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

Citation: *L. D. v. Canada Employment Insurance Commission*, 2017 SSTGDEI 97

Tribunal File Number: GE-16-3268

BETWEEN:

L. D.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Employment Insurance Section

DECISION BY: Eleni Palantzas

HEARD ON: January 24, 2017

DATE OF DECISION: June 26, 2017

Canada

REASONS AND DECISION

PERSONS IN ATTENDANCE AND PRELIMINARY MATTERS

The Claimant, Ms L. D., was in attendance with her representative Mr. Raymond Evans by teleconference however; she did not testify at this hearing.

The Canada Employment Insurance Commission (Commission) was represented by Mr. Matthew Vens and Ms. Tania Arreaga (paralegal) acted as an observer.

The parties agreed that neither had new evidence to submit at this hearing however; they will be presenting submissions and will respond to each other's final written submissions by February 20, 2017.

INTRODUCTION

[1] The Claimant applied for employment insurance regular benefits on July 22, 2014 at which time she indicated that she was in receipt of Canada Pension Plan (CPP) benefits in the amount of $522.61/month as of January 1, 2003. An investigation however, revealed that the Claimant was in receipt of CPP benefits in the amount of $805.00/month as of July 1, 2014.

[2] On April 27, 2015, the Commission allocated her CPP benefits to her benefit period and advised the Claimant that as of January 1, 2015 she must report $189.00/week to the end of her claim pursuant to sections 35, 36 and 77.95 of the *Employment Insurance Regulations* (Regulations). The Commission's decision resulted in an overpayment of $3,736.00.

[3] On May 7, 2015, the Claimant requested that the Commission reconsider its decision. On June 3, 2015, the parties confirmed that as of January 1, 2003, the Claimant was actually in receipt of a CPP survivor pension in the amount of $522.61/month and that as of July 1, 2014, she was in receipt of her CPP retirement pension in the amount of $ $460.95/month. As a result of this new information, the Commission modified its decision. It determined that the survivor pension was not considered earnings and thus, was not going to be allocated to her benefit period however; her CPP retirement pension was considered earnings and was allocated to her

benefit period pursuant to sections 35, 36 and 77.95 of the Regulations. As a result, the overpayment was recalculated to $2,174.00.

[4] On June 16, 2015, the Claimant appealed to the General Division of the Tribunal and on November 10, 2015, it was decided that the allocation of earnings was calculated correctly in accordance with sections 35, 36 and 77.95 of the Regulations. The Claimant appealed this decision to the Appeal Division. On August 23, 2016, the Appeal Division allowed the appeal and returned the file back to the General Division for a new hearing to address outstanding arguments that had been put forth by the parties.

[5] The present hearing was held by teleconference since (a) credibility was not anticipated to be a prevailing issue and (b) 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.

[6] The Claimant's representative, Mr. Evans, indicated at the hearing that he had just received the Commission's submissions RGD4 thus requested that he be provided the opportunity to respond. Mr. Evans agreed to make his submissions in writing by January 30, 2017.

[7] The parties agreed to provide the Commission's representative, Mr. Vens, an opportunity to respond to any/new submissions. The parties agreed to respond to each other's final submissions by February 20, 2017. The parties subsequently complied and provided exhibits RGD5 and RGD6 respectively.

ISSUE

[8] The Member must decide whether the Claimant's CPP retirement pension was properly deducted from to her benefits pursuant to sections 35, 36 and 77.95 of the *Employment Insurance Regulations* (Regulations) and subsection 19(2.1) of the *Employment Insurance Act* (EI Act).

EVIDENCE

[9] On July 22, 2014, the Claimant applied for employment insurance regular benefits having lost her last employment on July 11, 2014. The Claimant reported being in receipt of CPP benefits in the amount of $522.61/month as of January 1, 2003 (GD3-3 to GD3-14).

[10] The Claimant had two employers during her qualifying period and resided in X, Ontario in the economic region of Central Ontario. She had accumulated 600 insurable hours at one employer and 1904 at his second employer (GD3-15 and GD3-16). A benefit period was established effective July 13, 2014 and regular benefits were paid for 40 weeks until April 25, 2015 (GD3-24 and GD3-25).

[11] On April 27, 2015, an investigation revealed that the Claimant was in receipt of a CPP retirement pension as of July 1, 2014 in the amount of $805.00/month and $186.00/week. The Commission allocated $186.00/week from July 13, 2014 to December 27, 2014 and $187.00/week from December 28, 2014 to January 3, 2015 and then starting January 4, 2015 it allocated $189.00/week (GD3-17). The Commission advised the Claimant that based on this information, it allocated her CPP accordingly and that as of January 1, 2015 she must report $189.00/week to the end of her claim (GD3-26 and GD3-27). The Commission's decision resulted in an overpayment of $3736.00 (GD3-28).

