

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Jarman v. Jarman*,**
2011 BCSC 1155

Date: 20110825
Docket: E052714
Registry: Vancouver

Between:

Caroline Elizabeth Jarman

Claimant

And

Peter Charles Jarman

Respondent

Before: The Honourable Mr. Justice Savage

Reasons for Judgment

Counsel for the Claimant:

A.E. Thiele

Counsel for the Respondent:

H.B. Chiu

Counsel for Air Canada:

M. Dery

Place and Date of Hearing:

Vancouver, B.C.
August 23, 2011

Place and Date of Judgment:

Vancouver, B.C.
August 25, 2011

[1] The claimant is the former wife of an Air Canada pilot. The only issue before me, by agreement, concerns the method of payment to the claimant of her entitlement to payment in respect of the respondent's Supplemental Retirement Plan ("SRP").

[2] By way of background, Air Canada and its pilots have two pension plans. One of the pensions is a registered pension referred to as the Air Canada Pension Plan for Pilots (the "ACPPP"). The ACPPP is a defined pension plan which provides guaranteed monthly pension benefits. Air Canada also provides retiring pilots with a SRP with several options.

[3] I am advised that Air Canada has taken the position that it need not comply with Part VI of the *Family Relations Act*, R.S.B.C. 1996, c. 128 (the "FRA") with respect to either the payment of the ACPPP or SRP. Before me, however, is the more narrow issue regarding the SRP.

[4] Air Canada has an administrative policy regarding the SRP (the "Administrative Policy"). The operative parts here are extracted from the "Assignable Benefits" section of the policy, and read as follows:

No distribution will be made from any supplemental retirement plan (SRP). A SRP is a contract and is not subject to S. 25 of PBSA. There is no legislation forcing the SRP to provide that rights under such contract can be assigned to the former spouse upon divorce, annulment, separation or breakdown of common-law partnership.

To the extent that the family law of a province would include the SRP in the family assets and that the present value of such SRP is required, the member could have to produce a valuation of the SRP. He would then be responsible to hire his own expert as he would do for any other family asset subject to assignment.

No direct settlement is possible from the SRP. The member keeps full entitlement under the SRP and, if applicable, compensates the former spouse through other assets or through remittance directly by the member to the former spouse of any payment he receives from the SRP.

Furthermore, a pension benefit which is payable from a RPP on account of plan provisions intended specifically to secure in the RPP benefits otherwise payable from the SRP cannot be assigned to a former spouse.

[5] Air Canada therefore refuses to divide and pay a portion of the SRP to each spouse. Instead, Air Canada requires an actuarial calculation to determine the appropriate amount for the spouse, and the receiving spouse must rely on the pilot to pay that amount for the pilot's lifetime. After the pilot's death, the spouse may be required to rely on the pilot's new spouse to then pay them a share of the pilot's survivor benefits.

[6] Pilots at Air Canada currently must retire at age 60. In other jurisdictions that is frequently 65. Thus pilots who have retired from Air Canada from time to time move to other jurisdictions to extend their flying career. In such cases difficulties can arise in enforcing payment as the Administrative Policy does not allow the division of the SRP benefits at source. Of course, requiring the pilot's new spouse to pay the old one, on the death of the pilot payor, has its own difficulties.

[7] The issue before the Court is whether the SRP is subject to an order under Part VI of the *FRA*. The claimant asks for an order that Air Canada pay directly to the claimant the sum of \$1,581 per month at source from the SRP on a monthly basis following the making of this order. The respondent takes no issue with payment being made at source. The respondent has some issue with the amount based on the original court order and the changed tax consequences following his change of residence.

[8] The claimant says that the consequences of Air Canada's position place the payee spouse in a most difficult position depending, as she must, for the rest of her life to be dependent on receiving payments from either a former spouse or the partner of a former spouse. Further, enforcement applications take on new complications with retirees who continue working overseas. Specialist lawyers must draft orders and actuaries are required to be involved. The expense is great, and Section 81 of the *FRA* and s. 13 of the Pensions Regulations may not be relied upon to limit the cost to \$500.

[9] Air Canada opposes the order. Air Canada says that the Court does not have jurisdiction to make the order requested. It distinguishes contrary authority from

another jurisdiction on the basis that more general and different statutory language founded the Court's jurisdiction. It says that in a few months it will change its Administrative Policy. In the meantime it is "administratively impossible" to comply with the proposed order.

[10] As pointed out in the affidavit of Ms. Senecal, Air Canada is a federally regulated employer. It administers the ACPPP which is governed by the *Pension Benefits Standards Act, 1985*, R.S.C. 1985, c. 32, (2nd Supp.) ("PBSA"). Air Canada says that the SRP is not governed by the PBSA. I disagree.

[11] I was referred to ss. 4 and 25 of the *PBSA*.

[12] Section 4 is the charging section of the statute which provides in s-s 4(1) that it "applies in respect of pension plans". The term "pension plan" is defined in s-s 4(2) to include a "supplemental pension plan". A supplemental pension plan is defined in s-s 4(3) to include a supplemental plan for which membership is contingent on membership in another plan and is integral to that plan. Section 4(4) defines included employment to mean, *inter alia*, air transportation.

