



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *L. M. v. Canada Employment Insurance Commission*, 2016 SSTADEI 100

Tribunal File Number: AD-15-326

BETWEEN:

L. M.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division– Appeal decision

DECISION BY:: Pierre Lafontaine

HEARD ON: February 9, 2016

DATE OF DECISION: February 23, 2016

REASONS AND DECISION

DECISION

[1] The appeal is dismissed.

INTRODUCTION

[2] On April 30, 2015, the General Division of the Tribunal determined that:

- The allocation of earnings was performed in accordance with sections 35 and 36 of the *Employment Insurance Regulations* (the “*Regulations*”).

[3] The Appellant requested leave to appeal to the Appeal Division on June 1, 2015. Leave to appeal was granted on June 30, 2015.

TYPE OF HEARING

[4] The Tribunal held a telephone hearing for the following reasons:

- The complexity of the issue(s) under appeal.
- The fact that the credibility of the parties is not anticipated being a prevailing issue.
- The information in the file, including the need for additional information.
- The requirement under the *Social Security Tribunal Regulations* to proceed as informally and quickly as circumstances, fairness, and natural justice permit.

[5] At the hearing, the Appellant was present and the Respondent was represented by Carol Robillard.

THE LAW

[6] Subsection 58(1) of the *Department of Employment and Social Development Act* (the “*DESD Act*”) states that the only grounds of appeal are the following:

- a. the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;
- b. the General Division erred in law in making its decision, whether or not the error appears on the face of the record; or
- c. The General Division based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

ISSUE

[7] The Tribunal must decide if the General Division erred in fact and in law when it concluded that the allocation of earnings was performed in accordance with sections 35 and 36 of the *Regulations*.

ARGUMENTS

[8] The Appellant submits the following arguments in support of the appeal:

- At issue, is not that the *Canada Pension Plan (CPP)* Lump Sum option payment be considered earnings when the payment was received in April, 2014 but that the *CPP* Lump Sum option payment has been allocated as earnings under Section 36(14) of the *Regulations* to previous periods of time "on a monthly periodic payment basis" which fact is clearly erroneous;
- She disagrees with the General Division decision regarding the *CPP* Lump Sum Payment of retirement entitlements effective April 1, 2014 and received on

April 25, 2014 and considered earnings against her claim for Employment Insurance benefits from June 2, 2013 to March 29, 2014;

- The *CPP* retirement entitlements, which were applied for and payment was received eleven months after the loss of employment, eleven months after the Employment Insurance benefits had commenced and had already been exhausted, and more importantly the retirement entitlements received clearly represented a "lump sum payment on account of a pension" or to put in other words "a one time partial payment of an amount owed of a pension" and therefore must be clearly dealt with under Sections 35(2)(e), 36(15), 36(17) of the *Regulations*; 19(1) and 19(2)(b) of the *Act*;
- In her specific case, as contracted and accepted by the *CPP* plan, her *CPP* retirement benefits commenced April, 2014 which included the Lump Sum option payment, monthly benefit of \$1,200 per month calculated as of May 1, 2013 as opposed to a monthly benefit of \$1,300 per month calculated as of April 1, 2014.

[9] The Respondent submits the following arguments against the appeal:

- In the present case, although the Appellant received a lump sum *CPP* payment, the monies represented a retroactive monthly pension from May 1, 2013;
- Section 35 of the *Regulations* states for EI purposes that a pension paid under the *CPP* is earnings to be deducted from benefits payable. Section 36 of the *Regulations* allocates pension earnings depending on whether they are paid on a periodic basis or as a lump sum in lieu of pension;
- The Appellant argues that the payment should be allocated to when it was paid in April 2014 pursuant to section 36(15), the weekly amount calculated pursuant to section 36(17) as it is a lump sum annuity. She argues her decision to opt for

the lump sum payment was because she was told it would be declared as income in 2014;

- The Appellant's *CPP* payments are not paid once a year as a lump sum annuity but was a periodic payment for each month simply paid by one instalment. Therefore, the correct allocation is to the week the *CPP* was payable which is from May 1, 2013;
- The General Division correctly upheld the reconsideration decision that the *CPP* was considered earnings and was correctly allocated to the period from when it became payable pursuant to sections 35 and 36 of the *Regulations*. Having done so the General Division, in its analysis, referenced to 36(15) rather than 36(14) of the *Regulations* as argued by the Respondent;
- The authority to write-off an overpayment under section 56 of the *Regulations* is a matter within the exclusive purview of the Respondent.

