

Federal Court



Cour fédérale

**Date: 20200709**

**Docket: T-671-19**

**Citation: 2020 FC 744**

**Ottawa, Ontario, July 9, 2020**

**PRESENT: Madam Justice McDonald**

**BETWEEN:**

**NORMA DELA CRUZ**

**Applicant**

**and**

**THE ATTORNEY GENERAL OF CANADA**

**Respondent**

**AMENDED JUDGMENT AND REASONS**

[1] This is a judicial review of a decision of the Social Security Tribunal (SST) Appeal Division (AD) who refused Ms. Dela Cruz's request for leave to appeal a decision of the SST General Division (GD). Ms. Dela Cruz represents herself in this matter.

[2] The parties made oral submissions on this judicial review before Justice Boswell on March 9, 2020, in Toronto and Justice Boswell reserved his decision. I was appointed by the Chief Justice pursuant to Rule 39 of the *Federal Courts Rules*, SOR/98-106 to rehear the

application. The rehearing of this matter took place on June 25, 2020, at a special sitting of the Court held via teleconference.

[3] During the June 25, 2020 hearing, I advised Ms. Dela Cruz and counsel for the Respondent, Mr. Vens, that I had reviewed all of the materials filed on the judicial review and I had listened to a recording of the oral submissions made during the March 9, 2020 hearing before Justice Boswell.

[4] I advised the parties that I was prepared to render a decision based upon the materials filed and the oral submissions made for the March 9, 2020 hearing. At the hearing of June 25, 2020, Ms. Dela Cruz made submissions reiterating the same points she made during the hearing of March 9, 2020.

[5] Mr. Vens, responded to Ms. Dela Cruz's submissions and was in agreement to the Court otherwise relying upon the record filed for the March 9, 2020 hearing and the oral submissions made on that day.

## **Background**

[6] Ms. Dela Cruz is 72 years old and is retired from the Workplace Safety and Insurance Board. She was married in 1968 and she states that she and her husband separated on June 7, 1995. They were divorced effective May 15, 1997. Her ex-husband died in 2014.

[7] On February 3, 2017, Ms. Dela Cruz applied to the Minister of Employment and Social Development (Minster) for a *Canada Pension Plan*, RSC, 1985, c C-8 (*CPP*) division of unadjusted pensionable earnings (DUPE or credit split) with her late husband.

[8] On June 16, 2017, Service Canada approved her application, and the credit split resulted in a reduction of her pension benefits in the amount of \$31.12 (from \$585.31 to \$554.19).

[9] Ms. Dela Cruz sent a letter to Service Canada on June 26, 2017, requesting that the credit split be cancelled, indicating that she would not have applied had she known it would result in a reduction in her benefits.

[10] Service Canada reconsidered the decision on July 12, 2017 and upheld its decision. In the reconsideration letter, the Minister advised Ms. Dela Cruz that by subsection 55.1(1) of the *CPP*, credit splitting is mandatory for anyone who is divorced after January 1, 1987. Service Canada also advised Ms. Dela Cruz that she did not meet the criteria for the exception in subsection 55.1(5) to have the credit split cancelled.

[11] Ms. Dela Cruz appealed Service Canada's decision to the GD of the SST. On July 14, 2018, the GD dismissed her appeal on the basis that it had no reasonable chance of success pursuant to subsection 53(1) of the *Department of Employment and Social Development Act, SC*, 2005, c 34 (*DESDA*) and this Court's decision in *Miter v Canada (Attorney General)*, 2017 FC 262.

[12] The GD noted that paragraph 55.1(1)(a) of the *CPP* provides that credit splitting shall take place following a judgement granting a divorce on the Minister being informed of the judgement. The GD noted that the exception in subsection 55.1(5) did not apply to Ms. Dela Cruz as there was no evidence that the amount of benefits payable to both persons, Ms. Dela Cruz and her deceased ex-husband, decreased at the time of the division.

[13] The GD determined that upon receipt of Ms. Dela Cruz's application, credit splitting was performed in accordance with paragraph 55.1(1)(a) and that the legislation did not permit Service Canada to cancel or reverse its decision.

