



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *P. M. v. Canada Employment Insurance Commission*, 2018 SST 1170

Tribunal File Number: GE-18-2026

BETWEEN:

P. M.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Angela Ryan Bourgeois

HEARD ON: August 20, 2018

DATE OF DECISION: August 31, 2018

DECISION

[1] The appeal is dismissed. The Appellant's pension moneys are earnings and are allocated to the period for which they are payable, starting the week of September 1, 2017. Further, because of the amount of her earnings, the Appellant is unable to serve the required waiting period, and therefore, no benefits can be paid to her.

OVERVIEW

[2] The Appellant reported that after working for the City of St. John's for many years, she was forced into retirement, which created irreparable financial hardship for her. She stopped working in 2015, but her salary continued until August 31, 2017. When her salary stopped, she applied for regular benefits under the *Employment Insurance Act* (Act) and a benefit period was established. She started to receive her pension on September 1, 2017.

[3] The Canada Employment Insurance Commission determined that her pension represented earnings as set out in the *Employment Insurance Regulations* (Regulations), and they allocated her pension to certain weeks. Under the legislation, a claimant must serve a waiting period before benefits become payable. The Commission determined that because of the amount of the Appellant's earnings, the Appellant was not able to serve the required waiting period, and as such, benefits were not payable to her.

[4] The Appellant appealed the Commission's decisions to the Tribunal. She argued that she should be paid benefits despite her earnings because her present situation was caused by her employer's wrongdoings.

ISSUES

[5] Does her pension constitute earnings?

[6] If so, how must the pension moneys be allocated?

[7] Can the Appellant be paid benefits?

ANALYSIS

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

[9] Money that falls within the definition of earnings as set out in subsection 35(2) of the Regulations must be allocated to certain weeks. How the earnings are allocated depends on the nature of the earnings and why they were paid. Based on this determination, the earnings are allocated to weeks in accordance with the relevant subsection of section 36 of the Regulations.

Does her pension constitute earnings?

[10] Yes, I find that the Appellant's pension constitutes earnings. Earnings are the entire income of a claimant arising out of any employment, and include pension money¹. There is no evidence before me that would suggest that her pension is not income or that it arises from something other than her employment.

[11] Pension money is not considered earnings if a claimant has accumulated enough hours of insurable employment to qualify for benefits *after* she started to receive the pension.² This exception does not apply to the Appellant because she confirmed at the hearing that she has not worked since her pension started in September 2017.

[12] The Appellant argued that her pension should be exempt because her job was robbed from her and her earnings will never be recouped. However, these are not relevant considerations in determining what constitutes earnings under the Regulations.

[13] Because the Appellant's pension moneys constitute earnings, they must be allocated to weeks in accordance with section 36 of the Regulations.

How must the pension moneys be allocated?

[14] I find that the pension moneys must be allocated to the period for which they are paid or payable, because they are paid to her on a periodic basis.

[15] Subsection 36(14) of the Regulations provides that pension moneys paid on a periodic basis³ shall be allocated to the period for which they are paid or payable.

[16] Because the Appellant's pension is paid on a monthly basis but must be allocated to weeks, the weekly amount of her pension must be determined.

¹ Paragraph 35(2)(e) of the Regulations

² Subparagraph 35(7)(e)(ii) of the Regulations

³ Paragraph 35(2)(e) of the Regulations

[17] It is undisputed that the Appellant receives \$3,494.66 a month, which represents a weekly amount of \$806 ($\$3,494.66 \times 12 \div 52$). This is the same weekly amount determined by the Commission. The Appellant did not make any submissions with respect to this calculation.

[18] Section 2 of the Act defines week as a period of seven consecutive days beginning on and including Sunday.

[19] The Appellant started to receive her pension as of September 1, 2017. Therefore, I find that the amount of \$806 must be allocated to weeks starting on Sunday, August 27, 2017, which is the Sunday of the week of September 1, 2017.

