Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

Citation: *S. S. v. Canada Employment Insurance Commission*, 2017 SSTGDEI 2

Tribunal File Number: GE-16-1986

BETWEEN:

S. S.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Employment Insurance Section

DECISION BY: Eleni Palantzas

HEARD ON: December 6, 2016

DATE OF DECISION: January 4, 2016

Canada

REASONS AND DECISION

PERSONS IN ATTENDANCE

The Claimant, Ms. S. S., attended the hearing by teleconference.

INTRODUCTION

[1] The Claimant applied for employment insurance regular benefits on March 2, 2015. On April 10, 2015, the Commission advised the Claimant that the $102,286.00 that she received upon separation from her employer were allocated to her benefit period from March 1, 2015 to January 30, 2016. Due to the length of the allocation, the Claimant was advised that she may choose to stop completing her reports and renew her claim the week of January 24, 2016.

[2] On March 2, 2016 the Claimant applied to renew her claim. On March 8, 2016, the Commission advised the Claimant that the company pension she was receiving is considered earnings and that she must declare it on her weekly benefit reports.

[3] On March 21, 2016, the Claimant requested that the Commission reconsider its decision regarding the allocation of her company pension however; on April 12, 2016, the Commission maintained its decision.

[4] On May 12, 2016, the Claimant appealed to the General Division of the Social Security Tribunal (Tribunal).

[5] The hearing was held by teleconference given (a) the complexity of the issue under appeal (b) the fact that the Claimant was going to be the only party in attendance and because (c) the form of hearing respects the requirement under the Social Security Tribunal Regulations to proceed as informally and quickly as circumstances, fairness and natural justice permit.

ISSUE

[6] The Member must decide whether the Claimant's monthly company pension should be allocated to her benefit period pursuant to sections 35 and 36 of the *Employment Insurance Regulations* (Regulations).

EVIDENCE

[7] The Claimant initially applied for employment insurance regular benefits on March 2, 2015 after having been permanently laid off by her employer on February 19, 2015 (GD3-3 to GD3-10).

[8] The record of employment (ROE) indicates that upon separation from her employment, the Claimant received separation monies totalling $102,285.50 and a $6,349.00 bonus (GD3-11).

[9] On April 10, 2015, the Commission advised the Claimant that the $102, 286.00 that she received upon separation from her employer are considered earnings and that they were allocated to her benefit period from March 1, 2015 to the week of January 24, 2016. She was also advised that due to the length of the allocation, she may choose to stop completing her weekly reports and renew her claim the week of January 24, 2016 (GD3-12).

[10] On March 2, 2016, the Claimant applied to renew her claim indicating that as of March 1, 2015, she was in receipt of a company pension in the amount of $1,440.16/month (GD3-13 to GD23). The Claimant also indicated that she had worked for a new employer from July 22, 2015 until July 30, 2015 accumulating 24 hours of insurable employment (GD3-24).

[11] On March 8, 2016, the Commission advised the Claimant that her company pension is considered earnings and that she must declare $332.00 on her weekly benefit reports from January 17, 2016 until the end of her claim (GD3-25).

[12] On March 21, 2016, the Claimant requested that the Commission reconsider its decision to allocate her company pension arguing that she should not be penalized for collecting her pension. The Claimant noted that the only reason she is collecting her pension is because she does not want to be negatively affected by pending changes to the ‘Plan’. Plus, she has been mandatorily contributing to the employment insurance system for over 20 years (GD3-27).

[13] On April 12, 2016, the Commission maintained its decision stating to the Claimant that according to the legislation, she did not meet the criteria for her pension to ‘not’ be considered

earnings. The Commission explained that since being in receipt of her pension, she had not accumulated enough insurable hours to establish a new claim (to requalify) so that her company pension would not be considered earnings. The Claimant had accumulated only 24 hours of insurable employment after she started to receive her company pension and as a result, she did not have the required 630 hours of insurable employment to establish a new benefit period. She therefore did not meet the legislated criteria to have her pension not classified as earnings (GD3- 28 to GD3-31).

