



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *S. B. v. Canada Employment Insurance Commission*, 2016 SSTGDEI 15

Tribunal File Number: GE-15-3085

BETWEEN:

S. B.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Michael Sheffe

HEARD ON: January 27, 2016

DATE OF DECISION: January 29, 2016

REASONS AND DECISION

PERSONS IN ATTENDANCE

The Appellant attended the hearing.

INTRODUCTION

[1] The Appellant filed an initial claim for employment insurance benefits (benefits) on June 26, 2015 (Exhibit GD3-10). The Appellant was sent a decision from the Canada Employment Insurance Commission (Commission), dated July 16, 2015, advising that the pension money the Appellant received was considered as earnings for benefits purposes and must be allocated (Exhibit GD3-18). The Appellant requested a reconsideration of this decision on July 28, 2015 (Exhibits GD3-29 to GD3-21). The Appellant was sent a reconsideration decision, dated August 25, 2015, which upheld the original decision (Exhibits GD2-1). The Appellant appealed this decision to the Social Security Tribunal (Tribunal) on September 2, 2015 (Exhibits GD2-2 to GD2-6).

[2] The hearing was held by Teleconference for the following reasons:

- a) The complexity of the issue under appeal.
- b) The information in the file, including the need for additional information.
- 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

[3] Whether the allocation of pension payments pursuant to sections 35 and 36 of the *Employment Insurance Regulations (Regulations)* should be upheld

THE LAW

[4] Section 35 of the *Regulations* states, “(1) The definitions in this subsection apply in this section.

“employment”

“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*.

“income”

“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.

“pension”

“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.

“self-employed person”

“self-employed person” has the same meaning as in subsection 30(5).

(2) Subject to the other provisions of this section, 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

(a) amounts payable to a claimant in respect of wages, benefits or other remuneration from the proceeds realized from the property of a bankrupt employer;

(b) workers' compensation payments received or to be received by a claimant, other than a lump sum or pension paid in full and final settlement of a claim made for workers' compensation payments;

(c) payments a claimant has received or, on application, is entitled to receive under

(i) a group wage-loss indemnity plan,

(ii) a paid sick, maternity or adoption leave plan,

(iii) a leave plan providing payment in respect of the care of a child or children referred to in subsection 23(1) or 152.05(1) of the Act,

(iv) a leave plan providing payment in respect of the care or support of a family member referred to in subsection 23.1(2) or 152.06(1) of the Act, or

(v) a leave plan providing payment in respect of the care or support of a critically ill child;

(d) notwithstanding paragraph (7) (b) but subject to subsections (3) and (3.1), the payments a claimant has received or, on application, is entitled to receive from a motor vehicle accident insurance plan provided under a provincial law in respect of the actual

or presumed loss of income from employment due to injury, if the benefits paid or payable under the Act are not taken into account in determining the amount that the claimant receives or is entitled to receive from the plan;

(e) 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; and

(f) where the benefits paid or payable under the Act are not taken into account in determining the amount that a claimant receives or is entitled to receive pursuant to a provincial law in respect of an actual or presumed loss of income from employment, the indemnity payments the claimant has received or, on application, is entitled to receive pursuant to that provincial law by reason of the fact that the claimant has ceased to work for the reason that continuation of work entailed physical dangers for

(i) the claimant,

(ii) the claimant's unborn child, or

(iii) the child the claimant is breast-feeding.

(3) Where, subsequent to the week in which an injury referred to in paragraph (2)(d) occurs, a claimant has accumulated the number of hours of insurable employment required by section 7 or 7.1 of the Act, the payments referred to in that paragraph shall not be taken into account as earnings.

(3.1) If a self-employed person has sustained an injury referred to in paragraph (2)(d) before the beginning of the period referred to in section 152.08 of the Act, the payments referred to in that paragraph shall not be taken into account as earnings.

(4) Notwithstanding subsection (2), the payments a claimant has received or, on application, is entitled to receive under a group sickness or disability wage-loss indemnity plan or a workers' compensation plan, or as an indemnity described in paragraph (2)(f), are not earnings to be taken into account for the purpose of subsection 14(2).

(5) Notwithstanding subsection (2), the moneys referred to in paragraph (2) (e) are not earnings to be taken into account for the purposes of section 14.