#### **Appeal Division Decision Under Review**

[14] The issues at the AD were whether the GD based its decision on an erroneous finding of fact regarding the former spouses' agreement not to have their *CPP* credits split upon divorce, and, whether the GD erred in failing to consider Ms. Dela Cruz's financial circumstances.

[15] Pursuant to subsection 58(1) of the *DESDA*, there are only three grounds of appeal that the AD can consider: (1) that the GD failed to observe a principle of natural justice or made a jurisdictional error; (2) that the GD made an error in law; or, (3) the GD based its decision on an erroneous finding of fact made in a perverse or capricious manner or without regard to the evidence.

[16] In her appeal, Ms. Dela Cruz argued that the GD based its decision on an erroneous finding of fact because she and her ex-husband had an agreement that their *CPP* credits would

not be split after their marriage ended. On this issue, the AD noted that since the GD did not rely upon this agreement for the purpose of its decision, this issue could not form a ground of appeal. In any event, the AD noted that a *CPP* credit split is mandatory for any divorced couple after January 1, 1987 and Ms. Dela Cruz and her husband divorced in 1997.

[17] As well, the AD noted that because Ms. Dela Cruz resides in Ontario and as Ontario has not enacted legislation allowing parties to contract out of the mandatory credit split requirement, the terms of their separation agreement were irrelevant. The AD determined that even if the GD had considered their agreement, the agreement would have no impact on the outcome of the appeal because of the mandatory provisions of the *CPP*.

[18] The AD also considered Ms. Dela Cruz's submissions that the reduction in her *CPP* retirement benefits has dire financial consequences for her. However, the AD noted that the legislation does not provide an exception to the mandatory *CPP* credit split for financial difficulties. The AD therefore determined that the GD did not make an error when it failed to consider Ms. Dela Cruz's financial circumstances.

[19] The appeal was dismissed on April 12, 2019, as the AD determined that the GD did not make any erroneous findings of fact in a perverse or capricious manner or without regard to the material.

## **Issue**

[20] Ms. Dela Cruz makes a number of arguments; however, the overriding issue is whether or not the decision of the AD is reasonable.

## **Standard of Review**

[21] In reviewing the decision of the SST AD the Court applies the reasonableness standard of review. A reasonableness review looks at the decision-making process and its outcome. The Court looks for “internally coherent reasoning”, “the presence of justification, transparency and intelligibility” and determines whether the decision is “justified in relation to the relevant factual and legal constraints that bear on the decision” (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 12, 86 and 99 [Vavilov]; *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

## **Analysis**

[22] Ms. Dela Cruz raises a number of matters in this judicial review. She argues that the date of her separation is incorrectly recorded on some of the documents. She argues that the Minister was wrong not to exercise his discretion to reverse the decision as her husband was dead. She also argues that it was an error for the AD to say that a pre-trial conference had been held.

[23] Despite these various arguments, what Ms. Dela Cruz did not address is the clear legislative provisions that apply to her circumstances. Subsections 55(1) and 55.1(1) and section 55.11 of the *CPP* establish that credit splitting is mandatory where spouses obtain a divorce after

January 1, 1987. Ms. Dela Cruz was divorced well after the year 1987; therefore, these provisions apply to her circumstances.

[24] By operation of paragraph 55.1(1)(a) of the *CPP*, credit splitting is mandatory and automatic following a divorce (*Dominie v Canada (Minister of Social Development)*, 2005 FCA 242 at paras 3 and 4 [*Dominie*]). This is the case even if one of the parties is deceased and the split results in a disadvantage and a reduced pension to the living spouse (*Strezov v Canada (Attorney General)*, 2007 FC 417).

[25] Because the *CPP* legislative provisions are mandatory, Ms. Dela Cruz's arguments that the AD failed to consider the terms of her separation agreement with her ex-husband are without merit. Regardless of the terms of her separation agreement, as she resides in Ontario, it was not possible for Ms. Dela Cruz to "contract out" of the automatic application of the credit splitting provisions in the *CPP*.