[14] In her notice of appeal to the Tribunal, the Claimant indicated that she had to mandatorily contribute to both her company pension plan and the employment insurance system. She therefore objects and finds it unfair that she does not have access to both benefits and questions why one negatively affects the other (GD2-2).

[15] At the hearing, the Claimant confirmed (although not part of this appeal) that she was in receipt of the said separation monies and that they were allocated up to the week of January 24, 2016, at which time she then applied to renew her claim. The Claimant confirmed that she has been in receipt of a company pension in the amount of $1440.16/month since March 1, 2015. The Claimant testified that other than the 24 hours she worked from July 22-30, 2015, she had no other employment since she started receiving her pension.

[16] The Claimant adamantly disagrees that her company pension is ‘earnings’ stating that it is her “forced savings”. The Claimant stated that she was forced to make these savings and forced to contribute to the employment insurance system. Now she is being forced to draw on these savings 4 years early rather than at 65 years of age, as she had planned. The Claimant testified that she had a choice of when to draw/take the company pension however, she felt pressured to do so now because (a) she was let go by the employer (b) she did not want to be in the precarious position of falling victim to imminent changes to the company pension and (c) her personal financial circumstances.

[17] The Claimant stated that although she does not dispute that the Commission applied the law correctly, it “uses every loop hole” to prevent paying benefits. The Claimant stated that she finds that this “is all a farce” and a complete injustice. She doesn’t understand why there’s no discretion in the law for her exceptional circumstances.

[18] The Claimant stated that she is not objecting to how the pension was allocated.

[19] After the hearing, the Claimant wrote to the Tribunal indicating that her actual last day of employment was February 19, 2015 (not February 28, 2015) and that she started receiving her company pension on February 20, 2015 prior to receiving employment insurance benefits. The Claimant indicates that she therefore "should not be penalized" for collecting her pension according to the legislation. She indicated that her employer has submitted a corrected ROE (GD5).

SUBMISSIONS

[20] The Claimant submitted she has paid into both her company pension and was forced to contribute employment insurance system for over 20 years so it is unfair and unequitable that her employment insurance benefits entitlement is reduced by her company pension amount. The Claimant submitted that she is collecting her company pension now only because of anticipated imminent changes to her company pension plan (GD2 and GD3-27). The Claimant further submitted that her pension payments started prior to her employment insurance benefits and according to the legislation, it should not be allocated to her benefit period (GD5). Finally, the Claimant submitted that her company pension monies are not "earnings"; they are her own "forced savings".

[21] The Commission submitted that the Claimant's company pension arose from her employment and therefore constitutes earnings pursuant to paragraph 35(2)(e) of the Regulations. The Commission therefore submitted that it must be allocated pursuant to subsection 36(14) of the Regulations at $332.00 per week commencing March 1, 2015. The Commission submitted that the Claimant's circumstances do not meet those required under paragraph 35(7)(e) of the Regulations in order for her pension to not be considered earnings.

ANALYSIS

[22] The relevant legislative provisions are reproduced in the Annex to this decision.

[23] In many cases, and for various reasons, a claimant may be in receipt of monies during a benefit period. Consideration therefore, has to be given to whether the monies received are considered 'earnings' and whether these earnings should be allocated to the benefit period. Sections 35 and 36 of the Regulations define what monies are considered 'earnings' for the purposes set out in section 35 and how these earnings are to be allocated to the benefit period.

[24] In this case, the Claimant confirmed that she was in receipt of a monthly company pension ($1,440.16/month) when she first applied for employment insurance benefits on March 2, 2015. Paragraph 35(1)(e) of the Regulations defines "pension" as a retirement pension arising out of employment or out of service in any armed forces or in a police force, under the Canada Pension Plan or under a provincial plan. Accordingly, the Member finds that the Claimant's company pension is a retirement pension that arose out of her employment so it's a "pension" according to the Regulations.