[20] Because the Appellant's pension only became payable on September 1, 2017, the amount allocated for the week of August 27, 2017 shall be prorated in accordance with subsection 36(3) of the Regulations.

Can the Appellant be paid benefits?

[21] A claimant is not entitled to be paid benefits in a benefit period until she has served a waiting period of one *week of unemployment for which benefits would otherwise be payable*.⁴

[22] I find that the Appellant has not proven that she has had a week of unemployment for which benefits would otherwise be payable, and as such, she has not served the required one week waiting period.

[23] For the purposes of determining if the Appellant has served her waiting period, benefits are only considered to be payable if the benefits otherwise payable in a week are greater than the earnings allocated to that week, less 25% of the rate of weekly benefits.⁵

[24] Although there is no evidence before me as to the Appellant's rate of weekly benefits, I note that the maximum rate of weekly benefits in 2017 was \$543.

[25] The Appellant's weekly earnings of \$806 less 25% of the maximum rate of weekly benefits of \$543 equals \$670. Because the maximum amount of benefits otherwise payable of \$543 is not greater than \$670, benefits cannot be paid to the Appellant. As such, despite what the

⁴ Section 13 of the Act

⁵ Section 19 of the Act

Appellant's rate of weekly benefits is, given the amount of her earnings, she cannot have a week of unemployment for which benefits would otherwise be payable.

[26] Because the Appellant does not have a week of unemployment for which benefits would otherwise be payable, she cannot serve the required waiting period. Unfortunately for the Appellant, benefits cannot be paid to her until she has served the waiting period.

[27] The Appellant argued that she is entitled to employment insurance benefits regardless of her earnings. She stated that she should be paid benefits because of the circumstances that led up to the termination of her employment, and the need for her to draw on her pension years before she had planned.

[28] However, I must apply the law as it is written, and cannot change the way earnings are allocated under the Regulations, or waive the waiting period requirement, because of extenuating circumstances.

CONCLUSION

[29] The appeal is dismissed.

Angela Ryan Bourgeois

Member, General Division - Employment Insurance Section

HEARD ON:	August 20, 2018
METHOD OF PROCEEDING:	Videoconference
APPEARANCES:	P. M., Appellant

ANNEX

THE LAW

Employment Insurance Act

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

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

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

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

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

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

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

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

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

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

and

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

(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.

(4) Earnings from employment under employment benefits and earnings or allowances payable to a claimant for attending a course or program of instruction or training shall not be deducted under this section except in accordance with the regulations.

Employment Insurance Regulations

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

employment means

(a) any employment, whether insurable, not insurable or excluded employment, under any express or implied contract of service or other contract of employment,

(i) whether or not services are or will be provided by a claimant to any other person, and

(ii) whether or not income received by the claimant is from a person other than the person to whom services are or will be provided;

(b) any self-employment, whether on the claimant's own account or in partnership or co-adventure; and

(c) the tenure of an office as defined in subsection 2(1) of the *Canada Pension Plan*. (*emploi*)

income means any pecuniary or non-pecuniary income that is or will be received by a claimant from an employer or any other person, including a trustee in bankruptcy. (*revenu*)

pension means a retirement pension

(a) arising out of employment or out of service in any armed forces or in a police force;

(b) under the *Canada Pension Plan*; or

(c) under a provincial pension plan. (*pension*)

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

(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.

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.

(2) For the purposes of this section, the earnings of a claimant shall not be allocated to weeks during which they did not constitute earnings or were not taken into account as earnings under section 35.

(3) Where the period for which earnings of a claimant are payable does not coincide with a week, the earnings shall be allocated to any week that is wholly or partly in the period in the proportion that the number of days worked in the week bears to the number of days worked in the period.

(4) Earnings that are payable to a claimant under a contract of employment for the performance of services shall be allocated to the period in which the services were performed.

