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

Citation: *J. W. v Canada Employment Insurance Commission*, 2017 SSTGDEI 199

Tribunal File Number: GE-16-3674

BETWEEN:

J. W.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Kirsten Goodwin

HEARD ON: March 22, 2017

DATE OF DECISION: July 24, 2017

Canada

REASONS AND DECISION

PERSONS IN ATTENDANCE

[1] The Appellant and Ms. Blandie Samson, Barrister and Solicitor (Representative), attended the in-person hearing.

INTRODUCTION

[2] The Appellant made an initial claim for regular benefits on August 4, 2015, and his claim was changed to sickness benefits on September 18, 2015. The Respondent told the Appellant that his pension income was considered earnings and would be deducted from his sickness benefits. The Appellant asked the Respondent to reconsider its decision. The Respondent did so, but maintained its initial decision. The Appellant appealed the Respondent's reconsideration decision to the Social Security Tribunal (Tribunal).

[3] The hearing was held in-person for the following reasons:

a) the complexity of the issues under appeal;

b) credibility was not anticipated to be a prevailing issue;

c) the Appellant would be the only party in attendance;

d) the information in the file, including the need for additional information;

e) the Appellant was represented; and

f) the form of hearing respected the requirement under the *Social Security Tribunal Regulations* (SOR/2013-60) to proceed as informally and quickly as circumstances, fairness and natural justice permit.

ISSUE

[4] Did the Respondent correctly decide that the Appellant's pension income constituted earnings under section 35 of the *Employment Insurance Regulations*, SOR/96-332 (Regulations)? If so, did the Respondent correctly decide to deduct the pension income from the

Appellant's sickness benefits pursuant to subsection 21(3) of the *Employment Insurance Act*, S.C. 1996, c. 23 (Act)?

EVIDENCE

[5] The Appellant worked in his trade, and paid employment insurance premiums, for 46 years (testimony). He has battled various forms of cancer since 1997, and in 2015 a biopsy confirmed his cancer had returned and he began chemotherapy (testimony, GD2-13 and GD2-23).

[6] The Appellant's Records of Employment indicate he had 1,217.5 total insurable hours in 2014 (GD2-10 to GD2-12). His last day of employment was December 23, 2014 (GD2-10). He applied for regular benefits on August 4, 2015, then had his claim changed to sickness benefits on September 18, 2015 (testimony, GD3-4, GD3-11, GD3-14 and GD3-15). He could not work between December 23, 2014, and August 4, 2015, because of his illness and cancer treatments (testimony and GD3-24). He received 15 weeks of sickness benefits (GD3-24, GD3-25 and GD4-2).

[7] The Appellant contributed to a group pension plan that was part of his trade union's collective agreement (testimony). The only money put into the pension fund was from the Appellant -- neither the contractors that hired the Appellant nor the Appellant's trade union contributed (testimony). If the Appellant's hourly rate for a job was $42.00, $7.00/hour would not appear on his paycheque because $3.50/hour would go to medical insurance and $3.50 would go to his pension (testimony). The Appellant did not get to choose whether to pay into the pension – if he was part of the union he had to contribute (testimony). He started receiving monthly pension payments of $1,815.83 at the beginning of January 2015 (testimony and GD3-17).

SUBMISSIONS

[8] The Appellant submitted that:

- any doubts in the interpretation of EI legislation and regulations should be resolved in favour of the Appellant;

- since the Appellant accumulated sufficient insurable hours in 2014, his pension should not have been deducted from his sickness benefits;

- unlike a pensioner requesting regular benefits, the Appellant, a retired stage 4 cancer patient, could not go back to work and re-qualify for EI benefits after he started receiving his pension in January 2015;

- the Appellant was penalized by the Regulations which were not meant to respond to his particular circumstances, which goes against the liberal interpretation of the Act's re-entitlement provisions; and

- the Respondent failed to consider that the Appellant's pension did not have any employer or union contributions, the contributions were only from the Appellant and other union members, which meant the pension did not arise out of employment and therefore the pension income should not have been considered earnings.