[12] On May 7, 2015, the Claimant requested that the Commission reconsider its decision noting that she was already receiving $522.61/month when she applied for benefits and when she turned 60 years old on June 28, 2014, prior to becoming unemployed; she had applied for a full pension. She added that her pension was less than 25% of the benefits (GD3-29 to GD3-30).

[13] The Claimant clarified that (1) as of January 1, 2003, she was in receipt of a survivor pension of $522.61/month and that as of January 1, 2015, it increased by 1.8% or $9.41/month, and (2) as of July 1, 2014, she was in receipt of her CPP retirement pension of $460.95/month that also increased by 1.8% or $8.30/month as of January 1, 2015. The Claimant indicated to the Commission that she has a hearing issue and did not fully understand the employment insurance process so she did not advise the Commission when she accepted her CPP retirement pension. The Commission advised the Claimant and her representative, Mr. Evans, that given this new information, her survivor pension was not considered earnings and thus, was not going to be allocated to her benefit period. She was advised however; that her CPP retirement pension was considered earnings and that it would be allocated to her benefit period. The Claimant's representative indicated that although they understand that her CPP retirement pension is considered earnings and that it must be allocated at her weekly pension rate, he disagrees how the EI Act and EI Regulations allow the Commission to establish the overpayment (GD3-32).

[14] On June 3, 2015, the Commission advised the Claimant of its modified decision indicating that (1) her survivor pension was not considered earnings and thus, the $121.00/week that she received from July 13, 2014 to December 31, 2014 was not allocated to her benefit period and (2) the Claimant's CPP retirement pension was considered earnings and thus, allocated to her benefit period at a rate of $107.00/week from July 13, 2014 to December 31, 2014 and due to a 1.8% increase, at a rate of $109.00/week as of January 1, 2015 (GD3-33 and GD3-34). The Commission determined that the overpayment was $2,174.00 (GD3-24 to GD3-25).

[15] The Claimant submitted copies of the following:

(a) the Minister's announcement in a news release titled: "The Government of Canada announces new, national Employment Insurance Working While on Claim pilot project: Canadians able to keep more earnings while on claim with further El improvements" . The Claimant notes an excerpt that states (RGD5-7):

> "In Economic Action Plan 2012, the Government has introduced a new, national El pilot project, Working While on Claim. The pilot project increases the incentive for claimants to accept available jobs by allowing them to keep more of what they earn while on El, as benefits are only reduced by 50 percent of total earnings from working while on claim."

(b) a Canada Gazette publication (SOR/2012-128) noting an excerpt that states (RGD4-44 , RGD4-47 and RGD5-2):

> "WWC: Amendments to the El Regulations introduce a new national WWC pilot for three years, from August 5, 2012, to August 1, 2015. Pilot Project No. 18, *Pilot Project to Encourage Claimants to Work More While Receiving Benefits,* reduces a claimant's benefits by 50% of their earnings while on claim starting with the first dollar earned with the goal of ensuring claimants benefit from working more" (page 1455).
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> "To introduce a new WWC pilot, Pilot Project No. 18, *Pilot Project to Encourage Claimants to Work More While Receiving Benefits,* to test a new approach to create incentives to accept more available work while claiming EI" (page 1458).

(c) the Library of Parliament Research Publications on January 23, 2013 "Employment Insurance: Ten Changes in 2012-2013" under the heading 'Rationale' (RGD5-9):

> "EI claimants who stay active in and remain connected to the labour market find permanent employment faster than those who do not. The existing Working

While on Claim pilot project reduces claimants' EI benefits dollar-for-dollar once they have earned a certain amount, discouraging them from accepting additional work. Economic Action Plan 2012 proposes to invest $74 million over two years in a new, national J;J pilot project that will ensure claimants are not discouraged from accepting work while receiving EI benefits."

