**Date: 20080626**

**Docket: T-1643-07**

**Citation: 2008 FC 813**

**Ottawa, Ontario, June 26, 2008**

**PRESENT: The Honourable Madam Justice Mactavish**

**BETWEEN:**

**EUGENE UPSHALL**

**Applicant**

**and**

**ATTORNEY GENERAL OF CANADA**

**Respondent**

## REASONS FOR ORDER AND ORDER

[1] Eugene Upshall seeks judicial review of the decision of a member of the Pension Appeal Board refusing him leave to appeal a decision of the Review Tribunal. For the reasons that follow, the application for judicial review will be dismissed.

### Background

[2] Mr. Upshall was married to Sarah Hickey. The couple had five children, and during the marriage, Ms. Hickey stayed at home raising the children while Mr. Upshall worked outside of the home. After 20 years of marriage, the couple separated in 1996, and divorced in 1999.

[3] On December 8, 1998, Mr. Upshall applied for a division of pension credits. Mr. Upshall was advised that additional documentation would be required in order to process his request. This documentation was never provided, and Mr. Upshall's application evidently did not proceed.

[4] In March of 2004, Ms. Hickey herself applied for a division of pension credits. Mr. Upshall was notified that a division of pension credits was being sought. The Minister's letter to Mr. Upshall erroneously noted the dates of the period of cohabitation as being from June of 1976 to September of 1976, as opposed to September of 1996.

[5] On April 14, 2004, Ms. Hickey wrote to the Minister asking that her application for a division of pension credits be withdrawn. By letter dated May 7, 2004, the Minister refused Ms. Hickey's request to withdraw her application, stating that in accordance with the provisions of the *Canada Pension Plan*, an application for a division of pension credits in relation to a divorce occurring after January 1, 1987 could not be withdrawn.

[6] In the meantime, on May 3, 2004, the Minister approved Ms. Hickey's application for a division of pension credits. The period of division was from January of 1976 to December of 1995, as provided for in the Plan.

[7] In a letter dated May 7, 2004, the Minister apologized to Mr. Upshall for the error in recording the dates of cohabitation in the earlier correspondence, confirming that the correct period of cohabitation was June of 1976 to September of 1996. Mr. Upshall was also asked to notify the

Minister within 30 days in the event that he did not agree that this was in fact the period during which he cohabited with Ms. Hickey, failing which, the division of pension credits would proceed based upon the corrected dates.

[8] Mr. Upshall returned the form provided with the Minister's letter, seemingly objecting to a division of pension credits occurring, but not disputing the dates of cohabitation. The form filed by Mr. Upshall was treated as a request for reconsideration of the decision to carry out the division of pension credits.

[9] The decision to proceed with a division of pension credits based upon a period of cohabitation from June of 1976 to September of 1996 was subsequently confirmed.

[10] Mr. Upshall then appealed this decision to the Review Tribunal, submitting that pursuant to section 55.1(5) of the *Canada Pension Plan*, the Minister had the discretion to cancel Ms. Hickey's application for a division of pension credits, as this was a case where the effect of the division was to cause the benefits payable to both former spouses to decrease.

[11] The hearing before the Review Tribunal was adjourned to allow for an analysis to be carried out with respect to the CPP benefit eligibility of both Mr. Upshall and Ms. Hickey.

[12] A letter dated April 6, 2006 was then provided to the Review Tribunal by the Minister, which advised that an analysis of the file disclosed that it was clearly to Ms. Hickey's benefit that

the pension credits be divided, and that, as a result of the division, she received an increase in her pension credits for 18 out of the 20 years of cohabitation.

[13] Given that Ms. Hickey's pensionable earnings were higher as a result of the division of pension credits, the Minister took the position before the Review Tribunal that section 55.1(5) of the *Canada Pension Plan* could not be invoked as a basis for cancelling Ms. Hickey's application for such a division.

**The Review Tribunal Proceedings**

[14] Mr. Upshall's principle argument before the Review Tribunal was that the Minister failed to properly apply section 55.1(5) of the *Canada Pension Plan* in concluding that there was no discretion to cancel Ms. Hickey's application for a division of pension credits once it had been made.

