Citation: *GB v Minister of Employment and Social Development and KB*, 2023 SST 1648

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	G. B.
Representative:	Nicola-Antonio Melchiorre
Respondent:	Minister of Employment and Social Development
Representative:	Ian McRobbie
Added Party:	K. B.

Decision under appeal:	General Division decision dated January 11, 2023 (GP-21-1391)

Tribunal member:	Neil Nawaz
Type of hearing:	Videoconference
Hearing date:	October 25, 2023
Hearing participants:	Appellant Appellant's representative Respondent's representative Added Party
Decision date:	November 19, 2023
File number:	AD-23-256

Decision

[1] The appeal is allowed. A division of unadjusted pensionable earnings (hereafter referred to as a DUPE or credit split) will be applied from 1992 to 2001 and from 2008 to 2015.

Overview

[2] This case is about how a former couple's Canada Pension Plan (CPP) credits should be divided between them.

[3] The Appellant and the Added Party were once married. They divorced but then got back together again for a few years before separating once and for all.

[4] The Added Party applied for a DUPE in July 2019. In her application, she said that she and the Appellant were married in July 1992 and separated in April 2002. She also said that they resumed living together in April 2005 and separated again in November 2016.[1]

[5] In November 2019, the Minister of Employment and Social Development (Minister) wrote to the Appellant to notify him of the Added Party's DUPE application. The Minister asked the Appellant whether he agreed with the Added Party's dates of alleged cohabitation and, if not, to provide his own dates, along with evidence or documents to support those dates.[2] The Appellant replied by disputing the period of separation alleged by the Added Party. He agreed that he and the Added Party initially separated in April 2002, but he said that they did not get back together again until November 2008.[3]

[6] The Minister reviewed the information provided by the Appellant and Added Party. The Minister agreed with the Added Party on the period of separation and awarded her a DUPE from 1992 to 2001 and from 2005 to 2015.

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[1] See Added Party's application for a CPP credit split dated July 5, 2019, GD2-9. The Added Party had originally listed the date of reconciliation as April 2006, but she later amended it to April 2005.
[2] See Minister's letter dated November 5, 2019, GD2-33.
[3] See questionnaire completed by the Appellant on December 3, 2019, GD2-36.

[7] The Appellant appealed the Minister's decision to the Social Security Tribunal's General Division. It held a hearing by teleconference and dismissed the appeal. It agreed with the Added Party. It found that she and the Appellant resumed living together in a conjugal relationship in April 2005. It based this finding, among other things, on the Added Party's acceptance of a temporary reduction in her spousal support as a way of showing her "sincerity" in moving forward with a reconciliation.

[8] The Appellant then applied for permission to appeal to the Appeal Division. In March, one of my colleagues on the Appeal Division granted the Appellant permission to appeal because she thought he had at least an arguable case. Last month, I held a hearing to discuss the parties' respective positions in detail.

Preliminary Matter

[9] In December 2022, the rules governing the appeals to the Social Security Tribunal changed.[4] Under the new rules, the Appeal Division, once it has granted permission to proceed, must now hold a *de novo*, or fresh, hearing about the same issues that were before the General Division. As I explained at the outset of the hearing, that meant I would not be bound by any of the General Division's findings. I also made it clear that I would be considering all available evidence, including new evidence, about when the Appellant and the Added Party cohabited in a conjugal relationship.

Issue

[10] The CPP provides for an equal division of pension credits between two parties during the time they were married or cohabited in a conjugal relationship.[5]

[11] The CPP doesn't contain a definition for the term "conjugal relationship." The Federal Court of Appeal has said that the generally accepted characteristics of a conjugal relationship include factors such as:

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[4] The Appellant is subject to the new rules because his application for permission to appeal was filed with the Tribunal on March 13, 2023.
[5] See CPP sections 55.1 and 55.2.

- Whether the parties lived under the same roof and slept together;
- Whether they had children together and whether and how they shared child rearing responsibilities;
- Whether they had a sexual relationship and were faithful to each other;
- Whether they performed domestic tasks together, such as shopping, preparing meals, etc.
- Whether they socialized together;
- Whether the community saw them as a couple; and
- Whether they had shared property and financial arrangements.

[12] In this case, the Appellant and Added Party don't dispute that they were married in July 1992, nor do they dispute that they first separated in April 2002. They also agree that they finally separated in November 2016. What they don't agree about is the length of their first separation. The Appellant says that the first separation period was more than six years — from April 2002 to November 2008.[6] The Added Party says that the first separation period was only three years — from April 2002 to April 2005.