[25] Further, paragraph 35(2)(e) of the Regulations stipulates that the "earnings" to be deducted from benefits payable, are the entire income of a claimant arising out of any employment, including the moneys paid or payable to a claimant on a periodic basis or lump sum on account of or in lieu of a pension. The Member therefore finds that in this case, the Claimant was in receipt of moneys on a periodic (monthly) basis on account of a "pension" therefore, these moneys are "earnings" to be deducted from benefits payable to the Claimant.

[26] The Member considered the Claimant's submission that her pension monies are not "earnings" because they are her own "forced savings". The Member understands the Claimant's argument that because she contributed to her company pension, she considers these moneys a form of her own savings. The Member finds however that the Claimant contributed to a pension 'Plan' and the moneys she receives from her employer or from the 'Plan' are undisputedly a retirement pension that arose out of her employment, and for the reasons provided above, are considered a "pension" pursuant to paragraph 35(1)(e) of the Regulations and "earnings" pursuant to paragraph 35(2)(e) of the Regulations.

[27] The Member's finding is supported by case law. In a similar case, the Federal Court of Appeal confirmed that the claimant's monthly payments from the "the Pension Plan", to which

he contributed and was a member, is a retirement pension arising directly out of his employment. It is therefore, a pension by definition in section 35(1) of the Regulations and constitutes earnings for the purposes of sections 35 and 36 of the Regulations (McNeil A-75-09).

[28] Further, the Claimant submitted that since her pension started prior to her employment insurance benefits; it should not be allocated to her benefit period according to the legislation (GD5). The Claimant is likely referring to the Commission's reference to paragraph 35(7)(e)(ii) of the Regulations that sets out when a Claimant's pension is not considered earnings for the purposes of paragraph 35(2) of the Regulations (GD3-28 and GD3-29).

[29] According to paragraph 35(7)(e)(ii) of the Regulations, in the case of claimants that are not self-employed, the moneys referred to in paragraph 35(2)(e) do not constitute earnings if the claimant accumulates the required number of hours of insurable employment under section 7 or 7.1 of the EI Act, after the date on which those moneys became payable and during the period in respect of which he/she received those moneys. In other words, in order for the Claimant's pension to not constitute earnings to be allocated, three conditions must be met: (a) she must accumulate enough insurable hours of employment to (re)qualify for benefits i.e. to establish a (new) benefit period (b) the insurable hours must be accumulated after the date that the pension became payable and (c) she must be receiving her pension during the entire period that she is accumulating the required insurable hours.

[30] In this case, the Claimant's monthly pension would not constitute earnings if, after she started receiving her pension (on February 20, 2015), and while she continued to receive her pension, she accumulated the required insurable hours to qualify for benefits under section 7 and 7.1 of the EI Act. The Member finds that after February 20, 2015, even though she continued to receive her pension, the Claimant did not accumulate the required 630 insurable hours to establish a new claim; she accumulated only 24 hours of insurable hours (GD3-24 and GD3-28). The Member therefore, agrees with the Commission, and finds that the Claimant did not meet the conditions of paragraph 35(7)(e)(ii) of the Regulations in order for her pension to not be considered earnings.

[31] The Claimant's monthly company pension therefore must be allocated to her benefit period. Subsection 36(14) of the Regulations states that the monies referred to in paragraph 35(2)(e) that are paid or payable to a claimant on a periodic basis shall be allocated to the period for which they are paid or payable. In this case, after the Claimant stopped working on February 19, 2015, the Claimant's pension became payable and was paid to her as of February 20, 2015 (not March 1, 2015 - she corrected her prior GD3-18 submission in GD5). The Member therefore, finds that the Commission correctly calculated and allocated $332.00/week ($1440.16 x 12 months divided by 52 weeks = $332.34 = $332 per week) to the Claimant's benefit period pursuant to subsection 36(14) of the Regulations (GD3-28). The Member notes that although the allocation was made effective March 1, 2015, correcting this to February 20, 2015, has no effect on her renewal claim that became effective January 17, 2016. The Claimant was already in receipt of the pension on a monthly basis so the actual deductions started from this renewal date forward (GD3-25).