SUBMISSIONS

[16] The Claimant submitted that (GD2, RGD3, RGD5):

(a) although the Claimant's pension is considered earnings and should be allocated according to sections 35 and 36 of the Regulations, the Claimant's pension should be deducted from her benefits using subsection 19(2) not subsection 19(2.1) of the EI Act;

(b) the Commission does not have the authority pursuant to section 109 of the EI Act to 'amend' the EI Act but only has the authority to 'adapt' existing provisions of the EI Act; the creation of section 19(2.1) constitutes an amendment to the EI Act not sanctioned by section 109 of the EI Act;

(c) to apply the provisions of a regulation (section 77.95) made to give effect to a pilot project aimed at increasing earnings from 'Working While on Claim' to other forms of earnings, such as her pension income, would be a denial of natural justice and not the intent of Parliament;

(d) the enactment of section 77.95 for the Regulations did not alter nor suspend subsection 19(2) so it remains unchanged by the addition of subsection 19(2.1) and both are in effect; subsection 19(2) of the EI Act should be used to deduct her pension because it gives the greater benefit (GD2-2);

(e) subsection 19(3) is still operative today and was not repealed with section 15 of the Regulations; subsection 19(2) reads "subject to subsection (3) and (4)" therefore, section 19(3) combined with section 19(2) of the EI Act provide the means to calculate any overpayment; after her pension was found to be 'undeclared income' it should be deducted using paragraph 19(3)(a)(ii) of the EI Act; case law where the Commission used subsection 19(3) to recover

overpayments of benefits as a result of undeclared earnings shows continued relevance of subsection 19(3) in Fournier v. Human Resources Development Canada, 2002 FCA 138 and CUB 42966.

[17] The Commission submitted that (RGD2, RGD4, RGD6):

(a) it correctly allocated the Claimant's earnings using sections 35 and 36 of the Regulations and correctly deducted those earnings pursuant to subsection 19(2.1) of the EI Act as adapted by subsection 77.95(3) of the Regulations

(b) section 109 of the EI Act clearly gives it the authority, with approval of the Governor in Council, to make regulations to test amendments to the EI Act; section 77.95 of the Regulations was properly made pursuant to its authority under section 109 of the EI Act;

(c) section 77.95 of the Regulations does not alter the definition of "earnings" applicable to section 19 of the EI Act and its intent was that deductions would be applied to all earnings, so applying it to her pension income is correct and not a breach of the principles of natural justice;

(d) subsections 19(2) and 19(2.1) of the EI Act must be read to work together by replacing the amount to be deducted under subsection 19(2) with the new amount in subsection 19(2.1); the only exception is for the purpose of section 13, where the amount to be deducted in subsection 19(2) remains in effect;

(e) subsection 19(3) of the EI Act refers to undeclared earnings; the Claimant's pension income was correctly allocated and deducted using the transition provisions that are set out in section 14.1 of the Regulations after the repeal of section 15 of the Regulations on August 12, 2001; on and after August 12, 2001, declared and undeclared earnings are allocated and deducted using subsection 19(2) or subsection 19(2.1) after the coming into force of Pilot Project No. 18; the case law referred to by the Claimant dealt with undeclared earnings for periods of employment prior to the repeal of section 15 of the Regulations.

ANALYSIS

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

[19] The issue before the Tribunal is whether the Claimant's CPP retirement pension was properly allocated and deducted from her benefits pursuant to sections 35, 36 and 77.95 of the Regulations. The parties agree that the Claimant's CPP retirement pension is considered earnings pursuant to section 35 and that it should be allocated pursuant to section 36(14) of the Regulations respectively. The parties disagree however, on how the Claimant's CPP retirement pension, once allocated, should be deducted from her benefits. This is the only issue that needs to be decided by the Tribunal.

[20] The Claimant submitted that her pension should be deducted using subsection 19(2) of the EI Act and, if her pension was found to be 'undeclared income' it should be deducted using paragraph 19(3)(a)(ii) of the EI Act. On the other hand, the Commission submitted it correctly deducted those earnings pursuant to subsection 19(2.1) of the EI Act as adapted by subsection 77.95(3) of the Regulations.

[21] In support of her position, the Claimant argues that: (a) the Commission does not have the authority to 'amend' the EI Act as it did when it created subsection 19(2.1); (b) section 77.95 of the Regulations gave effect to a pilot project aimed at increasing earnings for claimants while working so it was not meant to be applied to other forms of earnings, such as her pension income; (c) subsection 19(3) is still operative today and was not repealed with section 15 of the Regulations; and finally, (d) subsection 19(2) remains unchanged by the addition of subsection 19(2.1) so both are in effect and 19(2) of the EI Act should be used to deduct her pension.

[22] The Member considered the Claimant's arguments and for the reasons provided below finds that that the Commission correctly deducted the Claimant's CPP retirement pension according to section 77.95 of the Regulations and subsection 19(2.1) of the EI Act.