[13] In this appeal, I had to decide whether the Appellant and the Added Party reconciled in April 2005, November 2008, or some other date indicated by the evidence.

Analysis

[14] I have applied the law to the available evidence and concluded that the Appellant and the Added Party did not resume living together in a conjugal relationship until November 2008. I have come to this conclusion for the following reasons:

[6] The Appellant's position has shifted twice. He originally stated that he and the Added Party did not reconcile until August 2008. At the General Division, he argued that the reconciliation occurred in August 2011. By the time of the Appeal Division hearing, he was again arguing that he and the Added Party reconciled in 2008 – this time in November.

There is no strong evidence that the Appellant and the Added Party lived together until November 2008

[15] A major reason for my decision is the lack of convincing and objective evidence that the Appellant and the Added Party cohabited between April 2002 and November 2008. As an applicant for a DUPE, it was up to the Added Party to prove that she and the Appellant lived under the same roof during the period she claimed. In my view, she failed to do so.

[16] The Appellant testified that, after he and his wife broke up the first time, he moved out of the former matrimonial home at X and went to live with his parents at X. He said that the two houses were only about a kilometre apart from each other, which meant that he had easy access to his children, whose primary residence would be with their mother. Under a separation agreement signed in August 2004, the children were to live with the Appellant on alternate weekends, and he and the Added Party were to "discuss joint vacations for the sake of the children."[7]

[17] The Appellant admits that he frequently saw the Added Party in the ensuing years. They shared custody of their children. They lived close to each other in the relatively small community of Thunder Bay. They even worked in the same place after the Appellant got the Added Party a job at his family's sawmill. However, he maintains that he did not resume living with the Added Party until November 2008 when, at her invitation, he moved back to X to convalesce after he suffered a heart attack.

[18] The Added Party tells a different story. She testified that she and the Appellant began trying to reconcile in 2004 and that they resumed living together in April 2005. She said that she and the Appellant maintained a sexual relationship, although she conceded that he also had relationships with other women from 2005 forward. Even so, she said, they lived under the same roof and provided emotional support to each other, doing the things that couples do, such as eating meals together, socializing together,

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[7] See Separation Agreement dated August 10, 2004, AD11-193. The terms of the Separation Agreement were later ratified in a Consent Judgment of the Ontario Court of Justice dated December 21, 2004, AD11-110.

and going on vacations together. The Added Party noted that the Appellant had his heart attack in their home at X.

[19] However, I didn't find enough evidence to convince me that the Appellant and the Added Party resumed living together earlier than November 2008:

– There is no paper trail to corroborate the Added Party's account

[20] The Added Party says that the Appellant moved back in with her in April 2005, but nothing in the documentary record backs that up. In support of her claim, the Added Party has submitted numerous utility statements, airline tickets, photographs, and witness statements, but none of them amount to objective evidence that the Appellant resided with her when she said he did.

[21] It is a reality that most people don't immediately notify institutions and service providers when they change their address. The incentive to make such notifications is further reduced when, as in this case, the move is only a short distance away from a former residence that continues to be occupied by family members. The Added Party produced, among other things, a gas bill indicating that the Appellant was listed as a resident of X in November 2004.[8] But all this likely meant was that the Appellant didn't bother taking his name off the account when he moved out of the matrimonial home two years earlier. On top of that, the Added Party herself has never claimed that the Appellant was living with her at any point during 2004.

[22] The Appellant's driver's license history does not offer a clear picture about his residence during the years in question either.[9] Again, many people take their time in reporting address changes to the Ministry of Transportation. However, the Appellant's readout indicates that he changed his address from X Drive to X on October 2, 2003, and changed it back on August 28, 2012. These dates don't precisely align with either

[8] See Union Energy gas bill dated November 12, 2004, GD2-50.
[9] See Appellant's Driver's Licence History compiled by the Ontario of Ministry of Transportation, search date November 28, 2021, GD11-102.

side's stories, but they do suggest that the Appellant and the Added Party were separated for significantly longer than three years.

