



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *L. D. v. Canada Employment Insurance Commission*, 2018 SST 40

Tribunal File Number: AD-17-521

BETWEEN:

L. D.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Pierre Lafontaine

HEARD ON: January 4, 2018

DATE OF DECISION: January 15, 2018

REASONS AND DECISION

DECISION

[1] The appeal is dismissed.

INTRODUCTION

[2] On June 26, 2017, the General Division of the Social Security Tribunal of Canada (Tribunal) decided that the Appellant's Canada Pension Plan (CPP) retirement pension was properly deducted from 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* (Act).

[3] The Appellant requested leave to appeal to the Appeal Division on July 19, 2017. Leave to appeal was granted on August 1, 2017.

TYPE OF HEARING

[4] The Tribunal held a teleconference hearing for the following reasons:

- the complexity of the issue under appeal;
- the credibility of the parties is not anticipated being a prevailing issue;
- the information in the file, including the need for additional information;
- the requirement under the *Social Security Tribunal Regulations* to proceed as informally and quickly as circumstances, fairness, and natural justice permit.

[5] The Appellant attended the hearing and was represented by Raymond Evans. The Respondent was represented by Matthew Vens.

THE LAW

[6] Subsection 58(1) of the *Department of Employment and Social Development Act* (DESD Act) states that the only grounds of appeal are the following:

- a) The General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;
- b) The General Division erred in law in making its decision, whether or not the error appears on the face of the record; or
- c) The General Division based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

ISSUE

[7] The Tribunal must decide whether the General Division erred when it concluded that the Appellant's CPP retirement pension was properly deducted from her benefits pursuant to sections 35, 36 and 77.95 of the Regulations and subsection 19(2.1) of the Act.

STANDARD OF REVIEW

[8] The Federal Court of Appeal has determined that the mandate of the Appeal Division is conferred to it by sections 55 to 69 of the DESD Act. The Appeal Division does not exercise a superintending power similar to that exercised by a higher court— *Canada (Attorney General) v. Jean*, 2015 FCA 242; *Maunder v. Canada (Attorney General)*, 2015 FCA 274.

[9] Therefore, unless the General Division failed to observe a principle of natural justice, erred in law, based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it, the Tribunal must dismiss the appeal.

ANALYSIS

Position of the parties

[10] The Appellant puts forward that although her pension is considered earnings and should be allocated according to sections 35 and 36 of the Regulations, her pension should be deducted from her benefits using subsection 19(2), not subsection 19(2.1) of the Act.

[11] The Appellant argues that the Respondent does not have the authority pursuant to section 109 of the Act to “amend” the Act, but rather has the authority only to “adapt” existing provisions of the Act; the creation of subsection 19(2.1) constitutes an amendment to the Act not sanctioned by section 109 of the Act.

[12] The Appellant submits that applying 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.

[13] The Appellant puts forward that the enactment of section 77.95 of 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 Act should be used to deduct her pension because it gives the greater benefit.

[14] The Appellant argues that her earnings should be deducted using subparagraph 19(3)(a)(ii) of the Act. Case law where the Respondent used subsection 19(3) of the Act to recover overpayments of benefits as a result of undeclared earnings shows continued relevance of subsection 19(3) of the Act.

[15] The Respondent puts forward that it correctly allocated the Appellant’s earnings using sections 35 and 36 of the Regulations and correctly deducted those earnings pursuant to subsection 19(2.1) of the Act as adapted by subsection 77.95(3) of the Regulations.

[16] The Respondent submits that section 109 of the Act clearly gives it the authority, with the approval of the Governor in Council, to make regulations to test amendments to the Act; section 77.95 of the Regulations was properly made pursuant to its authority under section 109 of the Act.

[17] The Respondent argues that section 77.95 of the Regulations does not alter the definition of “earnings” applicable to section 19 of the 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.

[18] The Respondent puts forward that subsections 19(2) and 19(2.1) of the 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.

[19] The Respondent submits that the Appellant’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) of the Act.

General Division decision

[20] The General Division concluded that section 109 of the Act gave the Respondent authority, with the approval of the Governor in Council, to make regulations to test amendments to the Act.

[21] The General Division found that the Respondent 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 No. 18 that tested an amendment to the Act, namely subsection 19(2.1) of the Act.

[22] The General Division also concluded that subsection 77.95(1) of the Regulations was clear that Pilot Project No. 18 applied to all earnings as defined in the Regulations. It

found that since Pilot Project No. 18 created subsection 19(2.1), it fell under section 19 of the Act; therefore, the definition of earnings, which includes a CPP retirement pension, applied to subsection 19(2.1) as well.

[23] The General Division found that the purpose of Pilot Project No. 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. Had the intent of Parliament been to include only earnings from work, Pilot Project No. 18 would also have amended the definition of "earnings" in section 35 of the Regulations.

[24] The General Division concluded that subsection 19(3) of the Act did not apply to the Appellant. Subsection 19(3) 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. It found, therefore, that since the period was no longer defined under the Regulations, subsection 19(3) of the Regulations was inoperable as of August 15, 2001.

Did the General Division err when it concluded that the Appellant's CPP retirement pension was properly deducted from her benefits pursuant to sections 35, 36 and 77.95 of the Regulations and subsection 19(2.1) of the Act?