(5) Earnings that are payable to a claimant under a contract of employment without the performance of services or payable by an employer to a claimant in consideration of the claimant returning to or beginning work shall be allocated to the period for which they are payable.

(6) The earnings of a claimant who is self-employed, or the earnings of a claimant that are from participation in profits or commissions, that arise from the performance of services shall be allocated to the weeks in which those services are performed.

(6.1) The earnings of a claimant who is self-employed, or the earnings of a claimant that are from participation in profits or commissions, that arise from a transaction shall be allocated

(a) if the aggregate amount of earnings that arise from a transaction occurring in a week is greater than the maximum yearly insurable earnings referred to in section 4 of the Act divided by 52, to the weeks in which the work that gave rise to the transaction was performed, in a manner that is proportional to the amount of work that was performed during each of those weeks or, if no such work was performed, to the week in which the transaction occurred; or

(b) if the aggregate amount of earnings that arise from a transaction occurring in a week is less than or equal to the maximum yearly insurable earnings referred to in section 4 of the Act divided by 52, to the week in which the transaction occurred or, if the claimant demonstrates that the work that gave rise to the transaction occurred in more than one week, to the weeks in which the earnings were earned, in a manner that is proportional to the amount of work that was performed during each of those weeks.

(6.2) The earnings of a claimant who is self-employed, or the earnings of a claimant that are from participation in profits or commissions, that do not arise from the performance of services or from a transaction shall be allocated equally to each week falling within the period in which the earnings were earned.

(7) The earnings of a claimant who is self-employed in farming shall be allocated

(a) if they arose from a transaction, in accordance with subsection (6.1); and

(b) if they were received in the form of a subsidy, to the week in which the subsidy was paid.

(8) Where vacation pay is paid or payable to a claimant for a reason other than a lay-off or separation from an employment, it shall be allocated as follows:

(a) where the vacation pay is paid or payable for a specific vacation period or periods, it shall be allocated

(i) to a number of weeks that begins with the first week and ends not later than the last week of the vacation period or periods, and

(ii) in such a manner that the total earnings of the claimant from that employment are, in each consecutive week, equal to the claimant's normal weekly earnings from that employment; and

(b) in any other case, the vacation pay shall, when paid, be allocated

(i) to a number of weeks that begins with the first week for which it is payable, and

(ii) in such a manner that, for each week except the last, the amount allocated under this subsection is equal to the claimant's normal weekly earnings from that employment.

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

(10) Subject to subsection (11), where earnings are paid or payable to a claimant by reason of a lay-off or separation from an employment subsequent to an allocation under subsection (9) in respect of that lay-off or separation, the subsequent earnings shall be added to the earnings that were allocated and, regardless of the period in respect of which the subsequent earnings are purported to be paid or payable, a revised allocation shall be made in accordance with subsection (9) on the basis of that total.

(10.1) The allocation of the earnings paid or payable to a claimant by reason of a lay-off or separation from an employment made in accordance with subsection (9) does not apply if

(a) the claimant's benefit period begins in the period beginning on January 25, 2009 and ending on May 29, 2010;

(b) the claimant contributed at least 30% of the maximum annual employee's premium in at least seven of the 10 years before the beginning of the claimant's benefit period;

(c) the Commission paid the claimant less than 36 weeks of regular benefits in the 260 weeks before the beginning of the claimant's benefit period; and

(d) during the period in which the earnings paid or payable by reason of the claimant's lay-off or separation from an employment are allocated in accordance with subsection (9) or, if the earnings are allocated to five weeks or less, during that period of allocation or within six weeks following the notification of the allocation, the claimant is referred by the Commission, or an authority that the Commission designates, under paragraph 25(1)(a) of the Act, to a course or program of instruction or training

(i) that is full-time,

(ii) that has a duration of at least 10 weeks or that costs at least \$5,000 or 80% of the earnings paid or payable by reason of the claimant's lay-off or separation from employment,

(iii) for which the claimant assumes the entire cost, and

(iv) that begins during one of the 52 weeks following the beginning of the claimant's benefit period.