Does the Commission have the legislative authority to amend the EI Act? Did the Commission have the legislative authority to create pilot projects (Pilot Project 17 & 18)?

[23] According to the Claimant, the Commission does not have the authority pursuant to section 109 of the EI Act to 'amend' the EI Act but only has the authority to 'adapt' existing provisions of the EI Act. Mr. Evans submitted at the hearing that the Commission used its authority under paragraph 109(d) of the EI Act to create subsection 19(2.1) which constitutes an amendment to the EI Act that is not sanctioned by section 109 of the EI Act rather than adapting existing provisions.

[24] On the other hand, the Commission submitted that section 109 of the EI Act clearly gives it the authority, with approval of the Governor in Council, to make regulations to test amendments to the EI Act. The Commission noted that the use of the words "notwithstanding anything in this Act" authorizes the Commission to make such regulations for the establishment of pilot projects that would be contrary to the EI Act, provided that the purpose of the regulation is to establish pilot projects to determine, after testing, what changes could be made to the EI Act or the Regulations. It also submitted that the use of the word "including" before the list indicates that the list is not exhaustive of the types of regulations that can be made by the Commission. It is the Commission's position therefore, that section 77.95 of the Regulations (Pilot Project 18) was properly made pursuant to its authority under section 109 of the EI Act.

[25] Section 109 of the EI Act stipulates that notwithstanding anything in the EI Act, the Commission may, with the approval of the Governor in Council, make such regulations as it deems necessary respecting the establishment and operation of pilot projects for testing whether or which possible amendments to this Act or the regulations would make this Act or the regulations more consistent with current industry employment practices, trends or patterns or would improve service to the public, including regulations for the situations in paragraphs (a) to (d).

[26] The Member finds therefore that the Commission has the authority to make regulations to test possible amendments to the EI Act or the Regulations. It goes without saying, that to test possible amendments, the Commission has to amend the EI Act or regulations. The Member disagrees with the Claimant's position that pursuant to paragraph 109(d) of the EI Act, the Commission cannot amend the EI Act but can only adapt existing provisions. Paragraph 109(d)

of the EI Act states that the Commission can make such regulations, including regulations respecting the manner in which and the extent to which any provision of this Act or the regulations applies to a pilot project, and adapting any such provision for the purposes of that application. In other words, the Commission can make such regulations that establish pilot projects for testing possible amendments to the EI Act or the regulations and, it can make such regulations respecting and adapting any existing provisions of the EI Act or the regulations that applies to a pilot project. The Member finds therefore that the Commission, with Governor in Council approval, can both amend and adapt existing provisions of the EI Act or the Regulations, for the purposes of section 109 of the EI Act.

[27] Further, the Member agrees with the Commission's position that the words in section 109 of the EI Act "notwithstanding anything in this Act" authorizes the Commission to make regulations that would be contrary to the EI Act, provided that the purpose of the regulation is to establish pilot projects for the purpose of that section. Finally, the Member agrees with the Commission that the use of the word "including" prior to types of regulations that that can be made by the Commission is not exhaustive list.

[28] The Member therefore finds that the Commission had the legislative authority to create Pilot Project 17 and 18. The Commission properly, with the approval of the Governor in Council, made/created a regulation, section 77.95 of the Regulations, to give effect to Pilot Project 18 that tested an amendment to the EI Act namely, subsection 19(2.1) of the EI Act.

Is Pilot Project No. 18 and section 77.95 of the Regulations applicable to income from non-working sources while on claim or should subsection 19(2) as legislated apply to income from sources other than working?

[29] The Claimant submitted that section 77.95 of the Regulations was enacted to give effect to "Working While on Claim" Pilot Project 18 which was intended for earnings only from working (such as wages). The pilot project therefore does not apply to her case since she was not working while she was receiving employment insurance benefits and her earnings were from a pension. The Claimant argued that the sole purpose of Pilot Project 18 was to encourage claimant's to work more while receiving benefits so it applies only to income from working. To apply the project to her pension income is a denial of natural justice and not the intent of

Parliament. The Claimant submitted that there's a difference between Parliament's intent and what was actually legislated by the Commission in section 77.95 of the Regulation noting that it didn't account that throughout all documents reference is made to earnings "while working".

[30] In support of her position, the Claimant first points to announcements made at the time of enactment. The Claimant notes the Minister's statements that the pilot project was to encourage claimants to keep more of what they earn "from working" (RGD5-7). Further, the Canada Gazette publication and news release by the Government of Canada stated the same noting that the pilot project increased the incentive for claimants to accept available jobs while on claim with the goal of ensuring claimants benefit from working more (RGD4-47 and RGD5-2).

