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

Citation: *T. G. v. Canada Employment Insurance Commission,* 2016 SSTGDEI 72

Tribunal File Number: GE-15-4036

BETWEEN:

T. G.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Employment Insurance Section

DECISION BY: Katherine Wallocha

HEARD ON: May 31, 2016

DATE OF DECISION: June 3, 2016

REASONS AND DECISION

PERSONS IN ATTENDANCE

T. G., the claimant, attended the hearing via teleconference.

INTRODUCTION

[1] The claimant became unemployed on May 31, 2013. He filed for Employment Insurance (EI) benefits on June 26, 2013. An initial claim for EI benefits was established on June 2, 2013. The Canada Employment Insurance Commission (Commission) determined that the claimant's Long Term Disability (LTD) payments were considered earnings for EI purposes and allocated these earnings causing an overpayment. The claimant sought reconsideration of the Commission's decision, which the Commission maintained in their letter dated November 6, 2015. The claimant appealed to the Social Security Tribunal (SST).

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

a) The complexity of the issue under appeal.
b) The fact that the claimant will be the only party in attendance.
c) The information in the file, including the need for additional information.

ISSUE

[3] The issue under appeal is whether the claimant had earnings to be allocated to a period of a claim pursuant to sections 35 and 36 of the *Employment Insurance Regulations* (Regulations).

THE LAW

[4] Subsection 35(1) of the Regulations defines "income" as "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."

[5] Subsection 35(2) of the Regulations provides that the earnings to be taken into account for the purpose of determining whether an interruption of earnings under section 14 has occurred and the amount to be deducted from benefits payable under section 19, subsection

21(3), 22(5), 152.03(3) or 152.04(4) or section 152.18 of the Act, and to be taken into account for the purposes of sections 45 and 46 of the Act, are the entire income of a claimant arising out of any employment, including

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.

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

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*.

[7] Subsection 35(8) of the Regulations provides that 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).

[8] Subsection 35(9) of the Regulations stated that 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.

[9] Subsection 36(1) of the Regulations provides that earnings as determined under section 35 shall be allocated in the manner describe in this section.

[10] Subsection 36(12) of the Regulations states that 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.

EVIDENCE

Information from the Docket

[11] The claimant applied for sickness EI benefits stating that he was not covered under a sickness benefit plan through his employer; paid sick leave or wage loss insurance. He further stated that he would be returning to his employer but his return date was unknown. The claimant indicated that during the last two years, he was unable to work for medical reasons starting June 21, 2012 (Pages GD3-3 to GD3-15).

[12] The employer submitted a Record of Employment (ROE) indicating that the claimant began working on August 15, 2011 as a Director of Corporate Safety and was no longer working due to illness or injury on May 31, 2013 accumulating 2080 hours of insurable employment. The employer commented that the claimant has not worked since June 2012 due to suffering a stroke at work; the employer continued to pay salary whilst a claim for disability was being processed (Page GD3-16).

[13] A Supplementary Record of Claim dated October 8, 2013 indicates that the claimant was in receipt of LTD disability through his insurance provider. The type of payment was Wage Loss Insurance starting October 19, 2012 with an end date of September 30, 2013; gross amount paid of $4,700.00 per month for five days per week. Additional information indicates that $53,736.67 was the full payment (Pages GD3-18 and GD3-19).

[14] The claimant further declared earnings of $1,085 for the period of September 22 to September 28, 2013 (Pages GD3-20 and GD3-21).

[15] The Commission sent a letter dated June 6, 2015 informing the claimant that his wage-loss insurance payments, before deductions, are considered earnings and will affect his EI benefits starting June 2, 2013 (Page GD3-22).

[16] The Commission sent a Notice of Debt dated June 13, 2015 to the claimant in the amount of $7,014.00 (Page GD3-24).

[17] The claimant submitted a Request for Reconsideration and included a letter dated July 14, 2014 from his insurance provider. This letter stated that "The purpose of this letter is to advise you that your file has been adjusted to reflex a non-taxable Long Term Disability benefit." The claimant included his T4As provided by his insurance provider which state "Cancelled" (Pages GD3-27 and GD3-28).

