



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

[TRANSLATION]

Citation: *D. P. v Canada Employment Insurance Commission*, 2019 SST 237

Tribunal File Number: GE-18-3268

BETWEEN:

D. P.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Charline Bourque

HEARD ON: January 31, 2019

DATE OF DECISION: February 2, 2019

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] The Commission granted the Appellant family caregiver benefits for adults starting on June 24, 2018. After a few weeks, the Commission informed the Appellant that his pension income is considered earnings and must be allocated at a rate of \$720 per week starting on February 4, 2018. The Commission informed the Appellant that, since that amount was higher than the amount of weekly benefits, it could not pay him Employment Insurance benefits.

[3] The Appellant is challenging the fact that he is unable to receive Employment Insurance benefits especially since the Commission had all of the information when it made its decision. He questions why the Commission indicated that he was entitled before reaching a new decision that he could not receive benefits.

ISSUES

[4] Does the pension the Appellant received constitute earnings within the meaning of the *Employment Insurance Regulations* (EI Regulations)?

[5] If so, how should these earnings be allocated?

[6] Can the Appellant's claim be established despite the allocation of earnings?

ANALYSIS

Issue 1: Does the pension the Appellant received constitute earnings?

[7] Earnings for benefit purposes are [translation] "income arising from any employment, whether wages, benefits, or other remuneration," and must be taken in account unless they fall within an exception (sections 35(2) and 35(7) of the EI Regulations). Furthermore, the earnings refer to the entire income from any employment, including the amounts paid or payable to a

claimant on a periodic basis or in a lump sum on account of or in lieu of a pension (section 35(2)(e) of the EI Regulations).

[8] A pension is specifically defined as a retirement pension arising, in particular, from employment (section 35(1)(a) of the EI Regulations).

[9] The portion of the income of a claimant that is derived from a pension does not constitute earnings when the number of hours of insurable employment required for the establishment of their benefit period was accumulated after the date on which those amounts became payable and during the period in respect of which they received those amounts (section 35(7)(e) of the EI Regulations).

[10] The entire income of a claimant arising out of any employment must be taken into account in calculating the amount to be deducted from benefits (*McLaughlin v Canada (Attorney General)*, 2009 FCA 365).

[11] The Appellant confirms that he retired on February 3, 2018. He confirms that he has received a pension of \$3,120 per month from his employer since then. The Appellant confirms that he has not worked again since he took his pension.

[12] The Tribunal is therefore satisfied that the pension the Appellant received is from his employment and constitutes earnings under section 35(2)(e) of the Act. The Appellant has not accumulated insurable hours of employment since he started receiving his pension. The pension therefore constitutes earnings and cannot be exempted under section 35(7)(e). As a result, these earnings must be allocated.

Issue 2: How should these earnings be allocated?

[13] Amounts that constitute earnings under section 35 of the Regulations must be allocated according to section 36 of the Regulations (*Boone et al v Canada (Attorney General)*, 2002 FCA 257).

[14] Pension-related amounts that are paid or payable to a claimant on a periodic basis must be allocated to the period for which they are paid or payable (section 36(14) of the EI Regulations).

[15] The Appellant stated that he received a pension of \$3,120 per month. Therefore, the earnings to allocate are \$720 per week as of February 2018.

Issue 3: Can the Appellant's claim be established despite the allocation of earnings?

[16] A claimant is not entitled to be paid benefits in a benefit period until the claimant has served a waiting period of one week of unemployment for which benefits would otherwise be payable (section 13 of the *Employment Insurance Act* (EI Act)).

[17] When the rate of benefits is \$200 or more, if the amount of earnings is greater than 25% of the claimant's rate of weekly benefits, that week would not be the waiting period (section 13.1(1)(b) of the EI Act).

[18] The Tribunal notes that the maximum rate of weekly benefits as of January 1, 2018, was set at \$547. The Appellant has an income allocation of \$720 per week. Therefore, the earnings allocated are greater than 25% of his rate of benefits. As a result, the Appellant cannot serve the necessary waiting period (section 13.1(1)(b) of the EI Act).

[19] The Commission confirms that the Appellant is entitled to family caregiver benefits. However, it indicates that, because of the allocation of earnings, the Appellant cannot be paid benefits since the waiting period cannot be served (GD4-4).

[20] Therefore, the Appellant is entitled to family caregiver benefits but cannot receive them because of the allocation of earnings preventing him from serving his waiting period.

[21] The Tribunal notes the Commission's errors when it first informed the Appellant on two occasions that he was entitled to Employment Insurance benefits. Furthermore, the Tribunal recognizes how complex the situation is and above all how difficult it is for an appellant faced with such a situation to understand.

[22] Although the Tribunal notes the Commission's obvious error, the Tribunal's role is to apply the Act, and the Tribunal cannot amend it or refuse to apply it despite the Commission's apparent error (*Granger v Canada Employment and Immigration Commission*, FCA A-684-85; *Canada (Attorney General) v Duffenais*, FCA A-551-92).

[23] Therefore, to answer the Appellant's questions, the Commission's decision not to pay him benefits is consistent with the *Employment Insurance Act* and its Regulations.

CONCLUSION

[24] The appeal is dismissed.

Charline Bourque
Member, General Division – Employment Insurance Section

HEARD ON:	January 31, 2019
METHOD OF PROCEEDING:	Videoconference
APPEARANCES:	D. P., Appellant