[31] Second, the Claimant referenced the Library of Parliament Research publications noting that the rationale for creating Pilot Project 18 was to encourage claimants to accept additional work, not discourage them as was sometimes the case using the existing Pilot Project 17 (RGD5- 9). The Commission however, in enacting the Pilot Project 18 only allowed claimants to choose if he/she was already on a claim prior to the new Pilot Project 18 that is prior to August 5, 2012, which was not Parliament's intent. The Claimant argued that the intent of Parliament was for all claimants to be able to choose between the old 19(2) and the new 19(2.1) which ever would be to their benefit.

[32] Finally, the Claimant submitted that Pilot Project 18 does not apply to all earnings, as the Commission contends, because an exception was made for maternity and sickness benefits i.e. they were not affected by the pilot project (Library of Parliament s.5.2 at RGD5-9). At the hearing, Mr. Evans added that income referred of in subsection 47(2) of the Regulations was also not included in section 77.95 which is contrary to the Commission's argument that the section 77.95 (Pilot Project 18) applies to "all income".

[33] In rebuttal, Commission submitted that section 77.95 of the Regulations does not alter the definition of "earnings" applicable to section 19 of the EI Act and its intent was that deductions would be applied to all earnings. Applying section 77.95 of the Regulations therefore to her pension income is correct and not a breach of the principles of natural justice.

[34] The Member agrees with the parties that the Claimant's CPP retirement pension is "earnings" as defined in paragraphs 35(2)(e) of the Regulations and that as per subsection 36(14) of the Regulations her pension earnings must be allocated to the period for which they are paid or payable. The Member agrees with the Commission that subsection 77.95(1) of the Regulations is clear that Pilot Project 18 applies to all earnings as defined in the Regulations.

[35] The Member acknowledges that Claimant's submissions and references to the publications at the time Pilot Project 18 came into effect. The Member finds however, that such references cannot be taken as authority and as stand-alone documents independent from the commensurate legislation enacted to give effect to Pilot Project 18. The Member finds that the entire context of the EI legislation, the purpose, and the language of the enacted section 77.95 of the Regulations must be considered.

[36] In this case, the Member finds that the intent of Parliament is evident in the plain language of section 77.95 of the Regulations that clearly states the purpose of Pilot Project 18 is to test whether " … deducting from benefits payable to any claimant who has earnings during a week of unemployment … would encourage claimants to work more while receiving benefits". The purpose or aim of this regulation and pilot project does not change the definition of "earnings" as is defined in paragraph 35(2)(e) of the Regulations. Accordingly, and undisputedly, pension moneys are considered "earnings". Further, subsection 35(2) of the Regulations states that "the earnings to be taken into account for the purpose of determining … the amount to be deducted from benefits payable under section 19…". The Member finds that since Pilot Project 18 created subsection 19(2.1), i.e. falls under section 19 of the EI Act, the definition of earnings which includes a CPP retirement pension, applies to subsection 19(2.1) as well.

[37] The Member finds that the purpose of Pilot Project 18 therefore was to test whether deducting any earnings (as defined in the Regulations) from a claimant's benefits, would encourage them to work more while receiving benefits. If the intent of Parliament was for Pilot Project 18 to test whether deducting only moneys payable to a claimant for work performed i.e. 'wage income' then it would have been clearly stated as such. That is, had the intent of Parliament been to only include earnings from work, Pilot Project 18 would also have amended the definition of 'earnings' in section 35 of the Regulations. Finally, the Member finds that to

interpret "earnings" in section 77.95 of the Regulations to mean all or any earnings as defined in section 35 of the Regulations does not lead to an absurd result. That is, it is not unreasonable to test whether deducting all earnings, including pension earnings, would encourage one to work more since one can work and receive their CPP benefits at the same time.

[38] The Member further disagrees with the Claimant's position that it was Parliament's intent for all claimants to be able to choose between Pilot Project 17 and 18 (thus, between subsections 19(2) and 19(2.1) of the EI Act) which ever would be to their benefit regardless of when they claimed benefits. This election was not available to all claimants. The Member finds that only claimants who had earnings that were subject to Pilot Project 17 during the period of August 7, 2011 and August 4, 2012, could elect between Pilot Project 17 and 18. Once they advised the Commission of their election, it was irrevocable. Further, subsection 77.95(2) of the Regulations stipulates that it applies in respect of every claimant who makes a claim for benefits for any week in the period beginning on August 5, 2012 and ending on August 1, 2015 and who is ordinarily resident in a region described in Schedule I. The Member does not agree that when enacting subsection 77.95(2), the obvious and clear language of the Regulation was not the intent of Parliament.