[18] The employer was contacted by the Commission and he explained that the way their plan is structured is that employees are entitled to benefits including: medical, dental, life insurance and LTD benefits. He confirmed that employees pay 100% of premiums associated with the LTD plan and the employer directly remits the premiums through payroll deductions. He stated that he believes that LTD coverage is mandatory and employees do not have the option to opt out of coverage (Page GD3-29).

[19] The claimant was contacted by the Commission and advised that if the LTD plan is considered a "group plan" as defined by the Regulations then the payments are considered earnings for EI purposes. The claimant stated that he believes his plan was portable meaning he could take it to another employer but he did not elect to do this as he was informed that with his stroke, he would not be able to draw benefits again (Page GD3-30).

[20] The employer was sent a letter dated October 19, 2015 asking for clarification on the claimant's LTD payments. This letter explained what conditions must be met in order to not be considered a group plan. The Commission stated that as they understand, the benefit plan offered to employees provides for LTD coverage and that coverage is mandatory for all employees; if this is not correct, please advise. The commission further asked if the premium rate is dependent on the experience of the group and is the plan portable (Page GD3-32).

[21] The claimant was contacted by the Commission and he was advised that no further details were provided by the employer relative to the LTD plan and therefore, the decision will be based on the facts already obtained; there was sufficient evidence to show that the claimant's LTD plan did not meet all requirements needed to exempt his LTD payments from allocation. The claimant argued that the Service Canada website states that these payments would not affect his claim (Page GD3-34).

[22] The Commission provided the Full Text Screens Payments showing that the claimant began receiving sickness EI benefits on June 2, 2013 until September 21, 2013 collecting 14 weeks of benefits. He served his waiting period from June 2 to June 15, 2013 and the claimant's weekly benefits were $501.00 (Page GD3-37).

[23] The claimant provided information from Service Canada's website regarding sickness benefits. He highlighted the section titled "Other types of income have no impact on your EI sickness benefits, including disability benefits." The claimant further highlighted the section that states "The following types of income will be deducted from your EI sickness benefits; payments received under a group health insurance plan or a group wage loss replacement plan" (Pages GD2-5 to GD2-16).

[24] The claimant submitted a letter dated September 24, 2013 from his insurance provider which states that "Your claim has been approved based on our assessment that you meet the definition of disability defined in your group policy as follows:

> Restrictions or lack of ability due to an illness or injury which prevent an Employee from performing the essential duties of:

a) His own occupation, during the Qualifying Period and the 2 years immediately following the Qualifying Period; and
b) Any occupation for which the employee is qualified, or may reasonably become qualified, by training, education or experience, after 2 years specified in part a) of this provision" (Page GD2-17).

[25] This letter further stated that this benefit is non-taxable, as he has paid 100% of the LTD premium. A cheque in the amount of $53,736.67 was forthcoming, in payment of disability benefits from October 19, 2012 to September 30, 2013 inclusive. Further, this letter advised the claimant that he was required to provide notification of all sources of income he is receiving or may receive in the future explaining that early notification will avoid an overpayment (Pages GD2-18 and GD2-19).

Testimony from the Hearing

[26] The claimant testified at the hearing that the Commission keeps turning the words around because they say it is wage loss insurance but it is LTD benefits. He stated that anything that he got from his insurance provider called it a long term disability and not wage loss insurance. He is not sure if these two things are different or if they are the same but it is his understanding that they are different.

[27] The claimant stated that he believes he received a disability benefit and Service Canada's website states "other types of income have no impact on your EI sickness benefits including disability benefits." He further stated he does not believe he received this benefit from a group health insurance or a group wage loss replacement plan. He stated that the numerous information received from his insurance provider have always referred to his benefits as disability benefits. He further stated that the insurance provider provided a T4A but he complained to them because his disability benefits were non-taxable and he has provided the cancelled T4As because his benefits are deemed as a non-taxable benefit.

[28] The claimant explained that when he had his stroke, nobody knew what the long term effects would be. He stated that his employer was kind enough to support him while they waited for the LTD benefits; initially the insurance provider denied his benefits but he appealed it and

was then provided with back pay. He stated that the insurance provider informed the employer that his LTD had been denied and his employer then stopped paying the claimant. At that point he went through EI sickness benefits and was paid 15 weeks.

