



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *A. J. v. Canada Employment Insurance Commission*, 2016 SSTGDEI 130

Tribunal File Number: GE-16-882

BETWEEN:

A. J.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Charline Bourque

HEARD ON: October 6, 2016

DATE OF DECISION: October 17, 2016

REASONS AND DECISION

PERSONS IN ATTENDANCE

Mrs. A. J., claimant, attended the teleconference.

INTRODUCTION

[1] The Appellant established an Employment Insurance benefits claim on March 2, 2014. On May 29, 2015, the *Canada Employment Insurance Commission* (the “Commission”) verbally notified the Claimant that the vacation pay and the severance pay were considered earnings to be deducted at a rate of \$788 per week and that the pension income from *Régie des Rentes du Québec* (“RRQ”) was earnings to be deducted at a rate of \$173 per week starting on March 2, 2014 and the pension income from *Société Air France* (“Air France”) was earnings to be deducted at a rate of \$ 425 per week, starting on April 1st, 2014.

[2] On January 14, 2016, the Commission notified the Claimant that following her request for reconsideration of her EI decision, the decision regarding earnings, was maintained. The claimant filed an appeal to the *Canada Social Security Tribunal* (the “Tribunal”) on March 3, 2016.

[3] 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

[4] The Claimant is appealing the decision regarding an allocation of earnings and the allocation of her pension payments pursuant to sections 35 and 36 of the *Employment Insurance Regulations* (the “Regulations”).

EVIDENCE

[5] The evidence on the docket provide that:

- a) Claim for benefits made on April 2, 2015 (GD3-3 to GD3-14).
- b) Record of employment indicating a last day of work on February 28, 2014. A vacation pay of \$633.92 was paid.
- c) Letter from Air France dated September 10, 2013 indicating a payment as a severance package of \$51,506.00.
- d) On May 5, 2015, Air France confirms that the Claimant was eligible for her retirement and chose that option although she would have lost her job in any case (GD3-20).
- e) On May 29, 2015, the Commission advised the Claimant that she will not be payable because that she will not be able to serve her waiting period, since she is receiving a 598\$ as a pension (GD3-21).
- f) On January 13, 2016, the Commission indicates that the antedate was granted to March 2, 2014. Her severance was allocated until June 2015. It is explained to the claimant that currently, the pensions that are allocated on her file are preventing her from serving her 2 week waiting period, and because the waiting period is not served, she cannot received payments. The claimant confirms the amount of the pensions she is receiving: 1841.36\$ per month from her former employer, and 747.79\$ from Quebec Pension Plan. The Claimant explains that she is not receiving her full pension benefits because she was forced to withdraw early when she was 61 years old after her position was abolished (GD3-24).

[6] The evidence provided by the testimony of the Claimant provide that:

- a) She has been working and paying benefits since the 1970's.
- b) She has been laid off since her employer basically got rid of her. Because of the circumstances, she had to take early pension and early Quebec pension. It indicates that it wasn't part of her plan, she still had 4 years to work.
- c) She indicates that both her pensions are calculated as earnings and with an arbitrary 125%, she is not able to qualify because of an amount of 27\$ per month.
- d) She indicates that it is an arbitrary figure and bureaucratic manoeuvre. She has always played by the rule. She was counting on the money to payback debts.
- e) She would go back to work but she needs retraining. However, to get the training, she needs the money from the benefits. It is not a big amount that she would received but it all makes the difference in her situation.
- f) She did not have the choice to take her pension and it is not an easy situation to lose her job. She needed that help and has paid 46 years of premium on which she cannot count.
- g) She followed every rule and worked all her life.
- h) She is ashamed of the way her employer got rid of her. Can she not pay the 27\$ penalty and be allowed to receive benefits? The Commission told her to appeal the decision so that the law may change.
- i) She never received a written decision and she was getting different information from the Commission.
- j) She was off work for 3 years because of breast cancer and was paid 65% of her salary. She never asked for benefits. For her, government help is a sign of weakness. She didn't take the government's money since it was for the people that really need it. She cannot understand that she pays premium but is excluded because of 27\$. She cannot get the sense of injustice which is physically hurting her.

SUBMISSIONS

[7] The Appellant submitted that :

- a) The Claimant indicates that she was let go by Air France on February 28, 2014, after 32 years of service. Her job has been abolished. She was given 2 weeks of salary per year of service as a severance and being 60 years-old, she was given early pension.
- b) She was misinformed regarding the deadline for filing an application but Service Canada did forgive this mistake.
- c) She was initially told to submit her online reports, which she did. She was told her benefits would be \$158 weekly because of the severance, vacation pay and penalties. She qualified from July 26, 2015 only.
- d) The agent explained her that she could not be paid because of a technicality and that she should appeal so maybe the law could be changed.