[9] The Respondent submitted that:

- pension moneys arising out of employment are earnings for benefit purposes;

- although pensions are not earnings if a claimant has accumulated enough hours of insurable employment since they started receiving their pension to re-qualify for a new claim for benefits, the Appellant did not work any insurable hours following the start of his pension payments in January 2015, so he could not re-qualify and therefore his pension constitutes earnings; and

- because the Appellant was receiving sickness benefits, the pension income is deducted dollar for dollar from his benefits.

ANALYSIS

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

[11] Subsections 35(1), (2) and (7) of the Regulations are relevant to whether the Respondent correctly decided that the Appellant's pension income constituted earnings. Subsections 35(1)

and (2) provide that income from retirement pensions arising out of employment are earnings to be taken into account in determining the amount to be deducted from sickness benefits. However, pension income falling within an exception in subsection 35(7) of the Regulations does not constitute earnings, and therefore would not have to be deducted from benefits. The Appellant has the burden of proving his pension income did not constitute earnings (*Bourgeois v. Canada (Attorney General)*, 2004 FCA 117, at para. 1).

[12] If the Tribunal finds the pension income was earnings, then subsection 21(3) of the Act is relevant to whether the Respondent correctly decided to deduct that income from the Appellant's benefits. Subsection 21(3) requires earnings to be deducted dollar for dollar from sickness benefits.

(a) Did the Respondent correctly decide the pension income was earnings?

[13] For the reasons that follow, the Tribunal finds the Appellant's pension income constituted earnings.

[14] The Appellant's position was that his pension was not a retirement pension arising out of employment because only he (and other union members), not contractor employers nor the union, contributed to the plan. Therefore, the pension income did not constitute earnings. Additionally, he had accumulated enough hours of uninterrupted employment in 2014 to qualify for sickness benefits, and he could not be expected as a stage 4 cancer patient to re-qualify for benefits after his pension started, with the effect that he was penalized by the Regulations because they did not address his particular circumstances.

[15] The Respondent's position was that pension moneys arising out of any employment are earnings for benefit purposes, and the Appellant could not benefit from the exception in paragraph 35(7)(e) of the Regulations because he did not have sufficient insurable hours of employment since the start date of his pension.

[16] Subsection 35(2) of the Regulations identifies earnings to be taken into account in determining the amount to be deducted from benefits as required under subsection 21(3) of the Act (which applies to special benefits payable due to illness, also known as sickness benefits). Specifically, it requires the entire income of the Appellant including moneys paid or payable on a

periodic basis on account of a pension, to be considered earnings (paragraph 35(2)(e)). Subsection 35(1) of the Regulations defines a "pension" to include a retirement pension arising out of employment.

[17] Therefore, the legal test to determine if the Appellant's pension income constituted earnings for the purposes of subsection 21(3) of the Act, is whether the money was paid or payable on a periodic basis on account of a retirement pension arising out of employment. There is no dispute that the income was money paid or payable on a periodic basis on account of a retirement pension. The remaining factor is whether the pension arose out of employment. The Federal Court of Appeal (Court) has identified several indicators that a pension arises out of employment, including: the contributor has no control over contributions made to the plan on his behalf; the plan is not a private plan in the nature of a savings plan or an RRSP; and the pension contributions vary directly with the amount of work done by the contributor (*MacNeil v. Canada Employment Insurance Commission*, 2009 FCA 306 (*MacNeil*)).

[18] The Appellant testified that he contributed to a group pension plan that was part of his trade union's collective agreement. He also testified that the only money put into the pension fund was from him -- the contractors that hired the Appellant and the Appellant's trade union did not make contributions – and the amount contributed was tied to the hours he worked. He further testified that he did not get to choose whether to pay into the pension – if he was part of the union he had to contribute. Neither the collective agreement nor pension plan documents are in the record, but the Appellant gave clear consistent testimony, did not appear evasive in answering questions, and the Tribunal found him credible. So, despite the lack of documentary evidence on the pension plan, the Tribunal accepts the Appellant's description of the plan as fact.