[29] The claimant stated that right around the time that he was about to end his EI payments, he learned that his appeal was allowed and he would be receiving retroactive LTD benefits. He further stated that he was upfront with EI stating that he was told at the beginning when he applied for EI benefits that he needed to go on sickness benefits while he waited for the appeal and he asked what happens when his disability comes through; he was told "normally LTD does not affect your sickness benefits." He stated that he assumed because of this and because of what he read on the Service Canada website that disability benefits are a non-taxable and they do not affect sickness benefit. The claimant stated that two years goes by and all of a sudden he is hit with a $7,000.00 debt.

[30] The claimant confirmed that his LTD plan was purchased through work and he was responsible for 100% of the premiums. He stated that he is not sure if his plan was optional but he believes that he could opt out. He stated that his plan was portable explaining that his plan came with a conversion option or a follow me plan but he chose not to take the option because he was no longer able to be covered due to his pre-existing condition of having had a stroke. He further confirmed that he knew he had to report income to his insurance provider.

SUBMISSIONS

[31] The claimant submitted that:

a) His earnings were not wage-loss insurance payments; they were non-taxable LTD benefits which he paid the premiums as an employee, not his employer. It states right on the Service Canada website that "You do not have to repay your EI benefits, no matter what type you received if: you were paid special benefits (sickness)" (Page GD3-25).
b) He believes that the reconsideration decision is incorrect or should be changed because the payment he received was not a wage-loss indemnity plan, it was LTD benefits, non-taxable therefore, not earnings. According to Service Canada Sickness Benefits "When

you receive other payments; other types of income have no impact on your EI sickness benefits including disability benefits" (Page GD2-3).

c) When he received his LTD benefit in October during his 15th and final week of EI sickness benefits, the insurance provider paid back from October 19, 2012 to September 30, 2013. In October 2013, he called EI and explained that he had received retroactive LTD benefits and asked what he was supposed to do with his last week of reporting. He was told to go ahead and report as normal because the EI representative did not believe that disability benefits would affect his EI sickness benefits. He did just that and the last EI benefit payment was approved. Almost two years goes by and he receives a letter in June 2015 that he will have to repay the EI sickness benefits he should not have received. He requested a reconsideration but the Commission denied it as they were stuck on wage-loss indemnity (Page GD2-3).
d) Everything that he has received from his insurance provider is deemed as a non-taxable disability benefit. Nowhere in the information provided by his insurance provider does it say that his plan is a "wage-loss indemnity plan", it is a LTD disability plan and those two things are different. His benefits were non-taxable and had nothing to do with earnings.

[32] The Commission submitted that:

a) In the case at hand, it cannot be found that the monies the claimant received as disability payments did not arise from a group wage-loss disability plan as the long term disability plan is part of the employer's overall benefit plan for employees and as such is related to a group of persons employed by the employer. Therefore the plan does not meet the requirement of subsection 35(8)(a). In order to be exempted as group plan disability wage-loss earnings, all six conditions specified in subsection 35(8) must be met. Unfortunately, the evidence in this case does not support that finding (Page GD4-3).
b) The claimant argued that the monies are non-taxable; however, that is the determination of the Canada Revenue Agency in accordance with their regulations for taxation and does not determine whether or not the monies are considered earnings for EI purposes. The only exception would be if the monies are excluded as income under subsection 6(16) of the *Income Tax Act* in accordance with paragraph 35(7)(f) of the EI

Regulations. There has been no documentation presented to show that the monies have been exempted as earnings under the *Income Tax Act* subsection 6(16) (Pages GD4-3 and GD4-4).

c) Once it is determined the monies are earnings under subsection 35(7) of the EI Regulations the monies must be allocated as per paragraph 36(12)(b) to the weeks for which the payments are being made. Therefore, the monies must be allocated from the week of June 2, 2013 (the benefit period commencement date) at the rate of $1,085 per week (Page GD4-4).

d) The jurisprudence is clear that all of the conditions must be satisfied in order for a disability wage-loss indemnity plan to be exempt from earnings. The Commission is correct that while the claimant's Wage Loss Plan does meet the requirements of paragraphs 35(8)(b), (c) and (e) of the EI Regulations, it does not meet the requirements set out in paragraphs 35(8)(a), (d) and (f) of the EI Regulations and it therefore cannot be exempt from allocation (Page GD4-6).