(6) Notwithstanding subsection (2), the earnings referred to in subsection 36(9) and allowances that would not be deducted from benefits by virtue of subsection 16(1) are not earnings to be taken into account for the purposes of section 14.

(7) That 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):

(a) disability pension or a lump sum or pension paid in full and final settlement of a claim made for workers' compensation payments;

(b) payments under a sickness or disability wage-loss indemnity plan that is not a group plan;

(c) relief grants in cash or in kind;

(d) retroactive increases in wages or salary;

(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; and

(f) employment income excluded as income pursuant to subsection 6(16) of the *Income Tax Act*.

(8) For the purposes of paragraphs (2) (c) and (7) (b), a sickness or disability wage-loss indemnity plan is not a group plan if it is a plan that

- (a) is not related to a group of persons who are all employed by the same employer;
- (b) is not financed in whole or in part by an employer;
- (c) is voluntarily purchased by the person participating in the plan;
- (d) is completely portable;
- (e) provides constant benefits while permitting deductions for income from other sources, where applicable; and
- (f) has rates of premium that do not depend on the experience of a group referred to in paragraph (a).

(9) For the purposes of subsection (8), "portable", in respect of a plan referred to in that subsection, means that the benefits to which an employee covered by the plan is entitled and the rate of premium that the employee is required to pay while employed by an employer will remain equivalent if the employee becomes employed by any other employer within the same occupation.

(10) For the purposes of subsection (2), "income" includes

(a) in the case of a claimant who is not self-employed, that amount of the claimant's income remaining after deducting

(i) expenses incurred by the claimant for the direct purpose of earning that income, and

(ii) the value of any consideration supplied by the claimant; and

(b) in the case of a claimant who is self-employed in farming, the gross income from that self-employment, including any farming subsidies the claimant receives under any federal or provincial program, remaining after deducting the operating expenses, other than capital expenditures, incurred in that self-employment;

(c) in the case of a claimant who is self-employed in employment other than farming, the amount of the gross income from that employment remaining after deducting the operating expenses, other than capital expenditures, incurred therein; and

(d) in the case of any claimant, the value of board, living quarters and other benefits received by the claimant from or on behalf of the claimant's employer in respect of the claimant's employment.

(11) Subject to subsection (12), the value of the benefits referred to in paragraph (10) (d) shall be the amount fixed by agreement between the claimant and the claimant's employer and shall be an amount that is reasonable in the circumstances.

(12) Where the claimant and the employer do not agree on the value of the benefits referred to in paragraph (10) (d), or where the value fixed for those benefits by agreement between the claimant and the claimant's employer is not reasonable in the circumstances, the value shall be determined by the Commission based on the monetary value of the benefits.

(13) The value of living quarters referred to in paragraph (10) (d) includes the value of any heat, light, telephone or other benefits included with the living quarters.

(14) Where the value of living quarters is determined by the Commission, it shall be computed on the rental value of similar living quarters in the same vicinity or district.

(15) Where the remuneration of a claimant is not pecuniary or is only partly pecuniary and all or part of the non-pecuniary remuneration consists of any consideration other than living quarters and board furnished by the employer, the value of that consideration shall be included in determining the claimant's income.

(16) For the purposes of this section, living quarters means rooms or any other living accommodation.

[5] Section 36 of the *Regulations* states, “(1) 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.

(2) For the purposes of this section, the earnings of a claimant shall not be allocated to weeks during which they did not constitute earnings or were not taken into account as earnings under section 35.

(3) Where the period for which earnings of a claimant are payable does not coincide with a week, the earnings shall be allocated to any week that is wholly or partly in the period in the proportion that the number of days worked in the week bears to the number of days worked in the period.

(4) Earnings that are payable to a claimant under a contract of employment for the performance of services shall be allocated to the period in which the services were performed.

(5) Earnings that are payable to a claimant under a contract of employment without the performance of services or payable by an employer to a claimant in consideration of the claimant returning to or beginning work shall be allocated to the period for which they are payable.

(6) The earnings of a claimant who is self-employed, or the earnings of a claimant that are from participation in profits or commissions, that arise from the performance of services shall be allocated to the weeks in which those services are performed.

