



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *M. B. v. Canada Employment Insurance Commission*, 2018 SST 1010

Tribunal File Number: GE-17-3169

BETWEEN:

**M. B.**

Appellant

and

**Canada Employment Insurance Commission**

Respondent

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**SOCIAL SECURITY TRIBUNAL DECISION**  
**General Division – Employment Insurance Section**

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DECISION BY: Eleni Palantzas

HEARD ON: March 27, 2018

DATE OF DECISION: May 30, 2018

## **DECISION**

[1] The appeal is dismissed. The Claimant's CPP retirement benefit must be deducted from her employment insurance benefits and she must repay the benefits to which she was not entitled.

## **OVERVIEW**

[2] The Claimant received employment insurance sickness benefits from December 25, 2016 until April 8, 2017. On March 1, 2017, just after the Claimant turned 65 years old, the CPP disability benefit she was receiving was changed to a CPP retirement benefit. On May 12, 2017, the Canada Employment Insurance Commission (Commission) determined that the CPP retirement pension is considered earnings and deducted it from the Claimant's employment insurance benefits. The Claimant disagreed with the Commission's retroactive deduction because she was not told that the CPP retirement benefit (unlike the CPP disability benefit) was considered earnings that she had to declare. The Claimant requested that the Commission reconsider its decision noting that she cannot repay the overpayment due to financial hardship. The Commission however; maintained that its initial decision was correct and that the Claimant was responsible for the resulting overpayment of \$889.00. The Claimant appealed the reconsideration decision to the Social Security Tribunal of Canada (Tribunal).

## **PRELIMINARY MATTERS**

[3] The Claimant appealed late to the Tribunal. The Member allowed for the extension of time to appeal (GD5 and GD6).

[4] On her Notice of Appeal, the Claimant had requested that her hearing be conducted in person. The Tribunal call the Claimant for clarification. She advised that she thought the hearing would be over the phone. The Claimant's request to change the form of hearing from an in person to a teleconference was granted.

## **ISSUES**

[5] The issues that the Tribunal must decide are:

- 1) Should the Claimant's CPP retirement benefit be deducted from her employment insurance benefits?

2) Does the Claimant have to repay the overpayment to the Commission?

## ANALYSIS

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

### **Issue 1: Should the Claimant's CPP retirement benefit be deducted from her employment insurance benefits?**

[7] In many cases, and for various reasons, a claimant may receive other monies at the same time as receiving employment insurance benefits. The Commission must decide whether these other monies are considered "earnings" and whether these earnings should be applied to the period a claimant is entitled to receive benefits (benefit period). The *Employment Insurance Regulations* (Regulations) provide direction as to what monies are considered earnings (section 35) and how these earnings are to be applied to the benefit period (section 36).

[8] In this case, the CPP retirement benefit that the Claimant received is a pension that is considered earnings according to the Regulations. These earnings must therefore be deducted from the employment insurance benefits she had already received from March 1, 2017 to April 8, 2017. This resulted in an overpayment of \$889.00 that the Claimant must repay to the Commission.

[9] The Claimant received employment insurance sickness benefits from December 25, 2016 until April 8, 2017 (GD3-25). As of March 1, 2017, the Claimant's CPP disability benefit was replaced by the CPP retirement benefit because she turned 65 years old. The Claimant does not dispute that she started to receive the CPP retirement benefit in the amount of \$715.00/month or \$165.00/week (GD2-16 and GD3-13). The Claimant submitted however, that she was not advised by the Commission until May 13, 2017, after her employment insurance benefits had ended, that she was required to declare the CPP retirement benefit as earnings. She finds it unfair that the CPP retirement benefit was retroactively deducted from her employment insurance benefits and as a result, she must repay \$889.00. She feels that she is being punished for having claimed employment insurance benefits before she started to receive her CPP retirement benefit. Whereas others, who claimed benefits after receiving their CPP benefits, are not subject to this deduction.

