



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

[TRANSLATION]

Citation: *R. M. v. Canada Employment Insurance Commission*, 2016 SSTGDEI 54

Tribunal File Number: GE-15-3644

BETWEEN:

R. M.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Teresa Jaenen

HEARD ON: March 29, 2016

DATE OF DECISION: April 19, 2016

REASONS AND DECISION

PERSONS IN ATTENDANCE

Mr. R.M., the Appellant (Claimant) along with his spouse, Ms. D. M. attended the hearing.

INTRODUCTION

[1] On July 12, 2015 the Appellant established a claim for employment insurance benefits. On August 8, 2015 the Canada Employment Insurance Commission (Commission) notified the Appellant regarding his claim for benefits. On August 24, 2015 the Appellant made a request for reconsideration regarding the allocation of earnings. On October 16, 2015 the Commission maintained its original decision and the Appellant appealed to the *Social Security Tribunal of Canada* (Tribunal). An in person hearing took place on February 2, 2016 at which time an adjournment was requested to allow the Appellant to provide further details in support of the appeal. The adjournment was granted and the type of hearing changed to a teleconference to accommodate the demographics of all parties.

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

- a) The complexity of the issue(s) 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] The Tribunal must decide whether monies the Appellant received constitute earnings pursuant to subsection 35 of the *Employment Insurance Regulations* (Regulations) and if the monies were allocated in accordance with subsection 36 of the Regulations.

THE LAW

[4] Subsection 35(1) of the Regulations states 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, 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.

[5] Subsection 35(2)(a)(e) of the Regulations states 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 or subsection 21(3), 22(5), 152.03(3) or 152.04(4) or section 152.18 of the Act, and 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 earnings from the proceeds realized from the property of a bankrupt employer; and (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.

[6] Subsection 35(7) of the Regulations states 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 the number of hours of insurable employment required by section 7 or 7.1 of the Act for the establishment of the benefit period of the claimant was accumulated after the date on which those moneys became payable and during the period in respect of which the claimant received those moneys; and (f) employment income excluded as income pursuant to subsection 6(16) of the Income Tax Act.

[7] Subsections 36(9), (10) and (11) of the Regulations states: (9) Subject to subsections (10) and (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 they are purported to be paid or payable, a revised allocation shall be made in accordance with subsection (9) on the basis of that total. (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 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 number of consecutive weeks, beginning with the first week in respect of which the earnings are awarded, in such a manner that Subsections 36(9), (10) and (11) of the Regulations states: (9) Subject to subsections (10) and (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 they are purported to be paid or payable, a revised allocation shall be made in accordance with subsection (9) on the basis of that total. (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 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 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.

[8] Subsections 36(14), 36(15), 36(16), 36(17), 36(19) of the Regulations states: (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) The weekly amount shall be calculated in accordance with the following formula, according to the claimant's age on the day on which the lump sum payment is paid or payable:

A / B where A is the lump sum payment; and B is the estimated actuarial present value * of \$1 payable at the beginning of every week starting from the day on which the lump sum payment is paid or payable and payable for the claimant's lifetime, as calculated each year in accordance with the following formula: $B = [\sum_{t=0} \text{to infinity of } (tPx / (1+i)^t) - 0.5] \times 52$ where tPx is the probability that the claimant will survive for "t" years

from the claimant's age "x" using the latest Canadian mortality rates used in the valuation of the Canada Pension Plan prorated in equal parts between males and females, i is the annualized long-term Government of Canada benchmark bond yields averaged over the 12-month period ending on August 30, 2014, expressed as a percentage and rounded to the nearest one tenth of a percentage, and t is the number of years that the claimant survives according to the claimant's age for which the probability of survival is estimated by tP_x .

*Note: The estimated actuarial present values are published annually on the Service Canada website.

EVIDENCE

[9] A record of employment indicates the Appellant was employed with Gerdau Ameristeel Corporation from November 30, 2011 to December 31, 2014 when he left his employment due to mandatory retirement. A vacation pay in the amount of \$8188.00 was included in box 17 (GD3- 13).

