



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

[TRANSLATION]

Citation: *R. C. v. Canada Employment Insurance Commission*, 2016 SSTGDEI 38

Tribunal File Number: GE-13-549

BETWEEN:

R. C.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Joanne Blanchard

HEARD ON: February 29, 2016

DATE OF DECISION: March 11, 2016

REASONS AND DECISION

PERSONS IN ATTENDANCE

The Appellant, R. C. attended the telephone hearing.

Counsel Carole Vary, representing the Commission, also took part in the telephone hearing.

INTRODUCTION

[1] The Appellant filed an initial claim for Employment Insurance benefits starting on June 23, 2013 (GD3-2 to GD3-13).

[2] The Employment Insurance Commission (the Commission) informed the Appellant that the pension he receives from the *Régie des rentes du Québec* (RRQ) is considered earnings for the purposes of Employment Insurance benefits (GD3-15 and GD3-16).

[3] The Appellant filed a request for reconsideration of the Commission's initial decision (GD3-17 to GD3-18).

[4] On July 23, 2013, the Commission informed the Appellant that it was maintaining its initial decision concerning the allocation of his RRQ pension (GD3-19 and GD3-20).

[5] The Appellant is appealing the Commission's reconsidered decision before the Social Security Tribunal (GD2-1 to GD2-23).

[6] This appeal was heard by the teleconference hearing method for the following reasons:

- a) The information in the file, including the need for additional information;
- b) This form of hearing most effectively meets the parties' needs for accommodation;

- c) This method of proceeding respects the requirement under the Social Security Tribunal Regulations to proceed as informally and quickly as circumstances, fairness and natural justice permit.

ISSUES

[7] The Appellant is appealing in respect of the following issues:

1. The allocation of earnings under sections 35 and 36 of *the Employment Insurance Regulations* (“the Regulations”).

Constitutional challenge

2. Do paragraph 35(2)e), subparagraph 35(7)e)ii) and subsection 36(14) of the Regulations violate the equality rights provided in section 15 of the *Canadian Charter of Rights and Freedoms* (the Charter)?
3. If so, is the violation justifiable under section 1 of the Charter?

THE LAW

[8] Subsection 35(1) of the Regulations:

35 (1) The definitions in this subsection 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,
 - (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)

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*)

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)

self-employed person

has the same meaning as in subsection 30(5). (travailleur indépendant)

[9] Paragraphs 35(2)a) and e) of the Regulations:

(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 19 subsection 21(3), 22(5) or 23(3) 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;

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;

[10] Paragraph 35(7)(a)(e) of the Regulations:

(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;

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.

[11] Subsection 36(14) of the Regulations:

(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.

[12] Subsection 36(15) of the Regulations:

(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.

[13] Subsection 36(17) of the Regulations:

(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.

[14] Section 1 of the Charter

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

[15] Subsection 15(1) of the Charter

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

EVIDENCE

[16] The Appellant filed an initial claim for Employment Insurance benefits starting on June 23, 2013. In his claim, the Appellant reported receiving an RRQ retirement pension of \$372.06 per month since May 31, 2013 (GD3-2 to GD3-13).

[17] The employer, Autobus Québec Métro 2000 Inc., issued a record of employment for the period from March 11, 2013 to June 21, 2013, with the notation, "shortage of work/end of season or contract." The Appellant had accumulated 602 hours of insurable employment over this period (GD3-14).

[18] The Appellant's regional unemployment rate for the period from June 9, 2013 to July 6, 2013 was 4.7%. He therefore had to accumulate 700 hours of insurable employment to obtain entitlement to regular employment insurance benefits (GD4-5).

[19] On June 26, 2013, the Commission informed the Appellant that his pension is considered earnings for the purposes of Employment Insurance benefits. This means that the Appellant had to report \$86.00 in his reports. The deduction was subtracted from his weekly benefits starting on June 23, 2013 until the end of the claim (GD3-15 and GD3-16).

[20] The Appellant filed a request for reconsideration of the initial decision. He disputes the fact that he is required to report his RRQ pension of \$86.00 per week on his weekly reports, thus reducing his benefits. He said that such decision violates the Charter (GD3-17 to GD3-18).

[21] On July 23, 2013, the Commission informed the Appellant that it was maintaining its initial decision concerning the allocation of his RRQ pension. Moreover, since he had not worked a sufficient number of insurable hours after payment of this pension started, these earnings are not covered by the exemption (GD3-19 and GD3-20).

