

Federal Court of Appeal



Cour d'appel fédérale

Date: 20170322

Docket: A-130-16

Citation: 2017 FCA 56

**CORAM: NOËL C.J.
WEBB J.A.
WOODS J.A.**

BETWEEN:

LYNDA MOSLEY

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Vancouver, British Columbia, on March 21, 2017.
Judgment delivered at Vancouver, British Columbia, on March 22, 2017.

REASONS FOR JUDGMENT OF THE COURT BY:

NOËL C.J.

CONCURRED IN BY:

**WEBB J.A.
WOODS J.A.**

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REASONS FOR JUDGMENT

NOËL C.J.

[1] This is an application for judicial review by Linda Mosley (the applicant) of a decision of the Social Security Tribunal – Appeal Division – upholding an earlier decision issued by the General Division to the effect that a one sum payment of pension benefits received by the applicant is to be allocated over the 11 month period prior to its receipt thereby giving rise to an overpayment of employment insurance benefits paid to her pursuant to the *Employment Insurance Act*, S.C. 1996, c. 23.

[2] The legislative provisions which are relevant to the brief analysis which follows are set out in the appendix to these reasons.

[3] After being let go from her employment, the applicant applied for, and was granted by the Canada Employment Insurance Commission (Commission), employment insurance benefits (EI benefits) with an effective start date of June 2, 2013.

[4] After being unable to find further employment, the applicant submitted an application for benefits under the *Canada Pension Plan*, R.S.C., 1985, c. C-8 (CPP). Under this regime, a person between the ages of 65 and 69 who submits an application for a retirement pension can – within certain limits – choose the date of commencement of their retirement pension (subsection 67(3.1) of the CCP). The applicant, having reached the age of 67, elected to start receiving her monthly CPP retirement benefits in April of 2014, and to receive single payment for the monthly benefits to which she was entitled to for the period of May 1, 2013 to March 31, 2014.

[5] In August of 2014, the Commission informed the applicant that the CPP pension benefits which she received for that period created an overpayment of EI benefits because subsection 36(14) of the *Employment Insurance Regulations*, S.O.R./96-332 (EI Regulations) required that the amount representing her weekly CPP benefits be deducted from the EI benefits paid to her between June, 2013 and March, 2014 as provided by section 19 of the EI Act.

[6] The applicant petitioned the Commissioner to reconsider its decision to no avail. She then appealed the Commission's decision to the General Division, which ruled against her.

Ultimately, she appealed the General Division's decision to the Appeal Division again without success. The applicant now seeks to have this last decision judicially reviewed.

[7] The issue turns on whether the retroactive payment of CPP benefits was "paid or payable on a periodic basis" in which case it must be allocated pursuant to subsection 36(14) of the EI Regulations, or constitutes a "lump sum on account or in lieu of a pension" to be allocated prospectively pursuant to subsection 36(15), as the applicant contends. A related issue is whether, for the employment insurance purposes, the CPP benefits became payable when paid in April of 2014, or whether they were payable as of May 1, 2013.

[8] Decisions of the Appeal Division interpreting its own statute or statutes closely connected to its mandate are to be reviewed on a standard of reasonableness (*Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61 at para. 39).

[9] Both divisions of the Social Security Tribunal concluded that the CPP benefits received by the applicant in one sum constituted earnings under paragraph 35(2)(e) of the EI Regulations and that these benefits were payable on a periodic basis as of May 1, 2013. As a result, they had to be allocated for the period for which they were payable pursuant to subsection 36(14) of the EI Regulations.

[10] I can detect no error in this reasoning. For the purpose of allocating earnings under the EI Regulations, subsection 36(14) directs that "moneys [...] 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" under the

applicable pension plan. Under the CPP regime, a contributor is entitled to benefits periodically, *i.e.*: “monthly” (subsection 46(1)); payment of benefits for months preceding the approval of the retirement pension is made in one sum (subsection 62(1)); and the pension is payable from the date when it commences to be payable, being in this case the first day of the 11 month period chosen by the applicant *i.e.*, May 1, 2013 (paragraph 67(3.1)(c)).

[11] On this last point, the applicant insisted during the hearing that the time of commencement was April 2014 because that was the date which she chose in her application. Although she has not tendered her application in evidence, it can be seen from the record that the applicant chose to predate the time of commencement using the 11 month retroactive option provided for in paragraph 67(3.1)(c) with an effective date of May 1, 2013 (Respondent’s record, pp. 169 and 201). Indeed, if the applicant was correct in asserting that she chose April, 2014 as the commencement date under paragraph 67(3.1)(d), she would not be entitled to the retroactive payment that has given rise to this litigation.

[12] Because under the CPP, the benefits were payable commencing on May 1, 2013, they must be allocated accordingly, even if received in one payment in April of 2014.

[13] I would therefore dismiss the application for judicial review. As no costs were sought, none should be awarded.

"Marc Noël"
Chief Justice

"I agree
Wyman W. Webb J.A."

"I agree
Judith M. Woods J.A."

APPENDIX

Canada Pension Plan, R.S.C., 1985, c. C-8.