[8] 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) Based upon the facts on file the Commission determined that the vacation pay of \$ 633.92 (GD3-15) and the severance pay of \$51 506.00 (GD3-17), that the claimant received constitute earnings pursuant to subsection 35(2) of the Regulations because the payment was made to compensate the claimant for the loss of her employment. The Commission further submits that the payment was made by reason of her separation from employment. Consequently, the vacation pay and the severance pay were allocated

pursuant to subsection 36(9) of the Regulations, according to her normal weekly earnings from \$ 788.

- d) The Commission submits that the jurisprudence supports its decision. The Federal Court of Appeal reaffirmed the principle that amounts paid because of the severance of the employment relationship constitute earnings within the meaning of section 35 of the Regulations and must be allocated in accordance with subsection 36(9) of the Regulations (*Canada (AG) v. Boucher Dancause*, 2010 FCA 270; *Canada (AG) v. Cantin*, 2008 FCA 192).
- e) Pension moneys arising out of any employment are earnings for benefit purposes. Included in consideration of pension income are pensions that arise from service in any armed forces, or any police force. Also included are pensions paid or payable under the Canada Pension Plan or a provincial pension plan. Pension bridging benefits, whether paid from the pension fund or out of general company revenues, are considered to be a retirement pension arising out of employment, paid on a periodic basis in lieu of a pension.
- f) Pensions are allocated to the period for which they are paid or payable regardless of the method of payment or when the payment is ultimately made. The manner of allocating pension moneys depends on whether a pension is paid on a periodic basis, or in a lump sum in lieu of a pension.
- g) Pensions are not considered as earnings if the claimant has accumulated enough hours of insurable employment since they started receiving their pension to re-qualify for a new claim for employment insurance benefits.
- h) In this case, the facts prove that the claimant has cumulated both pensions while she was working for her former employer « Société Air France » and since the loss of her employment, on February 28, 2014, she did not work for another employer. For that reason, the pensions received are considered earnings to be deducted and must be allocated when she started to receive the pensions.
- i) Considering the fact that the initial claim was established effective March 2, 2014, the monthly pension, received from « Régime de Rentes du Québec » has to be allocated at this date, because the claimant has received her first payment, on February 28, 2014.

- j) The monthly pension is \$ 747.79 (GD3-8) and consequently the weekly amount of \$ 173 has to be allocated. On the other hand, the monthly pension of \$ 1 841.36 (GD3-8), received from « Société Air France », has started on April 1st, 2014 and consequently, a weekly amount of \$ 425, has also to be allocated, starting at this date.
- k) The Commission maintains that the claimant's pension incomes from « Régime de Rentes du Québec » and from « Société Air France » constitute earnings pursuant to subsection 35(2)(e) of the Regulations and must be allocated pursuant to subsection 36(14) of the Regulations.
- l) The Commission submits that the jurisprudence supports its decision. The Federal Court of Appeal re-affirmed the principle that where there is a clear and direct linkage between the claimant's employment and the Pension Plan out of which he or she received the monthly payments, the pension constituted earnings within the meaning and for the purposes of sections 35 and 36 of the Regulations (*MacNeil v. Canada* (AG), 2009 FCA 306).
- m) More specifically, the severance pays received from the employer has been allocated on a weekly amount of \$ 788.00, starting on March 2, 2014, until June 13, 2015. At this amount, the weekly pension of « Régime de Rentes du Québec » of \$ 173.00 has been added and also the weekly pension of « Société Air France » of \$ 425.00. The total of the allocations (\$ 1 386.00) has prevented the payment of the benefits until June 13, 2015. On June 14, 2015, only the weekly pensions of \$ 598.00, have continued to be allocated.
- n) Pursuant the section 13 of the Law, a claimant is not entitled to be paid benefits until he has served a two week waiting period. Sometimes an allocation, distributed on the first weeks of a benefit period, is higher than the rate of benefits. When this situation occurs and the distributed amount is equal to or exceeds 125% of the benefit rate, the waiting period is to be postponed.
- o) In this case, the benefit rate was set at \$ 457.00 per week and the allocation of pensions is \$ 598.00. By multiplying the rate of \$ 457.00 by 125% the result obtained is \$ 571.00.
- p) Thus, because the amount of the weekly allocation (\$ 598.00) is higher than \$ 571.00, the waiting period cannot be served and pursuant the section 13 of the Act, the claimant cannot begin to receive benefits as long as the waiting period will not be served.