[22] The Appellant is appealing the Commission's reconsidered decision to the Social Security Tribunal. He stated that the Commission's decision is imprecise and unclear in relation to the numbers of the sections in the Act and Regulations. He states that some provisions of the Act and Regulations are discriminatory (GD2-1 to GD2-23).

[23] The Tribunal held a preparatory conference on March 20, 2014 to clarify the grounds of the Appellant's appeals concerning the constitutional challenge (GD1-1 to GD1-2).

[24] On April 17, 2014, the Tribunal informed the Appellant that he had to file a notice under paragraph 20(1)a) of the *Social Security Tribunal Regulations* if he wished to bring a constitutional challenge before the Tribunal. The deadline for submitting the said notice was July 17, 2014 (GD5-1 to GD5-3).

[25] On June 30, 2014, the Appellant requested an extension of the deadline to file a notice under paragraph 20(1)a) of the *Social Security Tribunal Regulations* (GD9-1 to GD9-2). The Tribunal granted his request and a new deadline was set for October 6, 2014 (GD8-1 to GD8-2).

[26] The Appellant filed a notice under paragraph 20(1)a) of the *Social Security Tribunal Regulations* on October 1, 2014. He intends to challenge the constitutionality of paragraph 35(7)3) of the Regulations. In his opinion, the paragraph violates section 15(1) of the Charter. He states that some people are not required to report their RRQ earnings, which creates a distinction based on their personal information, specifically, their age. He therefore believes that the Regulations discriminate against him based on his date of birth (GD10-1 to GD10-63).

[27] The Tribunal gave an interlocutory judgement and issued an order on November 12, 2014 (GD12-1 to GD12-12).

[28] In response to the Commission's submissions, the Appellant restated his belief that he is being penalized because of his date of birth. Furthermore, he states that the Commission did not consider all relevant records of employment. He entered into evidence the following records of employment: Autobus Québec Métro 2000 Inc. confirming 687 hours accumulated during the period from July 11, 2012 to December 22, 2012, Autobus Québec Métro 2000 Inc. confirming 320 hours accumulated during the period from January 7, 2013 to March 2, 2013, Autobus Québec Métro 2000 Inc. confirming 686 hours accumulated for the period from July 11, 2013 to December 21, 2013, Autobus Québec Métro 2000 Inc. confirming 314 hours accumulated for the period from January 6, 2014 to March 1, 2014, Autobus Québec Métro 2000 Inc. confirming 610 hours accumulated for the period from March 10, 2014 to June 23, 2014 (GD17-1 to GD17-8).

[29] The Tribunal held a second preparatory conference on July 30, 2015 to clarify procedural issues in anticipation of the hearing (GD1b-1 to GD1b-3).

[30] The parties were called to a telephone hearing on February 29, 2016 (GD18-1 to GD18-4).

SUBMISSIONS

Appellant's written submissions

[31] On January 12, 2015, the Appellant filed his submissions to the Tribunal concerning the constitutional challenge. He states that paragraph 35(7)3) of the Act violates section 15 of the Charter (GD13-1 to GD13-130).

Appellant's arguments at the hearing

[32] At the hearing, the Appellant pointed out that he considered it unfair to be obliged to pay income tax to obtain entitlement to the two plans, and that one plan detracts from the other.

[33] In his estimation, two groups of claimants receive different treatment. He believes that the additional hours imposed under paragraph 35(7)3 are discriminatory. The connection between the date on which he received his first check and his date of birth leads to age-based discrimination.

[34] The Appellant denies that he had the option of waiting until the age of 65 to draw on his RRQ pension. His combined salary and pension provides him with an income of \$30,000. He would have lost a portion of his pension had waited later.

Respondent's written submissions

[35] The Commission filed its rebuttal with the Tribunal on April 13, 2015. The Commission submits that the Act does not create a distinction based on an enumerated or analogous ground. It also states that the impugned statutory provisions do not create a disadvantage by perpetuating a prejudice or stereotyping. If the Tribunal were to find that the statutory provisions violated the right to equality, the Commission contends that such a distinction is within reasonable limits and is demonstrably justified in a free and democratic society (GD15-1 to GD15-717).