STANDARD OF REVIEW

[10] The Appellant did not make any representations regarding the applicable standard of review.

[11] The Respondent submits that the applicable standard of review for a mixed question of fact and law is reasonableness - *Hickey v. Canada (AG)*, 2008 FCA 330.

[12] The Tribunal acknowledges that the Federal Court of Appeal determined that the standard of review applicable to a decision of a board of referees (now the General Division) or an Umpire (now the Appeal Division) regarding questions of law is the standard of correctness - *Martens c. Canada (AG)*, 2008 FCA 240 and that the standard of review applicable to questions of fact and law is reasonableness - *Chaulk v. Canada (AG)*, 2012 FCA 190, *Canada (PG) v. Hallée*, 2008 FCA 159.

ANALYSIS

[13] The Applicant submits that the retirement entitlements received represented a "lump sum payment on account of a pension" or to put in other words "a one time partial payment of an amount owed of a pension" and therefore must be dealt with under section 35(2)(e), 36(15) and 36(17) of the *Regulations*.

[14] The Respondent submits that the Appellant's *CPP* payments are not paid once a year as a lump sum annuity but was a retroactive periodic payment for each month simply paid by one instalment. Therefore, the correct allocation is to the week the *CPP* was payable which is from May 1, 2013 in accordance with section 35(14) of the *Regulations*.

[15] Both parties agree that the sum received by the Appellant constitutes earnings under section 35(2)(e) of the *Regulations*.

[16] The central issue in this appeal is to determine if the retroactive payment of the *CPP* benefits received by the Appellant constitutes a retroactive periodic payment for each month owing or a lump sum on account of or in lieu of a pension. This will determine if the earnings are to be allocated in accordance with section 36(14) or section 36(15) of the *Regulations*.

[17] The *CPP* provides workers with partial replacement of earnings in the case of retirement, disability or death. Almost all individuals who work in Canada contribute to the *CPP*. You can apply for and receive a full *CPP* retirement pension at age 65 or receive it as early as age 60 with a reduction, or as late as age 70 with an increase.

[18] If you have contributed to the *CPP*, you will receive benefits that will be paid by the plan according to your place of residence. The benefit amount you will be paid will take into consideration all contributions made to the plan.

[19] Most importantly, the *CPP* retirement pension provides a monthly benefit to eligible applicants.

[20] The retroactive sum received by the Appellant following her delayed *CPP* application was much more than an accepted offer to be paid a lump sum on account of or in lieu of a pension. The government had an obligation to pay the pension and did, in fact, retroactively honor that obligation. It was not a voluntary offer made by the government that was accepted by the Appellant.

[21] All that the Appellant has done in the present file, before changing her pension strategy, was to elect to postpone receipt of her monthly benefits for which she was fully entitled to as of May 1st, 2013. She did not accept a lump sum on account of or in lieu of a pension.

[22] Therefore, the Tribunal finds that the earnings are to be allocated in accordance with section 36(14) of the *Regulations*. It is unfortunate that the Appellant received information otherwise but the Tribunal has no choice but to apply the legislation.

[23] Despite the Appellant's very able arguments, the appeal must be dismissed.

CONCLUSION

[24] The appeal is dismissed.

[25] The *CPP* earnings are to be allocated in accordance with section 36(14) of the *Regulations*.

Pierre Lafontaine

Member, Appeal Division