Amount of retirement pension

46 (1) Subject to this section, a retirement pension payable to a contributor is a basic monthly amount equal to twenty-five per cent of his average monthly pensionable earnings.

...

Application for benefit

60 (1) No benefit is payable to any person under this Act unless an application therefor has been made by him or on his behalf and payment of the benefit has been approved under this Act.

...

Where payment approved after month of commencement

62 (1) Payment of a benefit for each month shall be made at such time during the month as the Minister directs, except that, where payment of a benefit is approved after the end of the month for which the first payment of the benefit is payable under this Part, monthly payments of the benefit shall be made for months commencing with the month following the month in which payment of the benefit is approved and payments of the benefit for months preceding that month for which the benefit is payable under this Part shall be paid in one sum during that month.

Régime de pensions du Canada, L.R.C. 1985, ch. C-8.

Montant de la pension de retraite

46 (1) Sous réserve des autres dispositions du présent article, une pension de retraite payable à un cotisant est un montant mensuel de base égal à vingt-cinq pour cent de la moyenne mensuelle de ses gains ouvrant droit à pension.

[...]

Demande de prestation

60 (1) Aucune prestation n'est payable à une personne sous le régime de la présente loi, sauf si demande en a été faite par elle ou en son nom et que le paiement en ait été approuvé selon la présente loi.

[...]

Cas où le paiement est approuvé après le premier mois

62 (1) Le paiement d'une prestation pour chaque mois doit se faire au moment du mois en question que le ministre précise par directive sauf que, lorsque le paiement d'une prestation est approuvé après la fin du mois à l'égard duquel le premier paiement de la prestation est payable aux termes de la présente partie, des paiements mensuels de la prestation doivent être faits pour les mois commençant avec le mois qui suit celui au cours duquel le paiement de la prestation est approuvé et les paiements de la prestation pour les mois précédant le mois au cours duquel la prestation commence à être payée aux termes de la présente partie doivent être versés en une seule somme durant ce mois.

Commencement of retirement pension — on or after January 1, 2012

67 (3.1) For a retirement pension that commences to be payable on or after January 1, 2012 and if the applicant is not an estate, subject to section 62, if payment of the retirement pension is approved, the pension is payable for each month commencing with the latest of

- (a) the month in which the applicant reached sixty years of age,
- (b) the month following the month in which the application was received if they were under sixty-five years of age when they applied,
- (c) the eleventh month preceding the month in which the application was received if they have reached sixty-five years of age when they applied, but in no case earlier than the month in which they reached sixty-five years of age, and
- (d) the month chosen by the applicant in their application.

Employment Insurance Regulations, S.O.R./96-332

35(2) (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; ...

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.

Ouverture de la pension de retraite à compter du 1^{er} janvier 2012

67 (3.1) En ce qui concerne une pension de retraite qui devient payable à compter du 1^{er} janvier 2012, si les requérants ne sont pas des ayants droit et sous réserve de l'article 62, la pension dont le paiement est approuvé est payable mensuellement à compter du dernier en date des mois suivants :

- a) le mois au cours duquel le requérant atteint l'âge de soixante ans;
- b) le mois suivant celui au cours duquel la demande du requérant a été reçue, s'il n'avait pas atteint l'âge de soixante-cinq ans au moment de la réception;
- c) le onzième mois précédant celui au cours duquel la demande du requérant a été reçue, s'il a atteint l'âge de soixante-cinq ans avant la réception, ce onzième mois ne pouvant en aucun cas être antérieur à celui au cours duquel il a atteint l'âge de soixante-cinq ans;
- d) le mois que choisit le requérant dans sa demande.

Règlement sur l'assurance-emploi, D.O.R.S./96-332

35(2) e) les sommes payées ou payables au prestataire, par versements périodiques ou sous forme de montant forfaitaire, au titre ou au lieu d'une pension; [...]

36(14) Les sommes visées à l'alinéa 35(2)e) qui sont payées ou payables au prestataire par versements périodiques sont réparties sur la période pour laquelle elles sont payées ou payables.

36(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.

36(15) Les sommes visées à l'alinéa 35(2)e) qui sont payées ou payables au prestataire sous forme de montant forfaitaire sont réparties à compter de la première semaine où elles lui sont payées ou payables de façon qu'elles soient égales, dans chaque semaine, au montant hebdomadaire, calculé selon le paragraphe (17), auquel il aurait eu droit si le montant forfaitaire avait été payé sous forme de rente.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-130-16

(APPLICATION FOR JUDICIAL REVIEW OF A DECISION OF THE SOCIAL SECURITY TRIBUNAL OF CANADA, APPEAL DIVISION, DATED FEBRUARY 23, 2016, TRIBUNAL FILE NO. AD-15-326)

STYLE OF CAUSE: LYNDA MOSLEY v. ATTORNEY
GENERAL OF CANADA

PLACE OF HEARING: Vancouver, British Columbia

DATE OF HEARING: MARCH 21, 2017

REASONS FOR JUDGMENT BY: NOËL C.J.

CONCURRED IN BY: WEBB J.A.
WOODS J.A.

DATED: MARCH 22, 2017

APPEARANCES:

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