(6.1) The earnings of a claimant who is self-employed, or the earnings of a claimant that are from participation in profits or commissions, that arise from a transaction shall be allocated

(a) if the aggregate amount of earnings that arise from a transaction occurring in a week is greater than the maximum yearly insurable earnings referred to in section 4 of the Act divided by 52, to the weeks in which the work that gave rise to the transaction was performed, in a manner that is proportional to the amount of work that was performed during each of those weeks or, if no such work was performed, to the week in which the transaction occurred; or

(b) if the aggregate amount of earnings that arise from a transaction occurring in a week is less than or equal to the maximum yearly insurable earnings referred to in section 4 of the Act divided by 52, to the week in which the transaction occurred or, if the claimant

demonstrates that the work that gave rise to the transaction occurred in more than one week, to the weeks in which the earnings were earned, in a manner that is proportional to the amount of work that was performed during each of those weeks.

(6.2) The earnings of a claimant who is self-employed, or the earnings of a claimant that are from participation in profits or commissions, that do not arise from the performance of services or from a transaction shall be allocated equally to each week falling within the period in which the earnings were earned.

(7) The earnings of a claimant who is self-employed in farming shall be allocated

(a) if they arose from a transaction, in accordance with subsection (6.1); and

(b) if they were received in the form of a subsidy, to the week in which the subsidy was paid.

(8) Where vacation pay is paid or payable to a claimant for a reason other than a lay-off or separation from an employment, it shall be allocated as follows:

(a) where the vacation pay is paid or payable for a specific vacation period or periods, it shall be allocated

(i) to a number of weeks that begins with the first week and ends not later than the last week of the vacation period or periods, and

(ii) in such a manner that the total earnings of the claimant from that employment are, in each consecutive week, equal to the claimant's normal weekly earnings from that employment; and

(b) in any other case, the vacation pay shall, when paid, be allocated

(i) to a number of weeks that begins with the first week for which it is payable, and

(ii) in such a manner that, for each week except the last, the amount allocated under this subsection is equal to the claimant's normal weekly earnings from that employment.

(9) Subject to subsections (10) to (11), all earnings paid or payable to a claimant by reason of a lay-off or separation from an employment shall, regardless of the period in respect of which the earnings are purported to be paid or payable, be allocated to a number of weeks that begins with the week of the lay-off or separation in such a manner that the total earnings of the claimant from that employment are, in each consecutive week except the last, equal to the claimant's normal weekly earnings from that employment.

(10) Subject to subsection (11), where earnings are paid or payable to a claimant by reason of a lay-off or separation from an employment subsequent to an allocation under subsection (9) in respect of that lay-off or separation, the subsequent earnings shall be added to the earnings that were allocated and, regardless of the period in respect of which the subsequent earnings are purported to be paid or payable, a revised allocation shall be made in accordance with subsection (9) on the basis of that total.

(10.1) The allocation of the earnings paid or payable to a claimant by reason of a lay-off or separation from an employment made in accordance with subsection (9) does not apply if

(a) the claimant's benefit period begins in the period beginning on January 25, 2009 and ending on May 29, 2010;

(b) the claimant contributed at least 30% of the maximum annual employee's premium in at least seven of the 10 years before the beginning of the claimant's benefit period;

(c) the Commission paid the claimant less than 36 weeks of regular benefits in the 260 weeks before the beginning of the claimant's benefit period; and

(d) during the period in which the earnings paid or payable by reason of the claimant's lay-off or separation from an employment are allocated in accordance with subsection (9) or, if the earnings are allocated to five weeks or less, during that period of allocation or within six weeks following the notification of the allocation, the claimant is referred

by the Commission, or an authority that the Commission designates, under paragraph 25(1)(a) of the Act, to a course or program of instruction or training

(i) that is full-time,

(ii) that has duration of at least 10 weeks or that costs at least \$5,000 or 80% of the earnings paid or payable by reason of the claimant's lay-off or separation from employment,

(iii) for which the claimant assumes the entire cost, and

(iv) that begins during one of the 52 weeks following the beginning of the claimant's benefit period.

(10.2) If any of the conditions under which the Commission may terminate the claimant's referral under paragraph 27(1.1)(b) of the Act exists, the earnings paid or payable to the claimant by reason of a lay-off or separation from an employment shall be re-allocated under subsection (9).