[32] The Member also understands that, for the reasons she provided at the hearing, the Claimant feels forced to collect her company pension now rather than later. As a result, she feels that she is being "punished" and finds it unjust that her pension was deducted from the employment insurance benefits to which she contributed for over 20 years. She therefore, asks that the Tribunal exercise some discretion. Unfortunately, it is neither within the Commission's, or the Tribunal's jurisdiction, to exempt, move, postpone or otherwise allocate earnings other than as prescribed in the Regulations.

[33] The Member finds that the company pension that the Claimant received as of February 20, 2015 is considered earnings and it was properly allocated to her benefit period pursuant to sections 35 and 36 of the Regulations.

CONCLUSION

[34] The appeal is dismissed with modification to the effective date.

Eleni Palantzas

Member, General Division - Employment Insurance Section

ANNEX

THE LAW

Subsection 35(1) of the Regulations provides the definitions that apply in this section.

employment means

> **(a)** any employment, whether insurable, not insurable or excluded employment, under any express or implied contract of service or other contract of employment,
>
> > **(i)** whether or not services are or will be provided by a claimant to any other person, and
> >
> > **(ii)** whether or not income received by the claimant is from a person other than the person to whom services are or will be provided;
>
> **(b)** any self-employment, whether on the claimant's own account or in partnership or co- adventure; and
>
> **(c)** the tenure of an office as defined in subsection 2(1) of the *Canada Pension Plan*. (*emploi*)

income means any pecuniary or non-pecuniary income that is or will be received by a claimant from an employer or any other person, including a trustee in bankruptcy. (*revenu*)

pension means a retirement pension

> **(a)** arising out of employment or out of service in any armed forces or in a police force;
>
> **(b)** under the *Canada Pension Plan*; or
>
> **(c)** under a provincial pension plan. (*pension*)

self-employed person has the same meaning as in subsection 30(5). (*travailleur indépendant*)

Paragraph 35(2)(e) of the Regulations is subject to the other provisions of this section and states that the earnings to be taken into account for the purpose of determining whether an interruption of earnings under section 14 has occurred and the amount to be deducted from benefits payable under section 19, subsection 21(3), 22(5), 152.03(3) or 152.04(4) or section 152.18 of the Act, and to be taken into account for the purposes of sections 45 and 46 of the Act, are the entire income of a claimant arising out of any employment, including the moneys paid or payable to a claimant on a periodic basis or in a lump sum on account of or in lieu of a pension.

Subsection 35(7) of the Regulations stipulates that, the portion of the income of a claimant that is derived from any of the following sources does not constitute earnings for the purposes referred to in subsection (2):

> **(e)** the moneys referred to in paragraph (2)(e) if
>
> > **(i)** in the case of a self-employed person, the moneys became payable before the beginning of the period referred to in section 152.08 of the Act, and
> >
> > **(ii)** in the case of other claimants, the number of hours of insurable employment required by section 7 or 7.1 of the Act for the establishment of their benefit period was accumulated after the date on which those moneys became payable and during the period in respect of which they received those moneys;

Subsection 36(1) of the Regulations stipulates that, subject to subsection (2), the earnings of a claimant as determined under section 35 shall be allocated to weeks in the manner described in this section and, for the purposes referred to in subsection 35(2), shall be the earnings of the claimant for those weeks.

Subsection 36(14) of the Regulations stipulates that the moneys referred to in paragraph 35(2)(e) that are paid or payable to a claimant on a periodic basis shall be allocated to the period for which they are paid or payable.