[19] Given that the Appellant had no control over contributions made to the plan on his behalf; there is no evidence that the plan was private similar to a savings plan or RRSP; and the Appellant's pension contributions were tied to and varied directly with his hours of work, the Tribunal finds his retirement pension arose out of his employment.

[20] The Representative argued that *MacNeil* should be distinguished because, in that case, the employer made the pension contributions. However, a close reading of *MacNeil* indicates the pension contributions were made on the same basis as for the Appellant. In *MacNeil*, the

employer made contributions to the pension on behalf of unionized journeymen at an hourly rate that, if the pension plan ended, would be added to the hourly wages as part of their wage package. In other words, the contributions represented part of the journeymen's wages, and the employer administered the transfer of those contributions to the plan, similar to the Appellant's situation.

[21] The Tribunal notes the parties agreed the pension income did not fall within the exception in subparagraph 35(7)(e)(ii) because the Appellant had no insurable employment, and therefore no accumulated insurable hours, after the day his pension started. That said, the Representative argued that the Appellant's accumulation of sufficient insurable hours of employment in 2014 to qualify for benefits should be enough. As a stage 4 cancer patient he could not return to work and re-qualify for benefits after his pension started. The Representative argued that any doubts in the interpretation of the Act and Regulations should be resolved in favour of the Appellant. The Representative also argued that the Regulations penalized the Appellant because they could not "respond to" his particular circumstances, and this went against the liberal interpretation of the re-entitlement provisions recognized in *Abrahams v. Attorney General of Canada*, [1983]1 SCR 2.

[22] With respect, the Tribunal cannot agree with the Representative's arguments. To receive benefits, one must meet the conditions set out in the Act and Regulations. Neither the Commission nor the Tribunal can alter or ignore those conditions. The Representative argued that any doubts in the interpretation of the law should be resolved in favour of the Appellant, but the applicable law is unambiguous. Although the Appellant's situation does not fit into any of the exceptions under subsection 35(7) of the Regulations, that does not give rise to any doubt as to how to interpret subsection 35(7). It is clear that to fall within the exception in paragraph 35(7)(e), the Appellant required sufficient insurable hours accumulated after his pension began, and he had none.

[23] During the hearing the Representative suggested that in interpreting the Regulations the Commission should have looked at the overall purpose of the Act as described by the Supreme Court of Canada (SCC) in *Reference re: Employment Insurance Act (Can.) ss. 22 and 23*, 2005 SCC 56 (*Re; EI Act*), which could have allowed an interpretation taking the Appellant's

circumstances into account. However, while SCC recognized that the purpose of a social insurance plan was to compensate the unemployed for a loss of employment income, it also recognized that the receipt of benefits under such a plan is contingent on the existence of qualifying employment (*Re: EI Act*). As with any insurance plan, those making a claim must meet the specified conditions to be compensated under the plan. Even where a claimant has contributed to employment insurance for years, and it might be unfair that benefits are denied, the EI Act establishes "an insurance plan and like other insurance plans, claimants must meet the conditions of the plan to obtain benefits" (*Pannu v. Canada (Attorney General*), 2004 FCA 90 (*Pannu*), at para. 3).