(11) Where earnings are paid or payable in respect of an employment pursuant to a labour arbitration award or the judgment of a tribunal, or as a settlement of an issue that might otherwise have been determined by a labour arbitration award or the judgment of a tribunal, and the earnings are awarded in respect of specific weeks as a result of a finding or admission that disciplinary action was warranted, the earnings shall be allocated to a number of consecutive weeks, beginning with the first week in respect of which the earnings are awarded, in such a manner that the total earnings of the claimant from that employment are, in each week except the last week, equal to the claimant's normal weekly earnings from that employment.

(12) The following payments shall be allocated to the weeks in respect of which the payments are paid or payable:

(a) payments in respect of sick leave, maternity leave or adoption leave or leave for the care of a child or children referred to in subsection 23(1) or 152.05(1) of the Act;

(b) payments under a group sickness or disability wage-loss indemnity plan;

(c) payments referred to in paragraphs 35(2) (d) and (f);

(d) workers' compensation payments, other than a lump sum or pension paid in full and final settlement of a claim made for workers' compensation payments;

(e) payments in respect of the care or support of a family member referred to in subsection 23.1(2) or 152.06(1) of the Act; and

(f) payments in respect of the care or support of a critically ill child.

(13) A payment paid or payable to a claimant in respect of a holiday or non-working day that is observed as such by law, custom or agreement, or a holiday or non-working day immediately preceding or following a holiday or non-working day that occurs at the establishment of the employer or former employer from whom the claimant receives that payment, shall be allocated to the week in which that day occurs.

(14) 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.

(15) The moneys referred to in paragraph 35(2) (e) that are paid or payable to a claimant in a lump sum shall be allocated beginning with the first week that those moneys are paid or payable to the claimant in such a manner that those moneys are equal in each week to the weekly amount, calculated in accordance with subsection (17), to which the claimant would have been entitled if the lump sum payment had been paid as an annuity.

(16) The moneys allocated in accordance with subsection (14) or (15) shall not be taken into account in the allocation of other earnings under this section.

(17) For the purposes of subsection (15), the weekly amount shall be calculated as the amount of the lump sum payment divided by 1,000 and multiplied by the weekly annuity equivalent, as set out in Schedule II, corresponding to the age of the claimant at the date the lump sum is paid or payable.

(18) Earnings that are payable to a claimant under a government program intended to encourage re-employment and that are payable to the claimant as a supplement to earnings arising from a contract of employment shall be allocated to the period for which they are payable.

(19) Where a claimant has earnings to which none of subsections (1) to (18) apply, those earnings shall be allocated

(a) if they arise from the performance of services, to the period in which the services are performed; and

(b) if they arise from a transaction, to the week in which the transaction occurs.

(20) For the purposes of this section, a fraction of a dollar that is equal to or greater than one half shall be taken as a dollar and a fraction that is less than one half shall be disregarded.

EVIDENCE

[6] An initial claim for benefits was established effective June 26, 2015 (Exhibit GD3-10).

[7] The Appellant is receiving a monthly pension of \$2,096.91 from the Ontario Teachers' Pension Plan (OTPP). The Commission calculated that the Appellant must declare that she received \$484.00 pension earnings weekly (Exhibit GD3-18).

[8] The pension administrator of the OTPP was contacted by the Commission. The administrator advised that teachers can work as an educator for up to 50 days per school year. After 50 days, the pension payments are suspended until the pensioner ceases to work as an educator. Typically pensions are reinstated during the months of July and August. If the pensioner continues to work as an educator during the subsequent school year the pensioner begins accumulating teaching days up to the 50 day mark. If pensioners work in any other field, there is no impact on their pension (Exhibit GD3-16).

[9] The Appellant confirmed that she is in receipt of a pension from the OTPP. She worked the 50 days during the 2014/2015 school year as a teacher from September to January and received her OTPP pension. Beginning in February 2015, she still worked as a teacher, and her pension was suspended until June. It was reinstated during July 2015 (Exhibit GD3-17).

SUBMISSIONS

[10] The Appellant submitted that her pension began on November 1, 2013 and should be exempt. It did not start, in her opinion, in July 2015.