- q) Furthermore, because the distribution of his pension is indefinite, she will never receive benefits with her current claim.
- r) Pursuant the subsection 35 (7) e) (ii), the only way in which pensions received will not be considered earnings, will be, for the claimant, to accumulate new hours of insurable employment in order to be able to re-qualify for a new claim for employment insurance benefits.
- s) Although the Commission understands and sympathizes with the situation of the claimant, the fact remains that the Commission has an obligation to enforce the law in its entirety and, consequently, the decision is in accordance with the Employment Insurance legislation and is supported by case law. The Commission, therefore, respectfully requests the Tribunal to dismiss the claimant's appeal.

ANALYSIS

[9] The relevant legislative provisions are reproduced in the Annex to this decision.

[10] Subsection 35 (1) of the *Employment Insurance Regulations* (the "Regulations"), defines employment and pension as:

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.
(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*)

Allocation of earnings

[11] The Claimant indicates that she was laid off from Air France. She was told by the Commission that her benefits would be of \$158 weekly because of the severance, vacation pay and penalties. She would qualify from July 26, 2015 only. Then, an agent explained her that she could not be paid because of a technicality and that she should appeal so the law could perhaps be changed.

[12] The Claimant received \$633.92 as a vacation pay and \$51 506.00 as a severance pay. Her last day of work was February 28, 2014.

[13] The Tribunal finds that the Regulations dealing with earnings and allocation have been drafted and interpreted broadly, to include the “entire income of a claimant arising out of any employment” (*McLaughlin* 2009 FCA 365 (CanLII)).

[14] The Tribunal finds that the amounts, which the Claimant have received as a severance package and as a vacation pay do not fit within any of the exceptions in subsection 35 (7) of the Regulations.

[15] On this basis, the Tribunal finds that any amount, which the Appellant received from the Employer as a salary or vacation pay, are earnings for the purpose of section 35 of the Regulation.

[16] Section 36 of the Regulations describes how earnings are to be allocated and in which weeks they will be considered to have been earned by the claimant (*Boone* 2002 FCA 257).

[17] The Tribunal finds that in deciding which subsection of section 36 should be resorted to in determining the method for the allocation, it is the reason or motive for the payment and not the date of the payment, which determines the date from which the allocation must begin (*Sarrazin* 2006 FCA 313).

[18] Subsection 36 (9) of the Regulations indicates:

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

[19] The Commission indicates having allocated the severance package of \$51 506.00 and the vacation pay of 633.92\$ according to her normal weekly earnings of \$788. The allocation began on March 2, 2014 until June 13, 2015.

[20] The Tribunal is satisfied that the earnings from the Claimant's vacation pay and severance package have been correctly allocated by the Commission.

Allocation of pension

[21] Subsection 35 (2) e) of the Regulations indicates:

Subject to the other provisions of this section, the earnings to be taken into account for the purpose of determining whether an interruption of earnings under section 14 has occurred and the amount to be deducted from benefits payable under section 19, subsection 21(3), 22(5), 152.03(3) or 152.04(4) or section 152.18 of the Act, and to be taken into account for the purposes of sections 45 and 46 of the Act, are the entire income of a claimant arising out of any employment, including

(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

[22] The Federal Court of appeal has indicated that where there is a clear and direct linkage between the claimant's employment and the Pension Plan out of which he or she received the monthly payments, the pension constituted earnings within the meaning and for the purposes of sections 35 and 36 of the Regulations (*Mac Neil* 2009 FCA 306).

[23] The Claimant confirms that she receives a monthly pension of \$747.79 from the Quebec pension ("RRQ") and a monthly pension of \$1 841.36 from Air France.

[24] The Tribunal is satisfied that both pensions are considered as earnings according to subsection 35 (2) (e) of the Regulations.

[25] The Regulations provide that the allocation of pension would not occur if the benefit period was accumulated after the date on which those moneys became payable. In this case, the Claimant's last day of work was February 28, 2014. She began receiving both pensions following her last day of work.

[26] Subsection 35 (7) (e) (ii) of the Regulations indicates:

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):

(e) the moneys referred to in paragraph (2)(e) if

(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

[27] Therefore, both pensions are considered as earnings and must be allocated. They cannot be exempted under subsection 35 (7) (e) (ii) of the Regulations.

[28] Section 36 (14) of the Regulations indicates:

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.

[29] The Commission indicates that the RRQ pension has been allocated from March 2, 2014 on a weekly basis for the amount of \$173 ($\$747.79 \times 12 \text{ months} \div 52 \text{ weeks}$) and the Air France pension has been allocated on a weekly basis for the amount of \$425 ($\$1\,841.36 \times 12 \text{ months} \div 52 \text{ weeks}$).

[30] The Tribunal is satisfied that the Commission correctly allocated the RRQ pension and the Air France pension according to subsection 36 (14) of the Regulations.

[31] The Commission also confirms that the benefit rate was set at \$457.00 per week. As stated previously, the allocation of both pensions is of \$598.00 ($\$173 + \425) per week.

