

Citation: 2025 TCC 30
Date: 20250226
Dockets: 2023-2169(EI)
2023-2170(CPP)

BETWEEN:

MELYNDA LAYTON

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

Post-Hearing submissions in writing on costs

Before: The Honourable Mr. Justice Randall S. Boccock

Appearances:

For the Appellant: The Appellant herself

Counsel for the Respondent: Devin Lundy

ORDER AND SUMMARY REASONS FOR COSTS

WHEREAS the Court issued its judgment in these appeals on January 15, 2025, both judgments being issued upon consent but for the issue of disputed costs;

AND WHEREAS the Court provided the parties with the opportunity to resolve the issue of costs during a Court directed recess;

AND WHEREAS after reconvening the Court, the parties advised no agreement on costs had been reached, whereupon the Court allowed the parties to make submissions orally with respect to costs;

AND WHEREAS the Court makes the following factual observations concerning the appeals and cost submissions:

- i) In respect of appeal: 2023-2169(EI) (the “EI Appeal”), the Respondent, through counsel, conceded that the EI Appeal of the Minister’s decision should be allowed on the basis that the subject worker, the Appellant’s daughter, was not 18 years or older;
- ii) In respect of appeal: 2023-2169(CPP) (the “CPP Appeal”), the Appellant withdrew the appeal concerning the subject worker, the Appellant’s son, because his earnings were subject to the Canada Pension Plan and all amounts owing had otherwise been remitted;
- iii) The parties strenuously disagree regarding why the appeals were called for hearing and not otherwise resolved before the trial date;
- iv) Specifically, the Appellant, who is a practising lawyer, contends that the Minister, her agents and/or counsel:
 - a) initially asserted the Appellant’s children were not her son and daughter;
 - b) asserted that the CPP findings of pensionable earnings applied to both her daughter and son;
 - c) was tardy in sending any offer to resolve the matter in December 2024 with unrealistic expectations over the holidays; and,
 - d) was late in filing reply pleadings necessitating a motion to late file a reply.
- v) Specifically, Respondent’s counsel contends the Appellant:
 - a) failed to comprehend that the notice of CPP confirmation did not include the Appellant’s daughter, but only her son which is the CPP Appeal now withdrawn by the Appellant;

- b) the Appellant chose to ignore the communicated offer to settle the EI Appeal sent December 16, 2024, likely owing to the Appellant's misunderstanding of the CPP Appeal;
- c) the Respondent could not consent to the CPP Appeal since the determination was correct, as witnessed by the Appellant's withdrawal of same on the day of hearing; and,
- d) the Appellant was not cooperative with the Minister's agent at the representation stage of either appeal which required the investigation to be abandoned and the original decision to govern the EI matter by reversion.

AND IN CONSIDERATION OF THE FOLLOWING CIRCUMSTANCES
AND ARGUMENTS RAISED IN ORAL SUBMISSIONS:

- a) The two appeals have split results: aside from the cost issue, the CPP Appeal is dismissed/withdrawn and the EI Appeal is allowed on consent;
- b) The Appellant, among other things, claims: i) aggregate legal fees in the amount of \$5,100 plus HST comprised of 10 hours of preparation, 5 hours to reply to the previous motion materials and her loss of opportunity to earn other income, and ii) \$250 for the filing fee in the EI Appeal;
- c) The Respondent submits that the Appellant is entitled to no costs because of the mixed results in both the CPP Appeal and the EI Appeal; and,
- d) Further, the Respondent submits that:
 - i) the EI Appeal concerning the Appellant's son was conceded on December 16, 2024;
 - ii) any EI amounts concerning the Appellant's daughter were abandoned and communicated to the Appellant on March 21, 2023; and,

- iii) by default, any appeal by the Appellant of CPP pensionable earnings deductively had to relate to the Appellant's son.

WHEREUPON the Court provides its written reasons for the costs as follows:

- a) The Court has full discretion to issue costs beyond the applicable Tariff if it chooses in any appeal;
- b) Consideration of the factors in subsection 147(3) of the *Rules* should be the sensible guide to follow in awarding costs in informal appeals: *Grant v. HMQ* [2001] CTC 2351 at paragraph 16;
- c) The Court, however, cannot simply ignore the *Informal Procedure* Tariff: *Callaghan v. HMQ* 2021 TCC 35 at paragraph 38; and,
- d) Where the Court departs from the *Informal Procedure* Tariff, there must be sufficient grounds to justify the increased costs; consideration should be made of the lower cost and simpler process in the *Informal Procedure*: *Callaghan, supra*, at paragraphs 64 – 65 and then the Court may award costs beyond the Tariff in *Informal Procedure* appeals provided:
 - (i) such costs should mostly adhere to the *Informal Procedure* Tariff;
 - (ii) any commensurate offers to settle should be considered;
 - (iii) generally, difficult and complex cases should draw costs;
 - (iv) complete success is not required;
 - (v) the factors in subsection 147(3) of the *General Procedure* may be considered; and,
 - (vi) good reasons for departing should be present.