[39] Regarding the Claimant's reference to the exception made for maternity and sickness benefits, the Member agrees with the Commission, that it is not relevant to her argument. The exception speaks to the fact that those receiving maternity and sickness benefits are not affected by Pilot Project 18 and that "Any earnings they make while receiving benefits will continue to be deducted dollar for dollar from benefits, as was always the case" (Library of Parliament s.5.1 at RGD5-9). This simply confirms that Pilot Project 18 would not apply to a benefit type where you are not permitted to work and/or have any earnings while in receipt of those 'types of benefits'. The exception is not made because of the 'type of earnings' the claimants may receive, as is her argument herein. In the case of maternity and sickness benefits, a claimant is not allowed to have 'any earnings' while in receipt of those benefits so it makes sense that Pilot Project 18 would not apply in those cases. Plus, subsection 21(3) and 22(5) of the EI Act provide that subsection 19(2) of the EI Act does not apply to maternity and sickness benefits.

[40] Similarly, the Claimant's reference to subsection 47(2) of the Regulations does not support her argument that Pilot Project 18 applies to only earnings while working or conversely,

that it refutes the Commission's position that it applies to all earnings. Section 47 of the Regulations refers specifically to earnings from work-sharing employment. Subsection 47(2) of the Regulations stipulates that if a claimant receives earnings for any week other than by reason of work-sharing employment, the amount determined under subsection 19(2) of the Act shall be deducted from the work-sharing benefits payable to the claimant for that week. The Claimant argues therefore that this subsection of the Regulations shows that the "earnings" referred to section 77.95 of the Regulations does not refer to "all earnings". The Member finds however, that for the reasons provided below, "non-work-sharing" earnings received during the period that the Pilot Project 18 is in effect, like all "earnings", are deducted according to subsection 19(2) together with, and as modified by, subsection 19(2.1) of the EI Act. The Member finds therefore, that subsection 47(2) of the Regulations does not refute the Commission's position that section 77.95 of the Regulations applies to all earnings as defined in the Regulations.

Should any reduction to the Appellant's benefits be determined using subsection 19(2) of the Act or subsection 19(2.1) as adapted by subsection 77.95 (3) of the Regulations, as both sections were in force at the time of her claim?

[41] The Claimant's benefit period became effective on July 13, 2014 and she was paid employment insurance regular benefits until April 25, 2015. From July 1, 2014, the Claimant was also in receipt of a CPP retirement pension. It is undisputed that the Claimant's CPP retirement pension is considered "earnings" pursuant to paragraph in paragraph 35(2)(e) of the Regulations. It is also undisputed that these earnings must be allocated to the period for which they are paid or payable, that is, from July 1, 2014 forward, pursuant to subsection 36(14) of the Regulations.

[42] The Member finds that although the Claimant had initially made reference to section 77.94 of the Regulations which gave effect to Pilot Project 17, it does not apply to her case because it only applies to earnings between August 7, 2011 and August 4, 2012. Since the Claimant had no earnings during this period, section 77.96 of the Regulations also does not apply to her case. The Claimant therefore could not elect to choose between Pilot Project 17 and 18. For the period that the Claimant was receiving her CPP retirement pension, section 77.95 of the Regulations was enacted to give effect to Pilot Project 18 which applied to "every claimant who makes a claim for benefits for any week in the period beginning on August 5, 2012 and

ending on August 1, 2015". The Member therefore finds that Pilot Project 18 applies the Claimant's case.

[43] Subsection 77.95(3) of the Regulations stipulates that for the purpose of Pilot Project 18, section 19 of the EI Act is adapted by adding subsection 19(2.1) after subsection 19(2) of the EI Act. Subsection 19(2.1) states how the amount (except for the purpose of section 13) must be deducted under subsection 19(2) of the EI Act.

[44] The Claimant submitted that the enactment of section 77.95 for the Regulations did not alter nor suspend subsection 19(2) so it remains unchanged by the addition of subsection 19(2.1) and so both are in effect. Further, she submitted that since subsection 19(2) of the EI Act gives her the greater benefit, it should be used to deduct her pension, not subsection 19(2.1) of the EI Act.

