed before the divorce judgement was granted;
- contains a provision that **expressly** mentions the Canada Pension Plan and indicates the intention of the parties that there be no division of unadjusted pensionable earnings under section 55 or 55.1 of the Canada Pension Plan;
- has not been invalidated by a court order; and
- is consistent with the provincial law that governs the agreement. This means that the provincial law that governs the agreement must expressly allow the parties to agree that there be no division of pension credits.

²⁷ Paragraph 55.1(1)(a) and subsection 55.11(a) of the *Canada Pension Plan*.

²⁸ This exception is set out in subsection 55.1(5) of the *Canada Pension Plan*.

²⁹ Page GD7-2.

³⁰ Subsections 55.2(2) and (3) of the *Canada Pension Plan*.

[50] The Appellant and the Added Party signed a separation agreement in British Columbia in March 2010.³¹ The province of British Columbia is one of four provinces that allows parties to opt out of a mandatory division.³²

[51] However, there is no provision in the parties' separation agreement that expressly mentions the Canada Pension Plan and indicates the intention of the parties that there be no division of unadjusted pensionable earnings under section 55 or 55.1 of the *Canada Pension Plan*. As such, the separation agreement cannot be used to opt out of the mandatory division regime.

The application cannot be withdrawn or cancelled

[52] As for the withdrawal of the application, the CPP legislation does not allow a party to withdraw an application for a division of pension credits if the application was approved following a divorce that occurred on or after January 1, 1987.³³ This is the case for the Appellant and the Added Party. They divorced in 2011.

[53] I can't ignore the law and I can't change it.

[54] The Appellant says that he was told by someone at Service Canada that he could withdraw the application if he was not happy with the result.³⁴

[55] I don't know what the Appellant was told by someone at Service Canada. However, it doesn't matter because even if what the Appellant says is true, I can't give him what he wants. This is because I don't have the jurisdiction to make a finding about whether the Appellant received erroneous advice.³⁵

[56] If the Appellant wants to pursue his argument about receiving erroneous advice, then he needs to do so directly with the Minister. The Minister will then make a decision

³¹ The Separation Agreement is at pages GD2-18 to GD2-29.

³² See section 62 of the *Family Relations Act*, R.S.B.C. c. 128.

³³ Subsection 45(3) of the *Canada Pension Plan Regulations*. See also *Dela Cruz v. Canada (Attorney General)*, 2020 FC 744 at paragraph 24.

³⁴ Page GD7-3

³⁵ My lack of jurisdiction to make findings about erroneous advice is set out in *Pincombe v. Canada (Attorney General)*, [1995] F.C.J. No. 1320, and *Canada (Minister of Human Resources Development) v. Tucker*, 2003 FCA 278.

under subsection 66(4) of the CPP. If the Appellant disagrees with the decision the Minister makes under subsection 66(4), then he can apply to have that decision judicially reviewed by the Federal Court.

Conclusion

[57] The appeal is dismissed.

Shannon Russell
Member, General Division – Income Security Section