NOW THEREFORE THE COURT makes the following conclusions:

a) with respect to the CPP Appeal withdrawn at the hearing by the Appellant:

- (i) the Pensionable and Insurable Earnings Review of April 1, 2022 (the “PIER Analysis”) from the materials filed and submissions made did identify the wages of both workers (the Appellants’ children) as both pensionable (CPP) and insurable (EI);
- (ii) after representations by the Appellant, the Minister’s notice of assessment dated March 21, 2023 (“NoA”) conceded that the daughter’s wages were not pensionable;
- (iii) the Appellant filed a single appeal on October 14, 2023 referencing both children and CPP amounts, all of which the Appellant contended were remitted for her over 18 year old son and were not owing for her under 18 year old daughter;
- (iv) deductively, the Respondent concluded, given the concession in (ii) above, the only CPP appeal possible to appeal to the Court concerned the son; and,
- (v) the parties never adequately discussed their divergent interpretations of the reassessment sequence.

b) With respect to the EI Appeal conceded by the Appellant:

- (i) the PIER Analysis initially concluded both workers had insurable earnings;
- (ii) the Appellant’s notice of appeal contended the workers (her children) were both non-arms length and therefore excluded employees under paragraph 5(1)(a) of the *Employment Insurance Act*; and,
- (iii) ultimately this was precisely the basis upon which the Respondent conceded the appeal by letter on December 16, 2024 and consented to judgment allowing it and filed at the hearing.

- c) Generally regarding the coincidence of the CPP Appeal and the EI Appeal:
- (i) The notice of appeal, when filed, was vague regarding for which worker and under which statute relief was sought because the sequence of the PIER Analysis and subsequent confirmation, coupled with abandonment was somewhat obscured;
 - (ii) The Court registry itself could not easily discern that no CPP dispute subsisted, and so, cautiously opened both the CPP Appeal and the EI Appeal;
 - (iii) Respondent counsel's letter of December 16, 2024 and subsequent emails continued to suggest that the son's CPP assessment was never appealed; and,
 - (iv) The parties never discussed this obvious divergence prior to hearing.

FINALLY THE COURT OBSERVES specifically concerning the costs sought by the Appellant in these *Informal Procedure* appeals:

- (i) No bill of costs was submitted evidencing counsel costs;
- (ii) Possibly no bill was submitted because of the solidarity of person existing with counsel and the Appellant, who are the same person;
- (iii) Courts have been very hesitant to impute costs to a lawyer on her own account as if she charged professional services to a client: *Sherman v. Canada* 2003 FCA 202 at paragraph 13 citing *Clark v. Taylor* [2003] NWTSC 50 at paragraph 12;
- (iv) Even where a lawyer on her own account receives a moderate allowance for time expended, it must be evidenced by a bill of costs: *Sherman, supra*, at paragraph 52;

- (v) The “tit for tat”, vague and uncollaborative communication on both sides, the likely impact of the Canada-wide postal strike in December 2024 and only cursory review of communications received by all concerned contributed greatly to the clunkiness of the twinned CPP and EI Appeals;
- (vi) The relevant *Informal Procedure* Tariff permits the following fees for counsel in section 11:
 - (a) Preparation of a notice of appeal: \$185;
 - (b) Preparation for hearing: \$250;
 - (c) Conduct of hearing: \$375 for each half day; and,
 - (d) Taxation of costs: \$60.
- (vii) The Supreme Court of Canada itself identified that costs are quintessentially discretionary in the hands of the trial judge: *Nolan v. Kerry (Canada)* 2009 SCC 39 at paragraph 126 itself referred to in *Sunlife Assurance v. HMQ* 2015 TCC 171 at paragraph 9.

NOW THEREFORE THIS COURT ORDERS THAT:

1. The Appellant shall be awarded one set of costs as follows:
 - a) Costs reflecting the *Informal Procedure* Tariff as below:
 - (i) preparation of the notice of appeal in the EI Appeal: \$185;
 - (ii) preparation of hearing for both Appeals: \$250
 - (iii) conduct for one half day of the hearing: \$375 less \$175 reflecting the unnecessary nature of the CPP Appeal, for a net total of \$200;
 - (iv) no distinct amount for costs beyond (iii) above since, by admission at the hearing, the EI Appeal remained the only issue in dispute;

- (v) the filing costs in the EI Appeal.
 - b) in the absence of any evidence such as a bill of costs regarding counsel fees, costs beyond the Tariff of \$200 as fees provided at the hearing concerning the EI Appeal.
2. There are no costs awarded in the CPP Appeal.
 3. For all of these reasons, increased costs in these *Informal Procedure* matters are granted in the amounts stated above.

Signed at Ottawa, Ontario this 26th day of February, 2025.

“R.S. Bocock”

Bocock J.