



Citation: *JL v Canada Employment Insurance Commission*, 2023 SST 1912

**Social Security Tribunal of Canada
General Division – Employment Insurance Section**

Decision

Appellant: J. L.
Representative: B. L.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission
reconsideration decision (538377) dated August 22, 2022
(issued by Service Canada)

Tribunal member: Lilian Klein

Type of hearing: Teleconference
Hearing date: November 23, 2022
Hearing participants: Appellant
Appellant's Representative

Decision date: January 31, 2023
File number: GE-22-3029

Decision

[1] **I'm allowing the Claimant's appeal in part.** This decision explains why.

[2] The Claimant's pension from his Canada Pension Plan (CPP) counts as earnings. They must be allocated against his employment insurance (EI) claim. So, I must dismiss that part of his appeal.

[3] But there's no evidence that the Claimant's pension started **earlier than** December 2020. So, I'm allowing this part of his appeal and his overpayment must be recalculated.

Overview

[4] J. L. is the Claimant in this appeal. He applied for EI benefits on September 28, 2020. He was paid benefits from September 27, 2020, until September 11, 2021.

[5] The Claimant applied for a pension from the Canada Pension Plan (CPP). He reported this pension on his tax returns but not on his biweekly EI claims. He says his pension began in December 2020.

[6] When the Canada Employment Insurance Commission (Commission) was notified that the Claimant was receiving a CPP pension, it allocated this money as earnings against his EI benefits. It calculated an overpayment of \$1,702. It says the Claimant's CPP began in November 2020.

[7] The Commission says a pension from the CPP counts as earnings and earnings must be allocated to the weeks you claim EI. Earnings will reduce your EI benefits.

[8] The Claimant says it's unfair to allocate his CPP as earnings since CPP is a pension and EI is an insurance plan. He says the Commission should have told him he'd lose out if he applied for CPP while getting EI. He says can't afford to give back the overpayment.

[9] The Claimant argues that his debt should be forgiven because the Commission is at fault for failing to explain the Notice of Debt. He says the government promised to help Canadians but hasn't set up a system that's fair and transparent.

The issues I must decide

[10] Does a CPP pension count as earnings?

[11] Does the Commission have to allocate the Claimant's pension earnings against his EI benefits?

[12] When should allocation of the Claimant's CPP pension begin?

I must consider relevant post-hearing documents

[13] After the hearing, the Claimant sent in bank statements for November and December 2020. They showed CPP and EI payments to an account ending with the numbers 2430. I accepted these statements as relevant to his appeal.¹

[14] I shared this information with the Commission and gave it the chance to respond. When it responded, I accepted as relevant its submissions about the Claimant's direct deposit requests. I then shared the Commission's submission with the Claimant and gave him another chance to respond, but he submitted nothing further.

Analysis

I must look at what the law says

[15] The Claimant argues that his CPP pension should not count as earnings. So, I will first look at the law that explains what counts as earnings.

[16] The law says earnings are the **entire income** that you get from any employment.²

[17] The law defines "income," "employment" and "pension."³

[18] **Income** can be anything you got, or will get, from an employer or any other person. **Employment** is any work you did, or will do, under any kind of service or work agreement. **Pension** means a retirement pension arising out of (that comes from) employment.

¹ The Claimant also invokes the *Charter* in his post-hearing submissions. I'm not going to consider this issue since we didn't discuss at the hearing whether this was relevant to his circumstances.

² See section 35(2) of the *Employment Insurance Regulations* (EI Regulations).

³ Section 35(1) of the EI Regulations sets out these definitions.

A CPP pension counts as earnings

[19] Next, I will look at whether the Claimant's CPP pension counts as earnings.

[20] The law says **a pension is money paid to a claimant periodically (on a recurring basis) as a pension**, or in a lump sum in place of a pension.⁴

[21] A pension includes a pension from the CPP.⁵

[22] The Claimant does not dispute that he receives recurring monthly payments from his CPP pension. He only disputes the start date of these payments (as discussed below).