[10] An amended record of employment indicates the Appellant quit his employment (GD3-15).

[11] On July 24, 2015 the employer stated to the Commission that the Appellant retired and did not contact the employer regarding changing his duties or receiving a different job. The employer explained the duties performed by the Appellant. The employer stated the Appellant took a pension payment from the employer in a lump sum so that is why it was coded as quit on the record of employment. The employer stated the Appellant would have been able to apply for other jobs but he opted for retirement and receive his pension (GD3-25).

[12] On August 8, 2015 the Commission notified the Appellant they were unable to pay him benefits to start on March 21, 2015 because he did not prove that between March 22, 2015 and July 12, 2015 that he had good cause for the delay. It also stated they were unable to pay him regular benefits because he voluntarily left his employment on December 31, 2014. As well since voluntary leaving he had only accumulated 624 hours of insurable employment but would need 700 hours to qualify (GD3-26 to GD3-27).

[13] On August 24, 2015 the Appellant made a request for reconsideration (GD3-28 to GD3-31).

[14] On October 16, 2015 the Commission contacted the Appellant and advised the disqualification had been removed however the reason he is not being paid benefits was due to the lengthy allocation of his separation money from his employer. The Appellant stated he wants reconsideration as to why he can't be eligible for benefits until 2022 as this is not fair. The Commission made attempts to explain why the lump sum retirement was being allocated as it was. The Appellant stated that he should not have to pay EI if he can't collect it. He stated he had to leave his job for medical reasons and took a buyout and now is being penalized (GD3-32 to GD3-33).

[15] On October 16, 2015 the Commission notified the Appellant the original decision on the earnings was maintained and provided him with the information on his right to appeal to the Tribunal (GD3-34 to GD3-35).

[16] On November 10, 2015 the Appellant filed a Notice of Appeal. The Appellant stated that reason for his delay in filing for benefits was because he didn't know he could. He stated he had to leave his employment due to medical reasons and he was denied benefits because he didn't have enough hours from his seasonal job. He stated he was finally told he couldn't collect benefits until 2022 because of the lump sum funds he received when he retired. He stated when he received his pension, half of it was locked in and it is untouchable for years. He stated he has paid taxes from this pension money and he has paid into EI for over 30 years and still am required to pay into in on any job now and in the future. The Appellant submitted a medical note and payroll information (GD2-1 to GD2-16).

[17] On February 1, 2016 the Appellant submitted a copy of their Credential Asset Management portfolio (GD5-1 to GD5-9).

[18] On February 10, 2016 the Commission responded to the submissions (GD5) however determined the information did not provide the information to determine how much of the \$469,960.54 retirement lump sum payout was directly transferred to a locked-in pension vehicle (G6-1).

[19] On February 21, 2016 the Appellant submitted detailed information regarding the acceptance of the employer pension plan (GD7-1 to GD7-14).

[20] On February 25, 2016 the Commission submitted that following the review of additional information provided a recommendation that the allocations of earnings would be amended as outlined (GD8-1 to GD8-7).

EVIDENCE AT THE HEARING

[21] The Appellant stated that there was an agreement made with his former employer regarding the payout and he could provide it.

[22] An adjournment was granted to provide the Appellant the opportunity to provide the necessary information.

[23] The Appellant confirmed the new information provided that the amount of \$225,723.96 was the amount that was transferred into a locked in retirement plan; and the amount of \$329,491.31 was not. He stated the later amount he has paid taxes on it and has invested it.

[24] The Appellant does not dispute that he received the vacation pay in the amount of \$8188.00 at the time of his separation from employment.

[25] The Appellant stated he still does not agree that he should be penalized and that these monies that are intended for his retirement should be considered for his future claims for employment insurance benefits.