Respondent's arguments at the hearing

[36] The Appellant worked from August 29, 2012 to June 21, 2013. He decided to draw on his RRQ pension starting on May 31, 2013. In the six months following May 31, 2013, the Appellant was able to cancel his retirement pension. Furthermore, if he had waited 11 weeks before drawing on his RRQ pension, the amounts would not have been allocated. He had to accumulate 700 hours from May 31, 2013 to gain the allocation exemption.

[37] Section 15 of the Charter provides that the law applies equally to all. There is no discrimination based on the Appellant's age since he made a personal choice to receive his RRQ pension in the first month he was eligible at a reduced rate. This was a personal choice unrelated to any distinction on the basis of age.

[38] The Act establishes a benefit period and a number of hours required for entitlement. There is no indication concerning age. The Appellant made a personal choice to draw on his pension fund early. Age is therefore not an immutable personal characteristic.

ANALYSIS

Allocation of earnings

[39] Under paragraph 35(2)e) of the Regulations, moneys paid or payable to a claimant on a periodic basis or in the form of a pension constitute earnings unless they are covered by the exception provided in subparagraph 35(7)e)ii) of the Regulations. Pursuant to subsection 35(1), all provincial pensions are considered income within the meaning of the Regulations.

[40] The evidence shows that the Appellant filed an initial claim for Employment Insurance benefits starting on June 23, 2013. He accumulated 602 hours of insurable employments while he was employed by Autobus Québec Métro 2000 Inc., in the period from March 11, 2013 to June 21, 2013. The Appellant reported that he was receiving an RRQ pension benefit of \$372.06 per month starting on May 31, 2013.

[41] The Commission determined that the amounts paid to the Appellant as RRQ pension benefits constitute earnings that must be allocated in accordance with paragraph 35(2)e) and subsection 36(14) of the Regulations. In its reconsidered decision of June 26, 2013, the Commission informed the Appellant that the amounts he received in pension benefits from the RRQ had to be allocated at a rate of \$86.00 per week, starting on June 23, 2013.

[42] The Appellant is challenging this decision before the Tribunal and claims that these statutory provisions create age-based discrimination in violation of subsection 15(1) of the Charter.

[43] Herein, the evidence is undisputed that the Appellant has been receiving an RRQ pension of \$372.06 per month since May 31, 2013. Based on the evidence submitted, the Tribunal finds that the RRQ pension paid to the Appellant constitutes earnings within the meaning of subsection 35(2)e) and that such earnings must be allocated in accordance with subsection 36(14) at a rate of \$86.00 per week, starting on June 23, 2013.

Constitutional challenge

[44] The Tribunal is also required to determine whether paragraph 35(2)e), subparagraph 35(7)e)ii) and subsection 36(14) of the Regulations violate the right to equality provided in section 15 of the Charter. If so, the Tribunal must decide whether the violation is justified under the terms of section 1 of the Charter.

[45] It seems appropriate first of all to specify that the Commission cited section 35(7)3) of the Regulations in its initial submissions to the Tribunal, whereas such an article does not exist. The relevant article is instead subparagraph 35(7)e)ii) of the Regulations, as the Commission specified at the hearing. The Tribunal will therefore cite section 35(7)e)ii) of the Regulations in reference to the exception concerning the allocation of a pension.

Do paragraph 35(2)e), subparagraph 35(7)e)ii) and subsection 36(14) of the Regulations violate the right to equality provided in section 15 of the Charter.

[46] Section 15(1) of the Charter provides: “Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.”

[47] In *Withler*, the Supreme Court of Canada (SCC) established a two-part test for assessing a claim under section 15(1) of the Charter. First, it must be determined whether the law creates a distinction that is based on an enumerated or analogous ground, and then determine whether the distinction creates a disadvantage by perpetuating prejudice or stereotyping. The SCC states that it is incumbent on the Appellant to “establish that he or she has been denied a benefit that others are granted or carries a burden that others do not, by reason of a personal characteristic that falls within the enumerated or analogous grounds of s. 15(1)” (*Withler v. Canada (Attorney General)*, 2011 SCC 12.)

[48] Herein, the Appellant is challenging the constitutionality of subparagraph 35(7)e)ii) of the Regulations. He submits that subparagraph 35(7)e)ii) of the Regulations is discriminatory because it creates a distinction based on age, which is a ground relating to a personal characteristic. He believes he was disadvantaged in comparison to other claimants born before

and after him. When asked to clarify his arguments in this regard, the Appellant stated that he considers there to be one group of claimants required to allocate their pensions, and another that is exempt based on their date of birth. Although the Appellant argues that subparagraph 35(7)e)ii) of the Regulations divides claimants into two groups, the evidence in this regard is inconclusive. In fact, the Appellant's argument concerning two separate groups lacks clarity.