[23] **The Claimant argues that his CPP pension should not count as earnings.** He says CPP is a pension and EI is insurance coverage. He says he has paid into both plans separately and has never claimed from either one.

[24] I follow the Claimant's logic but under the law, his CPP pension counts as earnings.

The Claimant's earnings from his pension must be allocated

[25] Next, I will consider whether the Commission had to allocate the Claimant's CPP pension to the weeks of his EI claim.

[26] The Claimant argues that it was "cruel" to pay him EI benefits and then later demand repayment from EI of the amount he got from CPP. He says reducing his EI in the middle of a pandemic is unjust and there should be leniency in such circumstances.

[27] But the law says **all earnings must be allocated when claiming EI benefits.**⁶

[28] A retroactive (after the fact) **allocation can occur after the Commission pays you benefits** if it later finds out that your biweekly claim reports were incorrect.⁷

⁴ See section 35(2)(e) of the EI Regulations.

⁵ See section 35(1) of the EI Regulations. (Note that CPP **disability** benefits do not count as a pension.)

⁶ See section 36(1) of the EI Regulations. The limited exception to this rule is explained in section 35(7)2 of the EI Regulations. It does not apply to the Claimant's circumstances.

⁷ The Commission was within the 36 months allowed to recover an overpayment. This period can be extended to 72 months if payment was based on false or misleading information.

[29] The Claimant's biweekly EI claims were incorrect since **he did not report the money that he got from his CPP pension.**

[30] The Claimant says he didn't know he had to declare his pension on his EI claims because he'd already reported it as income on his tax returns. He says he didn't view his pension as earnings. And he thought the recurring question asking if he had received "any other money" referred to money from employment, not from a pension.

[31] I agree with the Claimant that including "a pension" as an example of "any other money" on the EI claim forms would be helpful. But I also agree with the Commission that claimants should make enquiries **before** they complete their EI claims if they aren't sure what a question means.

[32] Regardless, the law requires the Commission to allocate all earnings, including money from a CPP pension. So, allocation of the Claimant's pension was correct.

But allocation of the Claimant's earnings started on the wrong date

[33] The Commission allocated the Claimant's earnings starting on November 1, 2020.

[34] The law says **earnings are allocated depending on the nature of the earnings.** In other words, why were the earnings paid?

[35] In the Claimant's case, **his earnings were recurring payments from a retirement pension** (CPP), and the pension came from his employment. This type of earnings is allocated to the week it was paid or payable.⁸ It is allocated at 50% of the amount of the earnings.

[36] In the Claimant's case, **the only available evidence** shows that he began receiving CPP payments in December 2020.

[37] This evidence is in the November and December 2020 bank statements that the Claimant submitted after his hearing for the account ending in the numbers 2430. These statements show CPP paid on December 22, 2020, but no CPP paid in November 2020.

⁸ This allocation method is set out in section 36(14) of the EI Regulations.

[38] The Commission argues that the Claimant had previously given direct deposit instructions for a different bank account ending with the numbers 9156. These instructions lapsed on November 24, 2020.⁹ They were for his EI benefits, not for CPP.

[39] From these instructions, the Commission “speculates” that the Claimant might have received an earlier CPP payment on November 22, 2020, into the account ending with the numbers 9156.

[40] However, it is public knowledge that CPP is paid **within two business days of the end of each month**. The exception is December when payments are made before the Christmas week.

[41] So, the Commission’s theory of a possible CPP payment on November 22, 2020, doesn’t seem to fit the facts.

[42] I note that it’s up to the Claimant to show that any money he got while claiming EI was **not** earnings. I’ve already found that he couldn’t meet this onus (fulfil this duty) because, under the law, a CPP pension counts as earnings.