[45] The Member agrees with the Claimant in that subsection 19(2) was not "suspended" or made inactive for the duration of Pilot Project 18 because for the purpose of section 13, the earnings must be deducted according to subsection 19(2) of the EI Act. The Member disagrees with the Claimant however, that her pension amount should be deducted according to subsection 19(2) because it gives her the greater benefit. There is nothing in the Regulations that states that this is how earnings are to be deducted. The Member finds that section 77.95(3) is clear, that for the duration of the Pilot Project, section 19 of the EI Act was modified by adding subsection 19(2.1), which is the subsection to be used for deducting all earnings from payable benefits, except for the purpose of section 13 of the EI Act. That is, for the duration of Pilot Project 18, earning must be deducted according to subsection 19(2.1) and not subsection 19(2) of the EI Act.

If it is determined that the Appellant's reduction of benefits is correctly calculated under subsection 19(2.1), then is paragraph 19(3)(a)(ii) the correct and only legislated means to calculate any overpayment?

[46] It is undisputed that although the Claimant had reported that she was in receipt of a survivor pension for several years prior to applying for employment insurance regular benefits; she did not advise the Commission when she accepted her CPP retirement pension effective July 1, 2014 (GD3-32). The Member finds therefore, that the Claimant's CPP retirement

pension was undeclared earnings that had to be retroactively allocated and deducted from her benefits that she had already received.

[47] It's the Claimant position that after her retirement pension was found to be undeclared income it should have been deducted according to paragraph 19(3)(a)(ii) of the EI Act. Further, the Claimant argued that subsection 19(3) is still operative and was not repealed with section 15 of the Regulations as the Commission submitted. The Claimant noted this is evident other provisions such as subsection 19(2) that reads "subject to subsection (3) and (4)" as does subsection 39(1) of the Regulations and subsection 22(5) and 38(2) of the EI Act. The Claimant noted therefore that section 19(3) combined with section 19(2) of the EI Act should be used to calculate any overpayment. Finally, the Claimant stated the fact that the Commission used subsection 19(3) to recover overpayments of benefits as a result of undeclared earnings in cases such as *Fournier v. Canada (Minister of Human Resources Development)*, 2002 FCA 138 and CUB 42966, shows continued relevance of subsection 19(3) of the EI Act.

[48] The Member understands the Claimant's arguments however; disagrees with all of them. First, subsection 19(3) of the EI Act stipulates that if a 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…" The period of undeclared earnings is defined in section 14.1 of the Regulations which in turn, was repealed by section 15 of the Regulations on August 15, 2001. The Member finds therefore, that since the period is no longer defined under the Regulations, subsection 19(3) of the Regulations is inoperable as of August 15, 2001. Second, the fact that other provisions in the EI Act refer to subsection 19(3), does not make it operable after August 15, 2001. The Member agrees with the Commission, that these other provisions are no relevant to the case at hand, nor do they support her position that subsection 19(3) of the EI Act together with subsection 19(2) should be used to deduct her undeclared earnings from her benefits. Third, the Member disagrees with the Claimant that case law from when subsection 19(3) of the Act was in effect supports her argument that it continues to be relevant today. Both cases referenced by the Claimant (*Fournier v. Canada (Minister of Human Resources Development)*, 2002 FCA 138 and CUB 42966), considered claimants' undeclared earnings prior to the repeal of section 15 of the Regulations when section 19(3) was still operable. The Member finds therefore, that subsection 19(3) of the EI Act does not apply to this case.

CONCLUSION

[49] The Member finds that the Claimant's pension was correctly deducted from her benefits benefit period pursuant to subsection 19(2.1) of the EI Act as adapted by subsection 77.95(3) and according to sections 35 and 36 of the Regulations.

[50] The Commission correctly deducted $107.00/week from July 13, 2014 to December 31, 2014 and $109.00/week as of January 1, 2015 from the Claimant's benefit period. The Claimant must repay $2,174.00 to the Commission.

[51] The appeal is dismissed.

Eleni Palantzas
Member, General Division - Employment Insurance Section

ANNEX

THE LAW

Subsection 19(2) of the EI Act stipulates that 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.

Subsection 19(3) of the EI Act stipulates that 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

(b) the deduction shall be made

(i) from the benefits paid for a number of weeks that begins with the first week for which the earnings were not declared in that period, and

(ii) in such a manner that the amount deducted in each consecutive week equals the claimant's benefits paid for that week.