[49] The Respondent submits that paragraph 35(2)e), subparagraph 35(7)e)ii) and subsection 36(14) of the Regulations do not violate the right to equality provided in section 15 of the Charter on the ground that the distinction is not based on age or an analogous ground. The Respondent contends that the Appellant did not successfully prove that he was denied a benefit by reason of a personal characteristic that falls within the enumerated or analogous grounds of section 15(1) of the Charter.

Does the law create a distinction that is based on an enumerated or analogous ground: is the Appellant treated differently than others?

[50] Subparagraph 35(2)(e) of the Regulations provides that pension income is deemed to constitute earnings for benefit purposes. In this case, there is no doubt that the Appellant has received an RRQ pension of \$372.06 per month since May 31, 2013. His RRQ pension income therefore constitutes earnings that must be allocated pursuant to subsection 36(14) of the Regulations, i.e., to the period in which it is paid or payable. Under subparagraph 35(7)e)ii) of the Regulations, this pension would not constitute earnings if the Appellant had accumulated a sufficient number of hours of insurable employment since he started receiving his pension, enabling him to establish a new Employment Insurance benefit period. In this case, the Appellant's regional unemployment rate for the period from June 9, 2013 to July 6, 2013 was 4.7%. He therefore had to accumulate 700 hours of insurable employment to obtain entitlement to regular employment insurance benefits. The Appellant did not accumulate the 700 hours required since he started receiving his pension on May 31, 2013. The evidence shows that the Appellant accumulated only 602 hours between March and June 2013. Therefore, the RRQ pension constitutes earnings since the Appellant cannot enlist the exception provided in subparagraph 35(7)e)ii) of the Regulations.

[51] The Appellant contends that subparagraph 35(7)e)ii) of the Regulations discriminates on the basis of age. Although the Tribunal is aware of the fact that birthdays are used to determine the date on which the RRQ pension is received, discrimination based on age does not necessarily follow as a result. In fact, the exception provided in subparagraph 35(7)e)ii) of the Regulations states that a pension does not constitute earnings if the Appellant has accumulated sufficient hours of insurable employment since the pension benefits started. These hours of insurable employment can be used to establish a new benefit period.

[52] Therefore, this exception is not granted to claimants based on their age, but rather on the fact that they are receiving a pension and have accumulated a sufficient number of hours of insurable employment to establish a new benefit period.

[53] Furthermore, the Appellant herein made a personal decision to request his RRQ pension benefits at a reduced rate on April 30, 2013 when he turned 60, rather than wait until he was 65. At the hearing, the Appellant said that his decision was not a personal choice but a financial necessity. The evidence shows that by deciding to draw on his pension at a reduced rate early, at the age of 60, the Appellant incurred a 30% penalty under section 120.2 of the *An Act Respecting the Québec Pension Plan*. Although the particular circumstances of date of birth determined the date on which the RRQ pension was paid to the Appellant, he nevertheless initiated payments of this pension at his request. The Appellant choose to receive his RRQ pension on April 30, 2013.

[54] At the hearing, the Appellant mentioned again that subparagraph 35(7)e)ii) of the Regulations creates a distinction between two groups. The Tribunal finds that the Appellant is not being treated differently than other claimants receiving an RRQ pension. All claimants are subject in the same manner to the relevant legislation. The Appellant also stated that the issue would only have been delayed had he waited until he turned 65 to request his RRQ pension. The Tribunal does not accept this argument. Although the Appellant's birth date determines the date on which he receives his pension, his employment period could differ and he might therefore obtain entitlement to benefits under the exception provided in subparagraph 35(7)e)ii) of the Regulations if he accumulated sufficient hours of insurable employment.

[55] It is important to bear in mind that equality is not about sameness, and subsection 15(1) does not protect a right to identical treatment, but rather it protects the right to be free from discrimination (*Withler v. Canada (Attorney General)*, 2011 CSC 12.).

[56] The fact that the Appellant requested his pension is a personal decision. Therefore, there is no analogous ground, since the Appellant made a personal decision to request his pension.. The Tribunal cannot find in this an immutable personal characteristic. The distinction is not based on age or an analogous reason. The distinction is based on the fact that the Appellant decided to draw on his RRQ pension. Therefore, subparagraph 35(7)e)ii) of the Regulations does not violate the right to equality provided in section 15 of the Charter on the ground that the distinction is not based on age.