[23] The Appellant's income tax filings are a different matter. When you complete an income tax return, you are actively invited to notify the Canada Revenue Agency whether you've changed your address in the previous year. By law, you are required to provide accurate information. In this case, the Appellant's income tax summaries indicate that he changed his registered address from his former matrimonial home to his parents' house in time for the 2003 tax year. At the same time, he listed his marital status as "separated."[10] Subsequent tax summaries and notices of assessment show that the Appellant did not change his address or marital status until the 2010 tax year.[11] At that time, he changed his residential address back to X — where he had previously lived with his wife and children.

[24] These tax returns are not definitive proof of the Appellant's residence, but they are largely consistent with his account that he did not resume cohabiting with the Added Party until well after 2005.

– The Appellant and the Added Party went on family vacations together but that doesn't mean they were cohabiting

[25] A large part of the Added Party's case rests on the fact that she and the Appellant took several vacations together between 2002 and 2008. The Added Party testified that they travelled together seven or eight times during that period, most of the time with their three children but on two occasions without them. To illustrate her point, she submitted dozens of photographs of the Appellant and herself together, usually with their children, along with airline tickets, boarding passes, and hotel receipts for various destinations, including Las Vegas, NV, Bristol, TN, and Talladega, AL.

[26] However, I don't think this material is compelling evidence of anything except the fact that the Appellant and the Added Party took vacations together. Both parties acknowledged that, even in the years when they were living apart, their lives remained

[10] See the Appellant's 2003 T1 Tax Return Summary, AD11-15.
[11] See Appellant's T1 2009 General Tax Form (AD11-69) and 2010 Notice of Reassessment (AD11-24).

intertwined. It's not just that they had children together — they continued to live close to each other and remained on civil, even friendly, terms. Both admit that they attempted reconciliation after 2004, although they differed about when the reconciliation finally occurred.

[27] It's not surprising that a couple in those circumstances would take vacations together as a "family," but it doesn't necessarily mean that they had reconciled or were living together. According to the Appellant, they only did it to make their children feel happy and secure. I would have been far more skeptical of this explanation had it not been for the fact that shared holidays were specifically contemplated under the terms of the Appellant's and Added Party's 2004 separation agreement. Under its terms, the parties agreed to "discuss joint vacations for the sake of the children."[12] This unusual provision suggests that travelling as a family was, rather than evidence of reconciliation or cohabitation, merely a demonstration of two people attempting to fulfill their legal obligations.

[28] Nor do I place much weight on the fact that the Appellant and Added Party vacationed at least twice without their children — on one occasion to Las Vegas, where they were accompanied by another couple, and on another to Texas and Mississippi, which the Appellant said was made largely for business purposes.[13] The Appellant said that both trips happened during times when he and the Added Party were attempting to reconcile.

[29] I accept that the two parties tried get back together more than once but attempts at reconciliation do not mean that they succeeded, nor are they necessarily proof of cohabitation.

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[12] See Separation Agreement dated August 10, 2004, AD11-196

[13] The Added Party submitted letters from R. H. and M. H. dated March 24, 2023 (AD5-3) and March 29, 2023 (AD6-2), respectively. Both confirmed that the Appellant and Added Party travelled with them in 2006 and 2007 and that they acted like a married couple.

– Letters of support from family and friends carry only so much weight

[30] The file contained numerous statements from various friends and family members declaring that, from what they remembered, the Appellant and the Added Party presented as husband and wife from 2005 onward. I am not inclined to give such evidence much weight since (i) it is rarely objective, usually coming from people who are close to the party who solicited it and (ii) it tends to be unreliable, often based on fragmentary memories of events that occurred years ago.

[31] For instance, the Added Party's parents wrote that the Appellant and the Added Party were ready to put their family back together two years after they initially separated in 2002. They recalled accompanying their daughter, son-in-law, and grandchildren on a two-week Florida cruise in 2003. They said they later babysat their grandchildren when the Appellant and Added Party went on trips together.[14]

[32] Parents have a natural tendency to support their children, and it is not surprising that the Added Party's mother and father would back her position. However, I can't help but observe that they perhaps unwittingly undermine their daughter's argument by confirming that the Appellant and the Added Party were travelling together in 2003 — a time when they both agree they were still separated. The statement of the Added Party's parents thus contributes to a larger picture of a couple who continued to do things together even after they had formally split up and were living in separate residences. For the Appellant and the Added Party, who were struggling to reconcile while presenting an image of family unity, joint activity did not necessarily mean they were cohabiting at that point in their lives.