[15] While acknowledging that Ms. Hickey did in fact receive more pension *credits* as a result of the division, Mr. Upshall contended that she will not have the same pension *benefits*. That is, Mr. Upshall argued before the Review Tribunal that if the "Child Rearing Dropout" provision of the *Canada Pension Plan* was applied to Ms. Hickey's application, she would receive almost 100% of the potential CPP benefits.

[16] CPP benefits are calculated based upon how long a contributor works, and how much they contribute. The Child Rearing Dropout provisions of the *Canada Pension Plan* allow contributors

to drop periods out of the calculation where the contributor has not been working outside of the home or where the contributor's earnings have gone down, because the contributor was raising a child under seven years of age.

[17] Being able to drop out periods of low earnings out of the calculation has the effect of increasing the ultimate amount of contributor's pension benefits.

[18] The Review Tribunal dismissed Mr. Upshall's appeal, holding that in accordance with section 55.1(5) of the *Canada Pension Plan*, a division of unadjusted pension earnings was mandatory following the issuance of a final divorce decree.

[19] The Review Tribunal further found that while subsection 66(4) of the Plan allows the Minister to reconsider an application for a division of pension credits where there has been departmental error resulting in the denial of a benefit, there was no jurisdiction in the Review Tribunal to review the exercise of the Minister's discretion in this regard.

[20] In the event that it was in error on the jurisdictional issue, the Review Tribunal did go on to consider the substance of Mr. Upshall's submissions. In this regard, the Review Tribunal held that the Minister did not err in failing to consider the Child Rearing Dropout provision of the legislation, noting that there was nothing in the wording of section 55 of the *Canada Pension Plan* which links an application for a division of pension credits to the Child Rearing Dropout provisions of the Plan.

[21] Given that Ms. Hickey's pensionable earnings increased as a result of the division, the Minister was correct in proceeding with the division, and in fact had no alternative but to do so, given the mandatory nature of the legislation. Given that one party benefited from the division, the discretionary power in section 55.1(5) to cancel an application was not engaged.

[22] Mr. Upshall then sought leave to appeal the decision of the Review Tribunal to the Pension Appeals Board.

**The Decision of the Designated Member of the Pension Appeals Board**

[23] The member of the Pension Appeals Board designated by the Chair of the Board to deal with this case dismissed Mr. Upshall's application for leave. The reasons given by the member were very brief, and state in full that:

> The Review Tribunal did not have jurisdiction in a case such as this and properly dismissed the appeal. For the same reasons leave to appeal to the Pension Appeals Board is refused.

**The Statutory Scheme and the Jurisdiction of this Court**

[24] By Direction of this Court issued in advance of the hearing, the parties were invited to make submissions as to the jurisdiction of the Court to entertain the application for judicial review in light of the decision of the Federal Court of Appeal in *Mazzotta v. Canada (Attorney General)*, [2007] F.C.J. No. 1209.

[25] Mr. Upshall did not make any submissions in this regard, although I take it from the fact that he brought the application in this Court that he is of the view that the Federal Court is the proper forum for the determination of the application. Counsel for the Minister agreed that the application is properly before this Court, pointing out that this case is entirely different than the classes of cases that were under discussion in *Mazzotta*.

[26] Appeals to the Pension Appeals Board are governed by section 83 of the *Canada Pension Plan*. A party seeking to appeal a decision of a Review Tribunal must apply in writing to the Chairman or Vice-Chairman for leave to appeal the decision to the Pension Appeals Board.

[27] Subsection 83(2) of the *Canada Pension Plan* provides that on receipt of an application for leave, the Chairman or Vice-Chairman shall either grant or refuse that leave.

[28] Subsection 83(2.1) of the *Canada Pension Plan* allows the Chairman or Vice-Chairman of the Board to designate a member of the Board to deal with a leave application. The decision in this case was made by a member of the Board designated for that purpose.