Section 109 of the EI Act stipulates that notwithstanding anything in this Act, the Commission may, with the approval of the Governor in Council, make such regulations as it deems necessary respecting the establishment and operation of pilot projects for testing whether or which possible amendments to this Act or the regulations would make this Act or the regulations more consistent with current industry employment practices, trends or patterns or would improve service to the public, including regulations

(a) respecting the time and manner in which employers are to supply their employees or former employees or the Commission with information on their employment history;

(b) providing for the use in a pilot project

(i) of gross earnings, as defined by regulation, or prescribed amounts that are functions of gross earnings, as so defined, for any purpose for which insurable earnings, maximum insurable earnings or weekly insurable earnings are relevant to the operation of this Act, or

(ii) of periods other than weeks, for any purpose for which a period of weeks or a number of weeks is relevant to the operation of this Act;

(c) providing for the application of a pilot project in respect of one or more of the following:

(i) prescribed employers or groups or classes of employers, including groups or classes consisting of randomly selected employers,

(ii) prescribed areas, or

(iii) prescribed claimants, employees, former employees or groups or classes of claimants, employees or former employees, including groups or classes consisting of randomly selected claimants, employees or former employees; and

(d) respecting the manner in which and the extent to which any provision of this Act or the regulations applies to a pilot project, and adapting any such provision for the purposes of that application.

Subsection 35(1) of the Regulations stipulates that 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*)

Subsection 35(2) of the Regulations stipulates that 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.

Subsection 36(1) of the Regulations is subject to subsection (2), the earnings of a claimant as determined under section 35 shall be allocated to weeks in the manner described in this section and, for the purposes referred to in subsection 35(2), shall be the earnings of the claimant for those weeks.

Subsection 36(14) of the Regulations stipulates that 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.

Subsection 77.94(1) Pilot Project No. 17 of the Regulations is established for the purpose of testing whether increasing the amount of a claimant's allowable earnings from employment while the claimant is receiving benefits would encourage more claimants to accept employment while receiving benefits.

Subsection 77.94(2) Pilot Project No. 17 of the Regulations applies in respect of every claimant whose benefit period is established or ends in the period beginning on August 7, 2011 and ending on August 4, 2012 and who is ordinarily resident in a region described in Schedule I.

Subsection 77.94(3) Pilot Project No. 17 of the Regulations stipulates that for the purpose of Pilot Project No. 17, subsection 19(2) of the Act is adapted such that the maximum allowable earnings shall be

(a) $75, if the claimant's rate of weekly benefits is less than $188; and

(b) 40% of the claimant's rate of weekly benefits, if that rate is $188 or more

Subsection 77.94(4) Pilot Project No. 17 of the Regulations stipulates that this section ceases to have effect on August 4, 2012.

Subsection 77.95(1) Pilot Project No. 18 of the Regulations is established for the purpose of testing whether deducting from benefits payable to any claimant who has earnings during a week of unemployment 50% of those earnings, until the earnings exceed 90% of their weekly insurable earnings, would encourage claimants to work more while receiving benefits.

Subsection 77.95(2) Pilot Project No. 18 of the Regulations stipulates that it applies in respect of every claimant who makes a claim for benefits for any week in the period beginning on August 5, 2012 and ending on August 1, 2015 and who is ordinarily resident in a region described in Schedule I.

Subsection 77.95(3) of the Regulations stipulates that for the purpose of Pilot Project No. 18, section 19 of the Act is adapted by adding the following after subsection (2):

> **(2.1)** The amount to be deducted under subsection (2), except for the purpose of section 13, is equal to the total of
>
> > **(a)** 50% of the earnings that are less than or equal to 90% of the claimant's weekly insurable earnings used to establish their rate of weekly benefits, and
> >
> > **(b)** 100% of any earnings that are greater than 90% of the claimant's weekly insurable earnings used to establish their rate of weekly benefits.

Subsection 77.95(5) of the Regulations stipulates that this section ceases to have effect on August 1, 2015.

Subsection 77.96(1) of the Regulations stipulates that the purpose of Pilot Project No. 18 is also to test which method, the one described in subsection 77.94(3) or the one described in subsection 77.95(3), is more effective in encouraging claimants to work more while receiving benefits.

Subsection 77.96(2) of the Regulations stipulates that a claimant who had earnings that were subject to subsection 77.94(3) during the period beginning on August 7, 2011 and ending on August 4, 2012 may elect to have subsection 77.94(3), instead of subsection 77.95(3), apply to earnings received during all weeks of unemployment included in a benefit period, or the portion of a benefit period, that falls within the period beginning on August 5, 2012 and ending on August 1, 2015. The election is irrevocable.