SUBMISSIONS

[26] The Appellant submitted that:

- a) He had to quit his job because of medical reasons and initially told he wasn't able to collect EI because he voluntarily left his job, as well he didn't apply on time so he couldn't backdate his claim, and also he didn't have enough hours. Then he was told that the money he received would prevent him from being able to collect EI until 2022;

- b) He does not agree that the monies he received from his separation from employment should be used against him and that monies should be allocated to 2022;
- c) Some of the monies were locked in and he isn't able to even use it; and

[27] He doesn't think this is fair because the government made him pay taxes on this money.

[28] The Respondent submitted that:

- a) Sums received from an employer are presumed earnings and must therefore be allocated to a period on claim unless the amount falls within an exception in subsection 35(7) of the Regulations or does not arise from employment;
- b) Earnings paid by an employer by reason of the separation from employment must be allocated pursuant to subsection 36(9) of the Regulations. It is the reason or motive for the payment, and not the date of payment that determines the date from which the allocation must begin;
- c) The Commission notes the claimant's arguments that the monies he received were for his pension and that "over half was locked by the Government" and that he has not taken or received any monies from this pension;
- d) The Appellant has not provided any documentation to show that these monies were not paid to him as a lump sum due to the occasion of his separation versus a sum paid with a locked in pension provision. The Commission notes that the claimant had not reached retirement age at the time of the lump sum payout and without specific information to support the lump sum was actually locked in pension credits transferred directly to a lock in vehicle these monies cannot be considered as other than monies paid on separation;
- e) The Commission would be willing to review the decision if he were to provide supporting documentation that these monies were not paid to him as a lump sum due to his separation from employment;

- f) The Appellant would need to provide the Commission with a copy of the pension plan information from Gerdau Ameristeel Corporation including the terms of the plan when taking out money prior to retirement age versus at retirement age. He needs to provide confirmation of whether the contributions he received are a combination of his and the employer's contributions and whether he received all the pension monies he was entitled to or if there is still pension contributions held by the employer. If the pension monies were locked in a non-commutable pension plan he cannot touch until retirement age he need to provide documentation supporting that information from his banking institution;
- g) Based upon the facts on file the Commission determined that the vacation pay of \$8188 and the lump sum payment in the amount of \$469,960.54 for a total of \$478,148.54 the claimant received constituted earnings pursuant to subsection 35(2) of the Regulations to compensate for benefits from his employment– vacation and retirement (pension payout) allowance. The Commission further submits that the payment was made by reason of his separation from employment. Consequently, the separation monies (vacation pay and pension payout) was allocated pursuant to subsection 36(9) of the Regulations, according to his normal weekly earnings from the week of December 28, 2014 as that is the week in which his separation from employment – December 31, 2014 occurred. (GD3-15 to GD3- 24) The date of separation was 21/03/2015, the weekly amount is \$1301.00 ending on 22/01/2022;

[29] The Respondent submitted following the new information provided by the Appellant that they recommend the allocation of earnings should be amended:

- h) The Appellant selected an option under the employer's Retirement Pension options that his pension "Commutated Value" to be transferred to a "Prescribed Locked-in Retirement Vehicle in the amount of \$225,723.96. These funds ultimately must be used to purchase an annuity. These appear to be the monies reflected on the documents showing in the Credential LIRA (Locked in Retirement Account) plan. Therefore these monies are not earnings to be allocated until such a time as the pension becomes payable;