[24] Regarding the Representative's liberal interpretation argument based on *Abrahams*, the Tribunal agrees with the Respondent that the case is not relevant. First, the legislative and regulatory provisions at issue are fundamentally different. *Abrahams* involved section 44 of the *Unemployment Insurance Act, 1971* (UI Act), which dis-entitled claimants who lost employment by reason of a labour dispute until they met a specified condition. Section 35 of the current Regulations identifies income constituting earnings for the purposes of determining if an interruption of earnings occurred, and the amount to be deducted from benefits payable. The provisions are legally distinct, and the interpretation of the re-entitlement provisions under the UI Act is irrelevant to the interpretation of section 35 of the Regulations. Second, the narrow interpretative issue in *Abrahams* arose because there was no definition in the UI Act for the phrase at issue, there was a debate over what the phrase meant, and past jurisprudence regarding the interpretation was inconclusive. There is nothing before the Tribunal suggesting that any part of section 35 is ambiguous or open to competing interpretations, or that there is any doubt arising from "difficulties of the language". Moreover, the Representative has not suggested a liberal interpretation of a particular phrase or provision, but rather asked for subsection 35(7) of the Regulations to be read in a way that includes the Appellant's circumstances. The Tribunal notes that such an approach would require a re-write of subsection 35(7) to either broaden an existing exception or add a new one, which is not possible. The Court has said that even where a claimant's case "is a sympathetic one, the Court cannot rewrite the Employment Insurance Act to accommodate [him]" (*Pannu*, at para. 4).

[25] The Tribunal notes its approach and findings are consistent with the Appeal Division decision in *J.M. v. Canada Employment Insurance Commission*, 2016 SSTADEI 461. In that case, the employer contributed a portion of the appellant's income to the pension for every hour worked, neither the employer or the union contributed to a pension, the appellant had no control over the contributions, and the pension was not similar to a RRSP or other private pension fund. The Appeal Division confirmed the General Division properly decided that the pension money constituted earnings under section 35 of the Regulations.

[26] The Tribunal finds the Appellant did not meet his burden of proof, and therefore the income constituted earnings under section 35 of the Regulations.

(b) Did the Respondent correctly decide to deduct the pension from benefits?

[27] For the reasons that follow, the Tribunal finds the Respondent correctly decided to deduct the Appellant's pension income from his sickness benefits.

[28] The Appellant's position was that he had accumulated sufficient insurable hours in 2014 to qualify for benefits, so his pension income should not have been deducted from his sickness benefits.

[29] The Respondent's position was that because the Appellant received sickness benefits, his pension income had to be deducted dollar for dollar from his benefits.

[30] Subsection 21(3) of the Act requires all earnings (as determined under section 35 of the Regulations) received during a week of unemployment to be deducted from sickness benefits received for that week.

[31] The Tribunal has determined that the Appellant's pension income constituted earnings. It is undisputed that the Appellant received those earnings during the weeks he received sickness benefits. The fact that the Appellant had sufficient insurable hours in 2014 to qualify for benefits is not relevant to this part of the analysis. If the Appellant received earnings in a week he received sickness benefits, the earnings are deducted dollar for dollar. Insurable hours, no matter when they were accumulated, are not a factor in this determination. Therefore, the Tribunal

finds the Respondent correctly deducted the Appellant's earnings income from his sickness benefits.

[32] The Tribunal notes the Appellant did not dispute the dollar amount of the pension income, nor the application of the allocation methodology. Rather, the Appellant challenged whether the pension income was earnings, and if so whether it was deductible from his benefits. The Tribunal has found the income constituted earnings under section 35 of the Regulations, and was deductible under subsection 21(3) of the Act. For the sake of completeness, the Tribunal reviewed how the earnings were allocated, and determined that the Respondent correctly decided: subsection 36(14) of the Regulations required the earnings to be allocated to the period for which they were paid or payable; the earnings were paid on a monthly basis which converted to a weekly amount of $419.00; section 21(3) of the Act required that amount to be deducted dollar for dollar from the Appellant's benefit rate of $524.00; and the result was benefit payments of $105.00 per week ($524.00 - $419.00 = $105.00).

[33] The Tribunal understands the Appellant's perspective that the application of the Regulations results in an unfair outcome, given his situation. It was clear from the Appellant's statements and demeanor during the hearing that if it had been possible he would have returned to work, but his illness and medical treatments prevented him from doing so. Regrettably, the Tribunal has no discretion to modify the requirements of subsection 35(7) of the Regulations, despite the Appellant's sympathetic situation. The Tribunal is not authorized to make decisions based on compassion or fairness. It must follow the law, and therefore concludes the Respondent correctly decided the pension income was earnings under section 35 of the Regulations, and correctly decided to deduct those earnings from the Appellant's sickness benefits under subsection 21(3) of the Act.