[13] Section 25(1) defines provincial property law to include property division on marital breakup, and makes pension plan benefits "subject to the applicable provincial property law". In my opinion this concatenation of provisions makes a supplemental pension plan subject to applicable provincial property law. In my view the SRP is a supplemental pension plan subject to applicable provincial property law.

[14] The claimant says that s. 70(1) of the *FRA* clearly applies to the two Air Canada pension plans. Clearly the definitions of "pension" and "plan" apply to the SRP. It was not argued otherwise. In my opinion the definition of "Exaprovincial Plan" is broad enough to include the SRP as a "supplemental pension plan to a local plan or extra provincial plan".

[15] There are authorities that make it clear that Part VI of the *FRA* applies to federal pensions. See, for example, *H.E.D.C. v. R.M.C.*, 2003 BCCA 420 where

Finch C.J.B.C., held that s. 77(4) of the *FRA* permits the Court to apply the method of division established by the Pension Regulation if the alternative method operates unfairly.

[16] I note that Holmes J. held in *Bentley v. Bentley*, 2007 BCSC 1204 at paras. 94-95 that the *PBSA* applied to an Air Canada Pension, and such were subject to applicable provincial law, being the *FRA*.

[17] A similar conclusion was reached by Ehrcke J. in *Burridge v. Burridge*, 2008 BCSC 588. Air Canada points out that in *Burridge* the parties agreed to an order that pending a change in the administrative policy of Air Canada, one spouse would pay the other. Ehrcke J., however made it clear that "given the difficulties posed by Air Canada's policies" the parties were at liberty to apply to the Court if they could not resolve the appropriate mechanism for the division of the pension.

[18] This brings in the regime enacted by s. 77 of the *FRA*. Under s. 77(1), if a pension is to be divided a spouse is entitled to receive "from the plan a proportionate share of the benefits paid under the pension" for the period specified. I note the section refers to receipts from "the plan", not the spouse.

[19] Air Canada emphasizes the description of the member of the plan as "trustee". I do not think the use of that term is intended to indicate that the payments should come from the member rather than the plan. Rather, the member holds all or part of his interest in the SRP as trustee for his spouse.

[20] Subject to s-s (4), s-s (1) does not apply if the plan or legislation establishing or regulating the plan provides an alternate method of satisfying the interest of the spouse in the pension. Subsection (4) reads as follows:

(4) If, having regard to the principles that apply to pension division under this Part, the alternative method under subsection (3) would operate unfairly, the Supreme Court may order the spouse's share in the pension to be satisfied under subsection (1).

[21] As I understand the argument of Air Canada, the Court cannot look at what an individual might do in determining whether the alternate method "would operate

unfairly". Thus, whether the respondent is or is not inclined to abide an order is not a consideration under this section. Individual difficulties in collecting payments to spouses are not germane.

[22] The claimant, however, points to the method by which the plan operates, as I understand the argument, rather than the individual circumstances here, although those circumstances may have occasioned this application. The method operates unfairly because it requires a spouse to rely on the good will of a former spouse or, in the event of the death of the former spouse, on the good will of the new spouse.

[23] I was referred to an affidavit filed on behalf of the claimant sworn by Thomas Anderson, Q.C. Mr. Anderson amongst other things described the cost and complexity of abiding by the Air Canada Administrative Policy. On occasion he may have strayed into opining on legal matters, but no more so than the affiant for Air Canada who attested to the conformity of the Air Canada Administrative Policy with the *PBSA*, and whether the SRP is governed by the *PBSA*. Based on the information from Mr. Anderson I accept that Air Canada's Administrative Policy adds significant costs and complexity, and difficulty, to the litigating parties.

[24] On the other hand, the affiant for Air Canada refers to the administrative impossibility of dividing and paying SRP benefits at source. In the same affidavit, however, the affiant deposes that they may be able to do so by October or November 2011. One of the difficulties may be obtaining the consent of the pilots to changes in the policy; however, policies arising from such negotiations cannot prevent the application of provincial law: see *Frueh v. Mair*, 1998 ABQB 738 at para. 28. Moreover, Air Canada is complying with an order of an Alberta Court that it divide an SRP and pay a spouse her share of the SRP directly arising from the decision in *Paxton v. Paxton*, 2009 ABQB 435.

[25] In the circumstances, I am satisfied that the claimant should have an order that Air Canada pay directly to the claimant her entitlement at source from the Supplemental Retirement Plan on a monthly basis following the first day of the month following the making of this order.

[26] As the respondent took issue with the amount of such payment, in light of the other orders made in this proceeding, and the lack of time to hear the parties, failing agreement on such amount, the parties are at liberty to apply to the Court to determine such amount. By agreement the other matters raised by the respondent's Notice of Application are adjourned, together with items 1, 3, 4, 5, and 6 of the claimant's Notice of Application, all of which may be set down concurrently. I am not seized of those matters.

[27] If there is an issue as to costs the parties may make arrangements through the registry to speak to costs.

The Honourable Mr. Justice J. Savage