[32] Subsections 19 (1) and 19 (2) of the Law indicate:

- (1) If a claimant has earnings during their waiting period, an amount not exceeding those earnings shall, as prescribed, be deducted from the benefits payable for the first three weeks for which benefits are otherwise payable.
- (2) Subject to subsections (3) and (4), if the claimant has earnings during any other week of unemployment, there shall be deducted from benefits payable in that week the amount, if any, of the earnings that exceeds
 - (a) \$50, if the claimant's rate of weekly benefits is less than \$200; or
 - (b) 25% of the claimant's rate of weekly benefits, if that rate is \$200 or more.

[33] Therefore, by multiplying the benefit rate of \$457.00 by 125%, the result obtained is of \$571.00. Since the earnings from both pensions are of \$598.00, the Claimant would not have benefits payable during the weeks where an allocation of both pensions is made.

[34] Section 13 of the Law indicates that:

A claimant is not entitled to be paid benefits in a benefit period until, after the beginning of the benefit period, the claimant has served a two week waiting period that begins with a week of unemployment for which benefits would otherwise be payable.

[35] Therefore, the Claimant cannot serve her waiting period and will not be able to receive benefits under her current EI claim.

[36] Although the Tribunal has a great deal of sympathy for the Claimant's situation and that it understands the difficulties of being laid off after so many years of services for an employer and the difficulties arising from this particular situation, the sentiment of injustice that the Claimant feels regarding the situation and the fact that she has contributed to the EI system without benefiting from it, the Tribunal's role is to ensure the enforcement of the EI Act and Regulations. The Tribunal does not have the authority to modify the Law despite its sympathy for the Claimant's particular situation.

CONCLUSION

[37] The appeal is dismissed.

Charline Bourque

Member, General Division - Employment Insurance Section

ANNEX

THE LAW

13 A claimant is not entitled to be paid benefits in a benefit period until, after the beginning of the benefit period, the claimant has served a two week waiting period that begins with a week of unemployment for which benefits would otherwise be payable.

19 (1) If a claimant has earnings during their waiting period, an amount not exceeding those earnings shall, as prescribed, be deducted from the benefits payable for the first three weeks for which benefits are otherwise payable.

(2) Subject to subsections (3) and (4), if the claimant has earnings during any other week of unemployment, there shall be deducted from benefits payable in that week the amount, if any, of the earnings that exceeds

(a) \$50, if the claimant's rate of weekly benefits is less than \$200; or

(b) 25% of the claimant's rate of weekly benefits, if that rate is \$200 or more.

(3) If the claimant has failed to declare all or some of their earnings to the Commission for a period, determined under the regulations, for which benefits were claimed,

(a) the following amount shall be deducted from the benefits paid to the claimant for that period:

(i) the amount of the undeclared earnings, if, in the opinion of the Commission, the claimant knowingly failed to declare the earnings, or

(ii) in any other case, the amount of the undeclared earnings less the difference between

(A) all amounts determined under paragraph (2)(a) or (b) for the period,

and

(B) all amounts that were applied under those paragraphs in respect of the declared earnings for the period; and

[...]

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, 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*. (*emploi*)

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*)

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*)

self-employed person has the same meaning as in subsection 30(5). (*travailleur indépendant*)

35 (2) Subject to the other provisions of this section, the earnings to be taken into account for the purpose of determining whether an interruption of earnings under section 14 has occurred and the amount to be deducted from benefits payable under section 19, subsection 21(3), 22(5), 152.03(3) or 152.04(4) or section 152.18 of the Act, and to be taken into account for the purposes of sections 45 and 46 of the Act, are the entire income of a claimant arising out of any employment, including

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

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

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

(i) a group wage-loss indemnity plan,

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

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

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

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

(d) notwithstanding paragraph (7)(b) but subject to subsections (3) and (3.1), the payments a claimant has received or, on application, is entitled to receive from a motor vehicle accident insurance plan provided under a provincial law in respect of the actual or presumed loss of income from employment due to injury, if the benefits paid or payable under the Act are not taken into account in determining the amount that the claimant receives or is entitled to receive from the plan;

(e) the moneys paid or payable to a claimant on a periodic basis or in a lump sum on account of or in lieu of a pension; and

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

(i) the claimant,

(ii) the claimant's unborn child, or

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

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

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

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

(c) relief grants in cash or in kind;

(d) retroactive increases in wages or salary;

(e) the moneys referred to in paragraph (2)(e) if

(i) in the case of a self-employed person, the moneys became payable before the beginning of the period referred to in section 152.08 of the Act, and

(ii) in the case of other claimants, the number of hours of insurable employment required by section 7 or 7.1 of the Act for the establishment of their benefit period was accumulated after the date on which those moneys became payable and during the period in respect of which they received those moneys; and

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

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

36 (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.