– The Appellant continued to pay the Added Party spousal support

[33] As I have noted several times now, the fact that the Appellant and the Added Party attempted reconciliation did not mean that they had in fact succeeded in reconciling. This point again comes into play when look at a consent judgment dated

[14] Statement by J. H. and C. H., certified and stamped on February 6, 2020, GD2-45.

April 4, 2005, which reflects the Appellant's and Added Party's agreement to reduce the amount of monthly spousal support from $1,600 to $1,375 for a temporary period of 15 months.

[34] The Added Party maintains that this agreement to vary the Appellant's spousal support obligation is evidence that they had got back together. She says that her willingness to accept a lower monthly payment was "meant to show her sincerity in moving forward with a reconciliation."[15] That might have been so but, again, it doesn't necessarily mean the reconciliation was successful, nor does it mean the Appellant resumed cohabiting with the Added Party in 2005.

[35] Moreover, even if the Added Party accepted a lower amount, the fact remains that the Appellant was still obligated under their agreement and the consent order to continue paying the Added Party spousal support. The very existence of such an arrangement, which was negotiated by lawyers and ratified by a court, is not the act of a couple that had reconciled as of early 2005.

[36] I see further evidence that no reconciliation took place in early 2005. It appears that the Added Party's spousal support amount reverted to $1,600 after the 15-month period specified in the consent order had elapsed. In uncontradicted testimony, the Appellant said that he continued to pay the Added Party spousal support until approximately 2010, a year or two after they had genuinely reconciled.

[37] In the end, I found the Appellant's account more believable than the Added Party's. It is hard to imagine why someone would continue paying their spouse court-mandated support for years after they had supposedly reconciled and resumed living together. The Added Party argued that the Appellant was happy to continue nominally paying her support payments because he was able to deduct them for income tax purposes. However, I find this unlikely.

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[15] See undated mediation brief, GD2-95. This brief, parts of which are reproduced out of order from GD2-95 to GD2-121, appears to have been prepared on the Added Party's behalf following her second separation from the Appellant in late 2016.

[38] It seems more likely that, if a reconciliation had occurred, the spouses would have taken steps to nullify their prior separation agreement. As we will see, this is precisely what happened — but it didn't happen until after 2008.

– The Appellant's and Added Party's reconciliation was reflected in an August 2011 Agreement

[39] According to the Appellant, he didn't resume living with the Appellant until November 2008. That's when he was released from hospital after suffering a heart attack two months earlier. He testified that, after he had surgery to insert two stents in his coronary arteries, the Added Party suggested that he convalesce at X because she, rather than his aging mother, would be in a better position to care for him. He accepted the invitation, and his relationship with the Added Party was soon resurrected.

[40] Again, the Appellant's account is largely backed up by the documentary record. There is a reconciliation agreement on file signed by the Appellant and the Added Party in August 2011.[16] It said that the parties were "continuing their efforts at reconciliation" and that they would resume their cohabitation and "live together as husband and wife" as of the effective date of the agreement. The Appellant said that he originally claimed a period of cohabitation that coincided with the date specified in the reconciliation agreement, but he eventually conceded that he and the Added Party had actually started living under the same roof nearly three years earlier. He said that, although he and the Added Party began discussing the terms of their reconciliation in 2009, it took two years for all the details to ironed out and be and for the agreement to be finalized.

[41] In my view, the reconciliation agreement means something. While it may not precisely reflect when the Appellant and Added Party resumed their cohabitation, it does suggest that they began living together later rather than sooner. If, as the Added Party claims, she and the Appellant reconciled in early 2005, it seems unlikely that it

[16] See Reconciliation Agreement dated August 12, 2011, GD2-137.The Added Party argued that this agreement, among others, had no relevance to this proceeding because it was no longer binding following her final separation from the Appellant. I don't agree with this argument. Although the Reconciliation Agreement no longer has any effect, it continues to be evidence of the Appellant's and the Added Party's respective intentions and states of mind during a key period.

would have taken more than six years to finalize an agreement reflecting that fact. It is far more likely that such an agreement would have emerged from a later reconciliation.

Conclusion

[42] The appeal is allowed. The Appellant and the Added Party, who were married in July 1992, initially separated in April 2002 but did not reconcile until November 2008. That was the month the Appellant was discharged from hospital and resumed living with the Added Party in a conjugal relationship, an arrangement that lasted until November 2016, when they split up for good.

[43] This means that the DUPE shall apply from 1992 to 2001 and from 2008 to 2015.

Member, Appeal Division