- i) The amount of \$329,491.31 is the “Excess Commuted Value” lump sum of the pension that was not transferred directly from one locked in vehicle to another and to which the Appellant was payable at the time of the end of the employment;
- j) The lump sum pension benefit is earnings as they are to compensate the Appellant in lieu of the pension at the time of the end of employment. However, as they were intended to cover him for the rest of his life in the same manner as a periodic pension the monies are converted to the equivalent of what would have been if paid as an annuity. This is in accordance with section 36(15) and 36(17) of the Regulations;
- k) The actuarial value based on the Appellant’s age of 51 at the time of receipt of the pension monies is 1.48, thus the calculation for the weekly annuity of \$329,491.31 is $1/48$ per \$1000 which equates to \$468.00 weekly ($1.48 \times 239.49 = \$487.64$);
- l) The allocation of the lump sum pension is at \$468.00 per week from January 1, 2015 (with a partial allocation week of December 28, 2014 to January 1, 2015 would be \$209.00) then \$468.00 of January 4, 2015 indefinitely. The Commission notes that the claim for benefits began on July 12, 2015 and thus the allocation is in effect from that date onward;
- m) Pension earnings can be exempt from allocation if three conditions are met in accordance with paragraph 35(7)(e)(iii). The claimant must accumulate the number of insured hours required to establish a claim; the insurable hours must accumulated after the date the pension became payable; and the claimant must be receiving pension payments during the entire period he/she is accumulating the required insured hours to establish a claim. Should the Appellant accumulate sufficient hours to establish a subsequent claim for benefits these pension earnings would be exempted from allocation; and
- n) There are two allocations for the claim for benefits: (1) Indefinite Pension Allocation of \$488.00 per week from January 4, 2015 which is still in effect at the benefit period commencement of July 12, 2015 as conditions for relief from allocation haven not yet been met; and (2) the vacation pay allocations at \$1301.00 from January 4, 2015 with

the last week amount of \$124.00 to the week of February 15, 2015. (Note: this allocation is prior to the benefit period start date of July 12, 2015).

ANALYSIS

[30] The Appellant presents the argument that he had to quit his job because of medical reasons and initially told he wasn't able to collect EI because he voluntarily left his job, as well he didn't apply on time so he couldn't backdate his claim, and also he didn't have enough hours. Then he was told that the money he received would prevent him from being able to collect EI until 2022.

[31] The Tribunal finds that the issue before it is that of the allocation of earnings and that is what the Appellant requested the reconsideration for. The Tribunal finds the evidence on the file supports that the reasons for separation had been allowed.

[32] The Tribunal must determine are the monies "earnings" for benefit purposes and if the monies were allocated to correctly.

[33] The Respondent presents the argument that the Appellant received \$8188.00 in vacation pay and a lump sum payment in the amount of \$469,960.54 for a total of \$478,148.54 and these monies constituted earning pursuant to section 35(2) of the Regulations to compensate for benefits from is employment, vacation and retirement (pension payout) allowance.

[34] The Respondent presents the argument that the separation monies (vacation pay and pension payout) was allocated pursuant to section 36(9) of the Regulations, according to his normal weekly earnings from the week of December 28, 2014 as that is the week in which his separation from employment on December 31, 2014. The date of separation was March 21, 2015 and the weekly amount is \$1301.00 ending on January 22, 2022.

[35] The Appellant presents the argument that the monies he received were not all paid in a lump sum and that some of the monies were transferred into a locked in fund and another amount was to compensate him for the future when he was retired. He does not dispute the amount of \$8188.00 was vacation pay and he received it at the end of his employment.

[36] In this case there are two allocations of earnings to be considered. The first one is the allocation of the vacation pay the Appellant received at the end of his employment.

[37] The Tribunal finds that the Appellant does not dispute the fact that he received \$8188.00 in vacation pay. This amount is substantiated by the documentary evidence provided on the record of employment.

[38] The Tribunal finds the Appellant received the amount of the vacation pay of \$8188.00 these earnings were earnings due from a separation from employment and constitutes earnings within the meaning of subsection 35(2) of the Regulations.

[39] The Tribunal finds the vacation pay must be allocated in accordance with subsection 36(9) effective from the week of the lay-off or the termination from employment.

[40] The Tribunal finds that the Appellant received \$8188.00 in vacation pay and these monies are allocated at the Appellant's normal weekly earnings of \$1301.00 from the date of his separation from employment. The Appellant's earnings in his last week of work from December 28, 2014 to January 3, 2015 were \$1043.95 and thus he was topped up to \$1301.16 and the remainder of the vacation pay of \$7903.79 was allocated at \$1301.00 from January 4, 2015 to February 14, 2015 with the remainder of \$124.00 to the week of February 15, 2015.

[41] The Appellant argues that the remaining amount of he received should not be allocated a lump payment because it was paid for his retirement and should not be allocated to 2022. He provided (GD7-1 to GD7-14) to prove the amounts that was locked in.