CONCLUSION

[34] The appeal is dismissed.

Kirsten Goodwin

Member, General Division - Employment Insurance Section

ANNEX

THE LAW

***Employment Insurance Act*, S.C. 1996, c. 23, subsection 21(3)**

21 (3) If earnings are received by a claimant for a period in a week of unemployment during which the claimant is incapable of work because of illness, injury or quarantine, subsection 19(2) does not apply and, subject to subsection 19(3), all those earnings shall be deducted from the benefits payable for that week.

***Employment Insurance Regulations*, SOR/96-332, sections 35 and 36**

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.

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.

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

(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.

(3) Where, subsequent to the week in which an injury referred to in paragraph (2)(d) occurs, a claimant has accumulated the number of hours of insurable employment required by section 7 or 7.1 of the Act, the payments referred to in that paragraph shall not be taken into account as earnings.

(3.1) If a self-employed person has sustained an injury referred to in paragraph (2)(d) before the beginning of the period referred to in section 152.08 of the Act, the payments referred to in that paragraph shall not be taken into account as earnings.

(4) Notwithstanding subsection (2), the payments a claimant has received or, on application, is entitled to receive under a group sickness or disability wage-loss indemnity plan or a workers' compensation plan, or as an indemnity described in paragraph (2)(f), are not earnings to be taken into account for the purpose of subsection 14(2).

(5) Notwithstanding subsection (2), the moneys referred to in paragraph (2)(e) are not earnings to be taken into account for the purposes of section 14.

(6) Notwithstanding subsection (2), the earnings referred to in subsection 36(9) and allowances that would not be deducted from benefits by virtue of subsection 16(1) are not earnings to be taken into account for the purposes of section 14.

(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*.

(8) 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).

(9) 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.

(10) For the purposes of subsection (2), "income" includes

(a) in the case of a claimant who is not self-employed, that amount of the claimant's income remaining after deducting

(i) expenses incurred by the claimant for the direct purpose of earning that income, and

(ii) the value of any consideration supplied by the claimant; and

(b) in the case of a claimant who is self-employed in farming, the gross income from that self-employment, including any farming subsidies the claimant receives under any federal or provincial program, remaining after deducting the operating expenses, other than capital expenditures, incurred in that self-employment;

(c) in the case of a claimant who is self-employed in employment other than farming, the amount of the gross income from that employment remaining after deducting the operating expenses, other than capital expenditures, incurred therein; and

(d) in the case of any claimant, the value of board, living quarters and other benefits received by the claimant from or on behalf of the claimant's employer in respect of the claimant's employment.

(11) Subject to subsection (12), the value of the benefits referred to in paragraph (10)(d) shall be the amount fixed by agreement between the claimant and the claimant's employer and shall be an amount that is reasonable in the circumstances.

(12) Where the claimant and the employer do not agree on the value of the benefits referred to in paragraph (10)(d), or where the value fixed for those benefits by agreement between the claimant and the claimant's employer is not reasonable in the circumstances, the value shall be determined by the Commission based on the monetary value of the benefits.

(13) The value of living quarters referred to in paragraph (10)(d) includes the value of any heat, light, telephone or other benefits included with the living quarters.

(14) Where the value of living quarters is determined by the Commission, it shall be computed on the rental value of similar living quarters in the same vicinity or district.

(15) Where the remuneration of a claimant is not pecuniary or is only partly pecuniary and all or part of the non-pecuniary remuneration consists of any consideration other than living quarters and board furnished by the employer, the value of that consideration shall be included in determining the claimant's income.

(16) For the purposes of this section, living quarters means rooms or any other living accommodation.