[43] I also note that where a claimant disputes the **amount** that the Commission is allocating as income, it’s up to the claimant to provide evidence of the correct amount.¹⁰

[44] But asking the Claimant to prove that he was **not** paid CPP in November 2022 is unfairly asking him to prove a negative.

[45] The Commission **hasn’t shared details of the internal audit** it relied on to argue that the Claimant’s CPP began in November 2020. **It hasn’t shown proof of a CPP payment** that month. As well, its amended payment chart **doesn’t show any amounts in the earnings columns for November 2020**.¹¹

[46] Without this evidence, I cannot rely on the Commission’s recent speculation that the Claimant was paid CPP on November 22, 2020.

⁹ See the Commission’s post-hearing submissions in the GD7 file.

¹⁰ See CUB 58496. I don’t have to follow CUB decisions, but I can choose to do so.

¹¹ See the payment chart at GD3-15.

[47] That's why **I find it more likely than not that the Claimant's CPP pension began in December 2020**. I've based this finding on the only CPP payment evidence that's available and the Claimant's consistent testimony about this date.¹²

[48] This means that **allocation of the Claimant's pension earnings can only start in December 2020**. So, the Commission will have to recalculate his overpayment. The recalculation should result in a decrease in the amount of the overpayment.

I can't remove the Claimant's EI overpayment

[49] The Claimant says the whole overpayment should be removed since the Notice of Debt came with no explanation, causing him a lot of stress. He wants the Commission to be reprimanded because none of its Service Canada staff could explain the overpayment.

[50] The Claimant also argues that he'd never have applied for CPP if he'd known he'd lose that amount off his EI benefits. He says the Commission should have told him this.

[51] I agree with the Claimant that he should have been able to get information much earlier about **why** he had an overpayment. But asking for help **after** a Notice of Debt arrives is not the same as making enquiries **before** applying for CPP.

[52] There's no evidence that the Claimant asked the Commission if it was wise to apply for CPP in his circumstances **before** he applied for it. He testified that he first spoke to the Commission (and his accountant) **after** receiving his Notice of Debt.

[53] I truly sympathize with the Claimant's situation, but I cannot change the law.¹³ A CPP pension counts as earnings. If your earnings weren't allocated because you didn't declare them, you must repay the EI you were overpaid.¹⁴

[54] Unfortunately, **I don't have the power to forgive or reduce the Claimant's EI overpayment**.¹⁵ I can only correct the date that allocation of his CPP earnings should have started. This should result in a small reduction in the amount of his debt.

¹² See, for example, GD3-28. He also gave sworn testimony at his hearing on when his CPP began.

¹³ See *Attorney General of Canada v Knee*, 2011 FCA 301.

¹⁴ Sections 43 and 44 of the EI Act explain this rule.

¹⁵ *Canada (Attorney General) v Villeneuve*, 2005 FCA 440. S

[55] But the Claimant still has options. He can ask the Commission to remove or reduce the rest of his overpayment based on undue hardship.¹⁶ If the Commission refuses, he can take the matter to the Federal Court.

[56] The Claimant can also call the CRA's Debt Management Centre to discuss his difficult financial situation and request a repayment schedule that he can manage.

Conclusion

[57] The Claimant 's CPP **pension counts as earnings. All earnings must be allocated** against EI benefits.

[58] **But the Commission allocated his CPP pension earnings starting in November 2020 without proving that he was paid CPP before December 2020.**

[59] So, **I'm dismissing the first part of the Claimant's appeal** on whether his CPP was earnings that had to be allocated against his EI. **But I'm allowing the second part of his appeal** on whether the Commission started the allocation too early.

[60] This explains why **I'm allowing the Claimant's appeal in part.**

Lilian Klein

Member, General Division – Employment Insurance Section

¹⁶ Undue hardship is listed as **possible** grounds for leniency (see section 56(1)(f) of the EI Regulations). Note: other parts of section 56(1) don't apply if the Commission has paid EI benefits without allocating earnings because of incorrect information on a claimant's biweekly claim reports.