(10.2) If any of the conditions under which the Commission may terminate the claimant's referral under paragraph 27(1.1)(b) of the Act exists, the earnings paid or payable to the claimant by reason of a lay-off or separation from an employment shall be re-allocated under subsection (9).

(11) Where earnings are paid or payable in respect of an employment pursuant to a labour arbitration award or the judgment of a tribunal, or as a settlement of an issue that might otherwise have been determined by a labour arbitration award or the judgment of a tribunal, and the earnings are awarded in respect of specific weeks as a result of a finding or admission that disciplinary action was warranted, the earnings shall be allocated to a number of consecutive weeks, beginning with the first week in respect of which the earnings are awarded, in such a manner that the total earnings of the claimant from that employment are, in each week except the last week, equal to the claimant's normal weekly earnings from that employment.

(12) The following payments shall be allocated to the weeks in respect of which the payments are paid or payable:

(a) payments in respect of sick leave, maternity leave or adoption leave or leave for the care of a child or children referred to in subsection 23(1) or 152.05(1) of the Act;

(b) payments under a group sickness or disability wage-loss indemnity plan;

(c) payments referred to in paragraphs 35(2)(d) and (f);

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

(e) payments 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; and

(f) payments in respect of the care or support of a critically ill child.

(13) A payment paid or payable to a claimant in respect of a holiday or non-working day that is observed as such by law, custom or agreement, or a holiday or non-working day immediately preceding or following a holiday or non-working day that occurs at the establishment of the employer or former employer from whom the claimant receives that payment, shall be allocated to the week in which that day occurs.

(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.

(15) The moneys referred to in paragraph 35(2)(e) that are paid or payable to a claimant in a lump sum shall be allocated beginning with the first week that those moneys are paid or payable to the claimant in such a manner that those moneys are equal in each week to the weekly amount, calculated in accordance with subsection (17), to which the claimant would have been entitled if the lump sum payment had been paid as an annuity.

(16) The moneys allocated in accordance with subsection (14) or (15) shall not be taken into account in the allocation of other earnings under this section.

(17) The weekly amount shall be calculated in accordance with the following formula, according to the claimant's age on the day on which the lump sum payment is paid or payable:

$$A / B$$

where

A is the lump sum payment; and

B is the estimated actuarial present value* of \$1 payable at the beginning of every week starting from the day on which the lump sum payment is paid or payable and payable for the claimant's lifetime, as calculated each year in accordance with the following formula and effective on January 1 of the year following its calculation:

$$B = [\sum_{t=0} \text{to infinity of } ({}_tP_x / (1+i)^t) - 0.5] \times 52$$

where

${}_tP_x$ is the probability that the claimant will survive for "t" years from the claimant's age "x" using the latest Canadian mortality rates used in the valuation of the Canada Pension Plan prorated in equal parts between males and females,

i is the annualized long-term Government of Canada benchmark bond yields averaged over the 12-month period beginning on the September 1 and ending on the August 30 before the January 1 on which the estimated actuarial present values are effective, expressed as a percentage and rounded to the nearest one tenth of a percentage, and

t is the number of years that the claimant survives according to the claimant's age for which the probability of survival is estimated by ${}_tP_x$.

*Note: The estimated actuarial present values are published annually on the Service Canada website.

(18) Earnings that are payable to a claimant under a government program intended to encourage re-employment and that are payable to the claimant as a supplement to earnings arising from a contract of employment shall be allocated to the period for which they are payable.

(19) Where a claimant has earnings to which none of subsections (1) to (18) apply, those earnings shall be allocated

(a) if they arise from the performance of services, to the period in which the services are performed; and

(b) if they arise from a transaction, to the week in which the transaction occurs.

(20) For the purposes of this section, a fraction of a dollar that is equal to or greater than one half shall be taken as a dollar and a fraction that is less than one half shall be disregarded.