[10] The Member understands the Claimant's position however, the legislation clearly defines a "pension" as a retirement pension that arises out of employment or out of service in any armed forces or in a police force, under the Canada Pension Plan or under a provincial plan (paragraph 35(1)(b) of the Regulations). The CPP retirement benefit the Claimant started to receive as of March 1, 2017 is a "pension" by definition in the legislation. Further, since the pension is payable on a periodic (monthly) basis as of March 1, 2017, it is considered earnings according to the Regulations (paragraph 35(2)(e) of the Regulations).

[11] Furthermore, these earnings that are paid or payable to the Claimant on a monthly basis must be applied (allocated) to the period for which they are paid or payable (subsection 36(14) of the Regulations). In this case, the pension earnings that the Claimant received in the amount of \$165.00/week must be deducted from each week starting from March 1, 2017. The Claimant's employment insurance benefit rate was \$158.00/week. The Claimant must therefore repay the benefits she received for the partial week of February 26, 2017 (\$99.00) and the subsequent 5 full weeks from March 5, 2017 to April 8, 2017 (5 x 158.00/week) which is a total amount of \$889.00. The Member understands that the Commission retroactively deducted these earnings after the claim had ended. However, it is not within the Commission's discretion to move, postpone or otherwise allocate earnings other than as prescribed in the Regulations.

[12] The Member also considered the Claimant's submission that she is being punished for applying for employment insurance benefits for the first time before she started receiving her CPP retirement pension. On the other hand, those who apply for employment insurance benefits after they start to receive their CPP pension are not subject to a deduction. The Member notes that in all cases, and for the reasons provided above, a pension is considered earnings according to the employment insurance legislation. As a result, if a claimant starts receiving a pension while already receiving employment insurance benefits, like all earnings, it is deducted from the employment insurance benefits. Likewise, when a claimant is already in receipt of a pension, then works in insurable employment, and subsequently qualifies for employment insurance benefits, the pension is again considered earnings however; it becomes part of the normal weekly earnings, and is not deducted from the benefits.

[13] In this case, the Claimant did not meet the exception in the legislation to which she is referring (paragraph 35(7)(e) of the Regulations). That is, the Claimant's pension would not

constitute earnings, if she had accumulated the required number of hours to qualify for benefits, after her pension became payable. Specifically in this case, there is no evidence to show that, after March 1, 2017 when the Claimant's CPP pension became payable to her, she had worked in insurable employment and had accumulated the requisite hours under the EI Act to establish a benefit period. When the Claimant's CPP retirement pension became payable, she was not working and was already receiving employment insurance benefits.

[14] The Member finds therefore that the pension that the Claimant received from the Canada Pension Plan as of March 1, 2017, is considered earnings and it must be deducted from her employment insurance benefits from March 1, 2017 until the end of her claim on April 8, 2017.

**Issue 2: Does the Claimant have to repay the overpayment to the Commission?**

[15] The Claimant submitted that she is experiencing financial hardship because when the CPP disability benefit was changed to the CPP retirement benefit/pension, the amount was reduced by \$299.35/month. Further, she finds it unfair that she should be responsible for the overpayment because she was not made aware by the Commission (or anyone) that the CPP retirement pension would be considered earnings and deducted from her employment insurance benefits. The Claimant testified that her health condition has worsened and that her bank statements show that she is experiencing financial hardship. The Claimant therefore requested that the overpayment (debt) be written off.

[16] On the other hand, the Commission submitted that it considered the possibility of writing off the debt (section 56 of the Regulations) however; it decided that the claim did not meet the requisite criteria (GD4-4).

[17] The Member recognizes and is sympathetic to the Claimant's frustration however; the Claimant is responsible for the overpayment. The Claimant received benefits to which she was not entitled and therefore, must return the amount owed (\$889.00) to the Commission (sections 43 and 44 of the Act).

[18] The Member understands that the repayment of the monies owed to the Commission may provide the Claimant hardship however, it is not within the jurisdiction of the Tribunal to "write-off", forgive or extinguish a debt owed to the Commission (Villeneuve 2005 FCA440, Buffone A-666-99). A decision of the Commission regarding the writing off of any amount owing to the

Commission is not subject to review by the Tribunal (section 112.1 of the Employment Insurance Act).