[42] The Tribunal find the documentary evidence supports that the Appellant chose option 8 of the employer's plan that clearly states \$225,723.86 the lump sum of the commuted value would be transferred to a locked in retirement vehicle and the amount of a lump sum of \$329,491.38, the excess commuted value can be transferred to a registered savings vehicle, providing available room exits, or a cash refund will be issued less with withholding taxes (GD7- 10).

[43] The Tribunal finds from the evidence that the amount of \$225,723.06 is not considered to have been paid to the Appellant because it was transferred directly from one locked in plan to

another at the time the Appellant ended his employment. Therefore the Tribunal find these monies are not earnings until such time as the pension becomes payable.

[44] The Tribunal finds from the Appellant's oral evidence that he does not dispute he received the lump sum of the excess commuted value.

[45] The Tribunal finds that the lump sum of \$329,491.31 constituted earnings pursuant to section 35(2)(e) of the Regulations and must be allocated to subsection 35(15) and 35(17) of the Regulations.

[46] Subsection 36(15) of the Regulations states that the monies referred to in paragraph 35(2)(e) that are paid or payable to the claimant in a lump sum shall be allocated beginning the first week that those monies 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.

[47] The Appellant presents the argument that he feels that he has been treated unfairly and that the monies should not be allocated until 2022.

[48] The Tribunal finds the amount of \$329,491.31 is intended to cover the Appellant for the remainder of his life in the same manner as a periodic pension the monies are converted into what would have been paid as an annuity pursuant to subsection 36(15).

[49] The Tribunal finds the calculation is based on subsection 36(17) and the table that was applicable at time of the Appellant's payout January 1, 2015. The Tribunal finds the calculation was based on the fact the Appellant was 51 years old at the time he received the pension monies and actuarial value is 1.48 per \$1000.00 which equates to \$48.00 weekly (1.48 x 329.49 - \$487.63).

[50] The Tribunal finds the allocation of the lump sum pension is calculated at \$468.00 per week from January 1, 2015 (with a partial week from December 28, 2014 to January 1, 2015 would be \$208.00) indefinitely.

[51] However pension earnings can be exempted from allocation if three conditions are met in accordance with 35(7)(e)(iii) of the Regulations. (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.

[52] The Tribunal finds from the Appellant's statements that he believe the system to be unfair, however the Tribunal does not have the authority to alter the requirements of the Act and must adhere to the legislation regardless of the personal circumstances of the Appellant (*Canada (AG) v. Levesque*, 2001 FCA 304).

[53] The Tribunal finds based on the new information provided by the Appellant (GD7-1 to GD7-14) the Tribunal finds that the Commission's was correct in determining some of monies constituted earnings and that they allocated some of the monies correctly; however as they did not have all the facts before it at the time the Appellant filed his application for benefits or during the request for reconsideration, there was an amount that was not allocated correctly.

[54] The Tribunal finds that the amount of \$225,723.96 does not constitute earnings in accordance with 35(2) of the Regulations because it was not to be considered paid to the Appellant as it was transferred directly from one locked in vehicle to another. Therefore, these monies are not earnings to be allocated until such a time as the pension becomes payable.

[55] The Tribunal finds that the amount of the vacation pay of \$8188.00 constituted earnings in accordance with subsection 35(2) of the Regulations and should be allocated in accordance with subsection 36(9) of the Regulations.

[56] The Tribunal finds the amount of \$329,491.31 constitutes earnings in accordance with subsection 35(2)(e) of the Regulations and allocated in accordance with subsections 36(15) and 35(17) of the Regulations.

[57] The Tribunal notes that pension earnings can be exempted from allocation if the Appellant meets the three conditions in accordance with 35(7)(e)(iii) of the Regulations.

[58] The Tribunal respectfully asks the Commission amend the allocations.

CONCLUSION

[59] The appeal is allowed in part.

Teresa Jaenen

Member, General Division - Employment Insurance Section