[26] As noted by the AD, Ms. Dela Cruz does not qualify for the exception under subsection 55.2(3) because she is a resident of Ontario and Ontario has not enacted legislation that would allow parties to withdraw from the mandatory credit split. Therefore, her agreement would not have had any impact on the outcome of the appeal because such agreements have no legal validity (*Hamilton v Hamilton*, [2005] OJ No 3050 (QL) at para 130; *Lowe v Lowe* [2006] OJ No 132 (QL) at para 16; *Mignella v Federico*, 2012 ONSC 5696 at para 99; *M. A. v Minister of Employment and Social Development*, 2017 SSTADIS 25 at para 31).

[27] Ms. Dela Cruz also argues that the Minister erred by failing to exercise his discretion and cancel the credit split. Unfortunately, for Mrs. Dela Cruz, her circumstances did not fit within the limited discretion available to the Minister to cancel the credit split under subsection 55.1(5). This provision does not apply to her circumstances as there was no evidence that the amount of *CPP* benefits payable to both her and deceased ex-husband would have decreased at the time of the division.

[28] The legislative provisions are a full answer to the issues raised by Ms. Dela Cruz. The other arguments that she raises are peripheral matters that do not go to the core of her case. For example, her arguments about the misstated separation date is irrelevant to the application of the *CPP* provisions. As well, the terms of her separation agreement are irrelevant because of the automatic application of the legislative provisions.

[29] Likewise, the fact that the AD states that a prehearing conference took place, when in fact, no such conference took place, is irrelevant to the legal issues. Such a conference is not mandatory and the evidence is that Ms. Dela Cruz declined to participate in a prehearing conference and chose to answer questions in writing. Accordingly, the AD cancelled the prehearing conference and advised that it would decide the appeal based on the documents filed. The fact that the AD decision references that a prehearing conference took place is an error, but it is a minor misstatement which has no impact on the analysis conducted by the AD and has no impact on the decision of the AD (*Bose v Canada (Attorney General)*, 2018 FCA 220 at paras 10 to 12).



[30] Ms. Dela Cruz is upset with the outcome of the application she made in 2017 for a split of *CPP* credits. She perceives the \$30.00 reduction in her *CPP* pension as an injustice and an error. I understand that she regrets having applied for the credit split and I understand she would like to undo that application. However the *CPP* credit split happened by operation of the *CPP* legislation and not because of an error on the part of Service Canada.

[31] Therefore, Ms. Dela Cruz has not established any error on the part of the AD that goes to the merits of her case. It appears that Ms. Dela Cruz refuses to accept the impact of the provisions of the legislation and the impact of those provisions on her circumstances.

[32] Ms. Dela Cruz is asking this Court to reverse the impact of the legislation. That is not the role of this Court. The issue in this judicial review is very narrow. The *CPP* legislation mandated a split of the pension benefits. Ms. Dela Cruz did not meet the exemption to allow the Minister to override the legislation. The decision of the AD is reasonable and there is no basis for this Court to intervene.

[33] This application for judicial review is dismissed.

[34] The Respondent did not request costs and no costs are awarded.

**JUDGMENT IN T-671-19**

**THIS COURT'S JUDGMENT is that** this judicial review is dismissed without costs.

"Ann Marie McDonald"

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-671-19

**STYLE OF CAUSE:** NORMA DELA CRUZ v THE ATTORNEY GENERAL  
OF CANADA

**PLACE OF HEARING:** HELD BY TELECONFERENCE BETWEEN TORONTO,  
ONTARIO AND OTTAWA, ONTARIO

**DATE OF HEARING:** JUNE 25, 2020

**AMENDED JUDGMENT AND REASONS:** MCDONALD J.

**DATED:** JULY 9, 2020

**APPEARANCES:**

Norma Dela Cruz

APPLICANT  
ON HER OWN BEHALF

Matthew Vens

FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

- NIL -

SELF-REPRESENTED APPLICANT

ATTORNEY GENERAL OF CANADA  
Department of Justice  
Gatineau, QC

FOR THE RESPONDENT