ANALYSIS

[33] In order to be considered earnings, the income must be arising out of any employment or there is a "sufficient connection" between the claimant's employment and the sums received (*Canada (Attorney General) v. Roch,* 2003 FCA 356). The claimant must disclose all monies paid or payable and must prove that the income is not earnings and should not be allocated.

[34] In order for LTD benefits to not be considered earnings pursuant to subsection 35(2) of the Regulations, the LTD plan must meet every aspect of subsection 35(8) of the Regulations (*Tramer v. Canada (Human Resources Development),* 2003 FCA 449).

[35] In this case, the claimant argued that he was paid disability benefits and not wage loss insurance however, the evidence provided by the claimant and the employer indicates that the claimant's LTD benefit plan was purchased through his workplace thus, related to a group of persons who are all employed by the same employer. Further, the letter dated September 24, 2013, sent by the claimant's insurance provider, identifies the LTD plan as a group plan and advises the claimant that he had been approved LTD disability payments due to the "Restriction or lack of ability due to an illness or injury which prevents an Employee from performing the

essential duties of his own occupation or any occupation for which he is qualified." From this, the Tribunal is convinced that the claimant's LTD plan is a disability wage loss group plan in accordance with paragraph 35(2)(c) of the Regulations.

[36] Paragraph 35(7)(b) of the Regulations states that income that is not considered earnings for EI purposes; payments under a sickness or disability wage-loss indemnity plan that is not a group plan. In order to determine if the claimant's LTD plan is not a group plan, he must meet all the conditions specified in subsection 35(8) of the Regulations. The Tribunal accepts that the plan was not financed in part by the employer, is completely portable and provided constant benefits while permitting deduction for income from other sources. However, the Tribunal has already determined that the claimant's plan is related to a group of persons who are all employed by the same employer. Further, the Tribunal is not convinced that the plan was voluntarily purchased by the claimant or that the plan had rates of premium that do not depend on the experience of the group. Accordingly, the Tribunal finds that the claimant has not met every aspect of subsection 35(8) of the Regulations and therefore, his LTD benefits are considered earnings pursuant to subsection 35(2) of the Regulations.

[37] Once a sum has been found to be earnings under section 35 of the Regulations, it is necessary to allocate that sum under section 36 of the Regulations. Subsection 36(12) of the Regulations states that the LTD payments shall be allocated to the weeks in respect of which the payments are paid or payable. The claimant was payable disability benefits for the period of October 19, 2012 to September 30, 2013. The claimant received EI benefits from June 2 to September 21, 2013 and therefore, the Tribunal finds that a portion of the claimant's LTD benefits needs to be allocated to the claimant's entire period where he received EI benefits.

[38] The claimant argued that Service Canada's website stated that disability benefits do not impact EI claims for sickness benefits. He stated that he was also told that normally LTD does not affect EI benefits. While the information provided on the website is correct, it is vague. Private insurance plans are treated differently than those who receive LTD payments under a group plan because group plans are normally linked with employment thus it is normal to consider that payments received under those plans are from the claimant's employer. Although the claimant's insurance provider only referred to his plan as LTD benefits, the documentation from the insurance provider clearly states that his benefits were to provide disability wage loss

insurance benefits as he was unable to work due to illness or injury; there is sufficient connection between the LTD benefits and the claimant's employment.

[39] The claimant argued that he was provided with non-taxable LTD benefits which he paid the premiums to, not his employer. The Tribunal recognizes that the claimant paid 100% of the premiums however, in order for the LTD benefits to be exempt from being considered earnings; it must meet all of the six conditions identified in subsection 35(8). The Tribunal is not convinced that the claimant met the conditions of paragraphs 35(8)(a), (c) and (f) of the Regulations. The fact that his benefits were non-taxable has no bearing on the determination of earnings for EI purposes according to the EI Act as taxation of the LTD benefits is determined by the Canada Revenue Agency and the *Income Tax Act*.

[40] For these reasons, the Tribunal concludes that, pursuant to subsection 35(2) of the Regulations, the claimant had earnings, albeit indirectly, from employment. And, in accordance with subsection 36(12) of the Regulations, these earnings were allocated correctly.

CONCLUSION

[41] The appeal is dismissed.

K. Wallocha

Member, General Division - Employment Insurance Section