[29] Although section 28 of the *Federal Courts Act* provides that judicial review of decisions of the Pension Appeals Board is to the Federal Court of Appeal, the Federal Court of Appeal has held that decisions of the Chair or Vice-Chair (or, presumably, their delegates), in the exercise of the jurisdiction confined to them by statute, are not decisions of the Pension Appeals Board itself. Judicial review of such decisions is to the Federal Court: see *Martin v. Canada (Minister of Human*

*Resources Development)*, [1997] F.C.J. No. 1600 (F.C.A.), at paragraph 5. See also *Gramaglia v. Canada (Pension Plan Appeal Board)*, [1998] F.C.J. No. 200, at paragraph 5.

[30] As I recently stated in *Layden v. Minister of Human Resources and Social Development Canada*, 2008 FC 619, this has not changed as a consequence of the Federal Court of Appeal's decision in *Mazzotta*: see also *Landry c. Canada (Procureur général)*, 2008 FC 810.

**The Issues and the Standard of Review**

[31] As I understand Mr. Upshall's submissions, he cites two reasons why he says his application should be allowed, and why the decision refusing him leave to appeal the Review Tribunal's decision should be set aside.

[32] Firstly, Mr. Upshall says that the Minister erred in failing to consider the impact of the Child Rearing Dropout provisions of the *Canada Pension Plan* in determining whether or not to proceed with Ms. Hickey's application for a division of pension credits. Secondly, Mr. Upshall argues that he has been the victim of discrimination on the basis of his marital status, contrary to the provisions of section 15 of the *Canadian Charter of Rights and Freedoms*.

[33] For the reasons that follow, I do not intend to deal with Mr. Upshall's *Charter* argument, and thus do not need to address the issue of the standard of review to be applied to such questions.

[34] Insofar as the Minister's alleged failure to consider the impact of the Child Rearing Dropout provisions in determining whether or not to proceed with Ms. Hickey's application for a division of pension credits is concerned, I am satisfied that the provisions of the *Canada Pension Plan* were applied correctly in this case. As a consequence, I do not have to address the issue of standard of review.

**Mr. Upshall's *Charter* Argument**

[35] It is not clear from the record whether Mr. Upshall's *Charter* argument was advanced before the Review Tribunal. It is clear that it was not referred to in his notice of application for leave to appeal to the Pension Appeals Board. It is also not clear from Mr. Upshall's submissions before this Court whether he seeks to challenge the provisions of the *Canada Pension Plan* itself, or whether he simply takes issue with the manner in which the legislation was applied in this case.

[36] If it is the former, I cannot entertain his argument, as he has not served a Notice of Constitutional Question, as required by section 57 of the *Federal Courts Act*.

[37] Moreover, regardless of whether it is the provisions of the *Canada Pension Plan* itself that Mr. Upshall feels are discriminatory, or the way in which the legislation was applied in this case that is in issue, his arguments in relation to this issue were not developed beyond his basic assertion that he had been the victim of discrimination on the basis of his marital status. Nor has Mr. Upshall provided any sort of evidentiary record of the type that is required to mount a challenge under the provisions of section 15 of the *Canadian Charter of Rights and Freedoms*. As the Supreme Court

of Canada has repeatedly observed, Charter questions cannot be decided in the absence of a proper evidentiary record: see, for example, *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130 at ¶ 80, and *MacKay v. Manitoba*, [1989] 2 S.C.R. 357 at ¶ 8 and following.

[38] This leaves Mr. Upshall's contention that the Minister erred in failing to consider the impact of the Child Rearing Dropout provision in determining whether or not to proceed with Ms. Hickey's application for a division of pension credits. This issue will be addressed next.

**The Child Rearing Dropout Provision and the Division of Pension Credits**

[39] As I understand Mr. Upshall's submissions, he says that the Minister should not have gone ahead and processed Ms. Hickey's application for a division of pension credits, given that his own pension credits would be reduced by such a division, without conferring any real benefit on Ms. Hickey, once the Child Rearing Dropout provisions were taken into account in calculating her pension entitlement.

[40] First of all, Mr. Upshall has not provided any evidence to support his contention that Ms. Hickey did not benefit from the division of pension credits.