[57] The Tribunal finds that it is not an analogous ground to decide to draw on a pension at the age of 60 rather than 65. In fact, the statutory provisions cited (paragraph 35(2)e), subsection 36(14) and subparagraph 35(7)e)ii) of the Regulations) make no mention of claimant age.

[58] The Tribunal is therefore unable to find that paragraph 35(2)e), subsection 36(14) and subparagraph 35(7)e)ii) of the Regulations are discriminatory. Herein, the Appellant was not denied a benefit granted to others or forced to carry a burden that others do not by reason of a personal characteristic that falls within the enumerated or analogous grounds of subsection 15(1) of the Charter.

Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?

[59] Having found that the statutory provisions cited do not create distinctions based on an enumerated or analogous ground, the Tribunal brings to a close its analysis of the first step in the *Withler* test. However, with concern for thoroughness, the Tribunal performed the second step in the analysis, i.e., it examined whether the distinction creates a disadvantage by perpetuating prejudice or stereotyping.

[60] In *Law*, the SCC proposed defining discrimination in terms of the effects of a law in relation to four contextual factors : (1) a pre-existing disadvantage experienced by a claimant group; (2) the correspondence, or lack thereof, between the different treatment and the actual circumstances of a group of claimants; (3) the ameliorative effects of the law or program; (4) the

nature of the right affected (*Law c. Canada (Minister of Employment and Immigration)* (1999) 1 SCR 497 and *R v. Kapp* (2008) 2 SCR 483).

[61] Considering the general context of the Act, the Tribunal cannot find that subparagraph 35(7)e)ii) of the Regulations creates a disadvantage by perpetuating prejudice or stereotyping. Rather, subparagraph 35(7)e)ii) of the Regulations creates an exception for claimants who are able to establish a new benefit period by accumulating a sufficient number of hours of insurable employment from the time they start receiving their pension.

[62] Herein, the Appellant states that he was disadvantaged by the date of his birth; however, he did not prove that the subparagraph creates discrimination in terms of contextual factors pertaining to the Act. The Tribunal therefore finds that the Appellant did not prove that subparagraph 35(7)e)iii) of the Regulations creates a disadvantage by perpetuating prejudice or stereotyping.

Section 1 of the Charter

[63] Notwithstanding the fact that the statutory provisions cited do not impugn the equality rights guaranteed under subsection 15(1) of the Charter, the Tribunal conducted an analysis of section 1 of the Charter.

[64] Section 1 of the Charter provides that “The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

[65] The test used to determine whether an objective is justified in a free and democratic society was set down by the SCC in *Oakes*. There must be a pressing and substantial objective, and the means must be proportional, i.e., the means must bear a rational connection to the objective; the means must impair the right in question as little as possible and there must be proportionality between the limiting measure and the objective (*R. v. Oakes* (1986) 1 SCR 103).

[66] Herein, the Tribunal analysed the facts in light of the test set out in *Oakes*. In *Tétreault-Gadoury*, the SCC recalled that the general objective of the Act is “to create a social insurance plan to compensate unemployed workers for loss of income from their employment and to

provide them with economic and social security for a time, thus assisting them in returning to the labour market.” The Court also specified that the objective of deducting pension receipts from employment insurance benefits is precisely to avoid the duplication of benefits: *Tétreault-Gadoury v. Canada (Employment and Immigration Commission)*, [1991] 2 SCR 22. Given the general objective of the Act, the Tribunal finds that the objective is substantial and the exception provided in subparagraph 35(7)e)ii) of the Regulations impairs the right guaranteed by the Charter as little as possible.

Conclusion

[67] The Tribunal finds, based on the evidence before it, that RRQ pension income constitutes earnings for the benefit purposes pursuant to paragraph 35(2)e) of the Regulations and that such earnings must be allocated within the meaning of subsection 36(14) of the Regulations.

[68] The Tribunal further finds that paragraph 35(2)e), section 36(14) and subparagraph 35(7)e)ii) of the Regulations do not violate the equality rights guaranteed to the Appellant under subsection 15(1) of the Charter.

CONCLUSION

[69] The appeal is dismissed.

Joanne Blanchard
Member, General Division – Employment Insurance Section