[11] The Respondent submitted that because there was a break in her pension payments, during the period in which she was accumulating her insurable hours, the pension payments are not exempt from allocation.

ANALYSIS

[12] The Federal Court of Appeal in *Boone v. Canada (Commission de l'assurance employ)*, 2002 FCA 257, upheld the principle that money which constitutes earnings under section 35 of the *Regulations* must be allocated according to section 36 of the *Regulations*.

[13] The Appellant was speaking with a Commission agent who reviewed the facts on file and explained to the Appellant that since she was not paid her full teacher's pension throughout the entire period in which she accumulated her insurable hours because it ceases after she had worked 50 teaching days, and is then reinstated after she stops teaching, it was not paid throughout the entire period.

[14] The Appellant's pension was re-instated July 1, 2015, which means it is treated as a 'new' pension. It was explained to the Appellant that if she had worked in a non-teaching job, she would have received her teaching pension for the entire time while working and accumulating her required insurable hours, and then the pension would have been qualified and exempt from allocation. However, as long as she continues to work only as a teacher, it will continue to be interrupted or suspended while she is accumulating hours, and therefore will never be considered exempt because she is not paid the pension during the entire period (Exhibit GD3-23).

[15] The Appellant advised while speaking with the Commission agent and again during the hearing, that she believes other teachers are getting benefits under the same circumstances. The Tribunal Member advised the Appellant that privacy issues would prevent any information from being distributed to the Tribunal Member regarding other claimants and their situation, and thus

the facts of other claimants' situations could not be verified. The Tribunal Member suggested to the Appellant that other claimants may have different situations than the one in which the Appellant is in, and that may be why they were receiving benefits.

[16] Pension money arising out of employment is considered earnings for benefits purposes. However, pensions are not considered earnings if a claimants have accumulated sufficient insurable hours since they began receiving their pensions, to re-qualify for a new claim for benefits.

[17] The Appellant worked for 392 insurable hours during her qualifying period, while she received her pension from September 22, 2014 to December 20, 2014. She taught for 49 days during this time. In January 2015, she continued to teach and reached her fiftieth day. Her pension was paid until the end of the month according to the provisions ones of the OTPP.

[18] From January 6, 2015 to June 24, 2015 the Appellant accumulated 788 insurable hours, but she did not receive any pension payments because her OTPP pension was suspended from February 1, 2015 to the end of June 2015 because of the 50-day rule of the OTPP.

[19] Because the Appellant had at least 490 hours of labour force attachment during the 52-week period before her qualifying period, it was determined in accordance with subsection 7 (4) of the Act, that the Appellant required 665 insurable hours to establish a claim for benefits according to subsection 7 (2) of the *Act*. The unemployment rate was 7.0% at the time she applied for benefits.

[20] The Appellant only accumulated 392 insurable hours while being paid her pension.

[21] According to subsection 35 (7) (e) (ii) of the *Regulations*, the pension money which the Appellant received was not exempt.

[22] The Appellant advised that her pension began November 1, 2013 and therefore should be exempt from being allocated. However, because of the suspension of the pension after she worked for 50 days as a teacher and then the pension was re-instated, her pension did not continue for the entire period of her employment in which the Appellant was accumulating the required number of insured hours to establish a claim for benefits.

[23] The three conditions which must be present in order for pension money to be exempted from earnings are:

1. The claimant must accumulate the number of insured hours required to establish a claim.
2. The insurable hours must be accumulated after the date the pension became payable, and
3. The claimant must be receiving pension payments during the entire period he/she is accumulating the required insured hours to establish a claim.

[24] The Appellant did accumulate some insurable hours, but did not receive pension payments throughout the entire time period in which she was working.

[25] Had the Appellant been working in any other field past 50 days, her OTPP pension would not have been suspended and she would not be in the situation in which she would have to report her pension money as earnings and have this money allocated, because there would not have been a break in the pension payments.

[26] The Tribunal finds that the Appellant did not meet all of the conditions to have the money she received from her pension be exempt from earnings status and thus it must be reported and allocated according to the *Regulations*.

CONCLUSION

[27] The appeal is dismissed

Michael Sheffe
Member, General Division - Employment Insurance Section