[41] Moreover, it is clear from the jurisprudence as well as the wording of the *Canada Pension Plan* itself that a division of pension credits is mandatory upon divorce, subject to certain limited exceptions: see paragraph 55.1(1)(a) of the *Canada Pension Plan* and *Canada (Minister of Human*

*Resources Development) v. Wiemer*, [1998] F.C.J. No. 809 (FCA) at paragraph 20, and *Strezov v. Canada (Attorney General)*, [2007] F.C.J. No. 568, at paragraph 21.

[42] The exception that is potentially in issue in this case is that identified in subsection 55.1(5) of the *Canada Pension Plan*, which provides that:

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| **55.1** (5) Before a division of unadjusted pensionable earnings is made under this section, or within the prescribed period after such a division is made, the Minister may refuse to make the division or may cancel the division, as the case may be, if the Minister is satisfied that | **55.1** (5) Avant qu'ait lieu, en application du présent article, un partage des gains non ajustés ouvrant droit à pension, ou encore au cours de la période prescrite après qu'a eu lieu un tel partage, le ministre peut refuser d'effectuer ce partage, comme il peut l'annuler, selon le cas, s'il est convaincu que : |
| (*a*) benefits are payable to or in respect of both persons subject to the division; and | *a*) des prestations sont payables aux deux personnes visées par le partage ou à leur égard; |
| (*b*) the amount of both benefits decreased at the time the division was made or would decrease at the time the division was proposed to be made. | *b*) le montant des deux prestations a diminué lors du partage ou diminuerait au moment où il a été proposé que le partage ait lieu. |

[43] The evidence provided by the Minister confirms that Ms. Hickey derived a benefit as a result of the division of the couple's pension credits. As a consequence, I am of the view that the Review Tribunal was correct in concluding that the Minister did not have the discretion not to proceed with the division, given the mandatory nature of the legislation.

[44] Moreover, it is evident from the plain wording of the introductory portion of subsection 55.1(1) that "a division of *unadjusted* pensionable earnings shall take place in the following circumstances …" [emphasis added]. That is, it is clear on the face of the statute that no adjustments are to be made to the parties' pensionable earnings prior to a division of pension credits taking place. This would presumably include an adjustment to Ms. Hickey's pension entitlement based upon the Child Rearing Dropout provisions of the *Canada Pension Plan*.

[45] The only other basis upon which the Minister could potentially take remedial action in relation to a division of pension credits is under subsection 66(4) of the *Canada Pension Plan*. This provision allows for relief in some, but not all, cases where an individual has been provided with erroneous advice by departmental officials. There is no suggestion in the evidence before me that either Mr. Upshall or Ms. Hickey was ever provided with erroneous advice in this case.

[46] As a consequence, I am satisfied that the Review Tribunal was correct in holding that it had no jurisdiction to grant relief to Mr. Upshall under either subsection 55.1(5) or subsection 66(4) of the *Canada Pension Plan*. Similarly, the designated member of the Pension Appeals Board did not err in denying leave to Mr. Upshall to appeal the decision of the Review Tribunal. The application for judicial review is therefore dismissed.

[47] Counsel for the Minister did not press the issue of costs, and no costs will be awarded.

**ORDER**

For these reasons, the application for judicial review is dismissed, without costs.

"Anne Mactavish"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | T-1643-07 |
| **STYLE OF CAUSE:** | EUGENE UPSHALL v.<br>ATTORNEY GENERAL OF CANADA |
| **PLACE OF HEARING:** | St. John's, Newfoundland and Labrador |
| **DATE OF HEARING:** | June 19, 2008 |
| **REASONS FOR ORDER AND ORDER:** | Mactavish, J. |
| **DATED:** | June 26, 2008 |

**APPEARANCES:**

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| Mr. Eugene Upshall | FOR THE APPLICANT<br>(Self represented) |
| Mr. Daniel K. Willis | FOR THE RESPONDENT |

**SOLICITORS OF RECORD:**

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|---|---|
| None | FOR THE APPLICANT |
| JOHN H. SIMS, Q.C.<br>Deputy Attorney General of Canada | FOR THE RESPONDENT |