[25] The parties agree that the Appellant's CPP retirement pension is considered earnings pursuant to section 35 of the Regulations and that it should be allocated pursuant to subsection 36(14) of the Regulations respectively. The parties disagree, however, on how the Appellant's CPP retirement pension, once allocated, should be deducted from her benefits.

[26] The Appellant argues that the Respondent does not have the authority pursuant to section 109 of the Act to "amend" the Act, but rather has the authority only to "adapt" existing provisions of the Act. The creation of subsection 19(2.1) constitutes an amendment to the Act not sanctioned by section 109 of the Act.

[27] Subsection 19(2) of the Act specifically provides for certain deductions of benefits when earnings are received by a claimant. The following is provided:

Earnings in periods of unemployment

(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.

[28] In section 109 of the Act, Parliament has provided the Respondent with the ability to establish pilot projects for determining, once tested, which amendments to make to the Act or its regulations.

[29] However, the provision regulates the Appellant's exercise of this authority to establish pilot projects. The regulations adopted under section 109 of the Act, which may contradict the other provisions in the Act, must, however, be consistent with current industry employment practices, trends or patterns that would improve service to the public.

[30] Section 109 of the Act provides a non-exhaustive list of possible pilot projects by the use of the word "including": *National Bank of Greece (Canada) v. Katsikonouris*, 1990 CanLII 92 (SCC), [1990] 2 SCR 1029. The period of application of a regulation adopted under section 109 of the Act is, unless repealed, three years.

[31] The Tribunal is of the view that section 109 of the Act allowed the Respondent to validly adopt Pilot Project No. 18, specifically section 77.95 of the Regulations, in order to anticipate the deductions under subsection 19(2) of the Act. Paragraph 54(e) of the Act already allowed the Respondent to establish certain regulations concerning the deductions on earnings received by a claimant for employment through an employment benefit.

[32] The subheading of section 77.95 of the Regulations clearly defines the purpose of Pilot Project No. 18: "Pilot Project to Encourage Claimant to Work More While Receiving Benefits." This pilot project is therefore intended to verify whether this measure would encourage claimants to work more while receiving Employment Insurance benefits.

[33] Pilot Project No. 18 significantly improves services to the public because it makes it possible to exceed the threshold provided under subsection 19(2) of the Act, that is, 25 percent of the claimant's rate of weekly benefits, if that rate is \$200 or more.

[34] The Tribunal has no difficulty finding that Pilot Project No. 18 is intended to improve services to the public, because it encourages claimants to work more while receiving benefits. The Tribunal finds that the Respondent could validly adopt regulations as part of a pilot project in order to establish the deductions to be deducted from benefits pursuant to subsection 19(2) of the Act.

[35] The Appellant submits that applying 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.

[36] As per the General Division's conclusion, subsection 77.95(1) of the Regulations is clear that Pilot Project No. 18 applies to all earnings as defined in the Regulations. Since Pilot Project No. 18 created subsection 19(2.1), it fell under section 19 of the Act. Therefore, the definition of earnings which includes a CPP retirement pension, applies to subsection 19(2.1) as well. Furthermore, section 77.95 of the Regulations does not alter the definition of "earnings" applicable to section 19 of the Act.

[37] The Appellant puts forward that the enactment of section 77.95 of 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 Act should be used to deduct her pension because it gives the greater benefit.

[38] Section 77.95 of the Regulations, which establishes Pilot Project No. 18, provides the following:

77.95 (3) 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.

[39] It is true that at first glance, the wording of section 77.95 of Pilot Project No. 18 is not very clear. The Respondent's use of the words "subsection 19(2) of the Act is adapted by adding" rather than simply stating that "subsection 19(2) of the Act is adapted," as provided for in the regulation establishing Pilot Project No. 17, seems to create this unpleasant first impression.

[40] However, a close reading of section 77.95 shows that section 2.1 is intended to replace subsection 19(2) of the Act, except for the purpose of section 13, not add to it. It clearly indicates that "[t]he amount to be deducted under subsection (2)" of section 19 of the Act, except for the purpose of section 13, is equal to the total of 50 percent of the earnings that are less than or equal to 90 percent of the claimant's weekly insurable earnings used to establish their rate of weekly benefits.

[41] Moreover, the Tribunal finds that subsection 77.96(2) of Pilot Project No. 18 offers the claimant the final choice, under certain conditions, to submit to Pilot Project No. 17, but does not allow them to submit to subsection 19(2) of the Act.

[42] The Appellant argues that her earnings should be deducted using subparagraph 19(3)(a)(ii) of the Act. Case law where the Respondent used subsection 19(3) of the Act to

recover overpayments of benefits as a result of undeclared earnings shows continued relevance of subsection 19(3) of the Act.

[43] The Tribunal finds that the General Division did not err in law when it found that subsection 19(3) of the Act did not apply to the Appellant's case because the provision is inoperative.

[44] Subsection 19(3) stipulates that if a claimant has failed to declare all or some of their earnings to the Respondent 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 effectively repealed by section 15 of the Regulations on August 12, 2001.

[45] For all the above reasons, the Tribunal finds that the General Division correctly applied the threshold for allowable earnings set out in section 77.95 of the Regulations.

CONCLUSION

[46] The appeal is dismissed.

[47] The General Division did not err when it concluded that the Appellant's CPP retirement pension was properly deducted from her benefits pursuant to sections 35, 36 and 77.95 of the Regulations and subsection 19(2.1) of the Act.

Pierre Lafontaine
Member, Appeal Division