[19] If the Claimant is not satisfied with the Commission's decision to decline the write off, she may appeal to the Federal Court who (at the present time) has the authority to consider such appeals of the Commission's decisions (Bernatchez T-735-12; Woods A-417-01; Villeneuve A-191-05; Buffone A-666-99; Filiatrault, A-874-97; Gladys Romero A-815-96; Jean-Roch Gagnon A-676-96; Cornish-Hardy v. Canada [1980] 1 SCR 1218, 1980 CanLII 187 (SCC) ).

[20] Alternatively, the Claimant may contact the Canada Revenue Agency and enquire as to how she could make affordable monthly payments.

### **CONCLUSION**

[21] The appeal is dismissed.

Eleni Palantzas

Member, General Division - Employment Insurance Section

HEARD ON:	March 27, 2018
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	M. B., Claimant

## ANNEX

### THE LAW

#### Employment Insurance Regulations

**35 (1)** The definitions in this subsection apply in this section.

*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*)

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

(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

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

(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;

**36 (1)** 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.

**36 (14)** The moneys referred to in paragraph 35(2)(e) that are paid or payable to a claimant on a periodic basis shall be allocated to the period for which they are paid or payable.

#### Write-offs

**56(1)** The Commission may write off a penalty owing under section 38, 39 or 65.1 of the Act or an amount payable under section 43, 45, 46, 46.1 or 65 of the Act, or the interest accrued on the penalty or amount payable, if:

- a) the total of the penalties and amounts, including the interest accrued on those penalties and amounts, owing by the debtor to Her Majesty under any program administered by the Department of Employment and Social Development does not exceed \$100, a benefit period is not currently running in respect of the debtor and the debtor is not currently making regular payments on a repayment plan;
- b) the debtor is deceased;
- c) the debtor is a discharged bankrupt;
- d) the debtor is an undischarged bankrupt in respect of whom the final dividend has been paid and the trustee has been discharged;
- e) the overpayment does not arise from an error made by the debtor or as a result of a false or misleading declaration or representation made by the debtor, whether the debtor knew it to be false or misleading or not, but arises from
  - (i) a retrospective decision or ruling made under Part IV of the Act, or
  - (ii) a retrospective decision made under Part I or IV of the Act in relation to benefits paid under section 25 of the Act; or



- f) the Commission considers that, having regard to all the circumstances,
  - (i) the penalty or amount, or the interest accrued on it, is uncollectable,
  - (ii) the repayment of the penalty or amount, or the interest accrued on it, would result in undue hardship to the debtor, or
  - (iii) the administrative costs of collecting the penalty or amount, or the interest accrued on it, would likely equal or exceed the penalty, amount or interest to be collected.

**56(2)** The Commission may write off the portion of an amount owing under section 47 or 65 of the Act in respect of benefits received more than 12 months before the Commission notifies the debtor of the overpayment, including the interest accrued on it, if:

- g) the overpayment does not arise from an error made by the debtor or as a result of a false or misleading declaration or representation made by the debtor, whether the debtor knew it to be false or misleading or not; and
- h) the overpayment arises as a result of
  - (i) a delay or error made by the Commission in processing a claim for benefits,
  - (ii) retrospective control procedures or a retrospective review initiated by the Commission,
  - (iii) an error made on the record of employment by the employer,
  - (iv) an incorrect calculation by the employer of the debtor's insurable earnings or hours of insurable employment, or
  - (v) an error in insuring the employment or other activity of the debtor.

## **Employment Insurance Act**

### **Repayments**

- 43** A claimant is liable to repay an amount paid by the Commission to the claimant as benefits
- (a) for any period for which the claimant is disqualified; or
  - (b) to which the claimant is not entitled.

**44** A person who has received benefits to which he/she is disentitled or is in excess of the amount to which the person is entitled, shall without delay return the amount, the excess amount or the special warrant for payment of the amount, as the case may be.

**112.1** A decision of the Commission made under the [\*Employment Insurance Regulations\*](#) respecting the writing off of any penalty owing, amount payable or interest accrued on any penalty owing or amount payable is not subject to review under section 112.