

[TRANSLATION]

Citation: *A. O. v. Canada Employment Insurance Commission*, 2014 SSTGDEI 12

Appeal No: GE-13-1356

BETWEEN:

A. O.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance

SOCIAL SECURITY TRIBUNAL MEMBER: Normand Morin

HEARING DATE: March 10, 2014

TYPE OF HEARING: Teleconference

DECISION: Appeal dismissed

PERSONS IN ATTENDANCE

[1] The Appellant, A. O., participated in the telephone hearing held on March 10, 2014.

DECISION

[2] The Social Security Tribunal, hereinafter referred to as the Tribunal, determines that the appeal from the decision of the Canada Employment Insurance Commission, hereinafter referred to as the Commission, related to the calculation of the Appellant's weekly Employment Insurance benefit rate, is without merit under section 14 of the *Employment Insurance Act* (the Act).

INTRODUCTION

[3] On August 23, 2013, the Appellant appealed to the Employment Insurance Section of the Tribunal's General Division from the reconsideration decision rendered by the Commission on July 22, 2013, concerning the calculation of his weekly benefit rate (Exhibits GD3-41, and GD2-1 to GD2-11).

TYPE OF HEARING

[4] The hearing was held by teleconference for the reasons given in the notice of hearing dated February 24, 2014 (Exhibits GD1-1 and GD1-2).

ISSUE

[5] The Tribunal must decide whether the appeal from the Commission's decision regarding the calculation of the Appellant's weekly Employment Insurance benefit rate has merit under section 14 of the Act.

APPLICABLE LAW

[6] The Act contains a number of provisions related to the issues in this case.

[7] The provisions regarding the calculation of the Appellant's weekly Employment Insurance benefit rate are set out in section 14 of the Act.

[8] The provisions concerning the liability to repay Employment Insurance benefit overpayments are set out in section 43 of the Act.

[9] The provisions related to the conditions under which amounts owing can be written off by the Commission are set out in section 56 of the *Employment Insurance Regulations* (the Regulations).

[10] The Federal Court of Appeal (the Court) reaffirmed the principle whereby a claimant's benefit rate is based on the weekly insurable earnings and whereby the method used to calculate the rate of these weekly benefits is the same for all claimants, that is, 55% of the weekly insurable earnings, pursuant to subsection 14(1) of the Act (*Manoli v. Canada (AG)*, 2005 FCA 178).

[11] The Court confirmed the principle whereby insurable earnings received outside the rate calculation period cannot be included in the calculation of the weekly benefit rate (*Canada (AG) v. Bégin*, 2007 FCA 354; *Canada (AG) v. Dupere*, 2001 FCA 83).

[12] The Court reaffirmed the principle whereby adjudicators are permitted neither to re-write legislation nor to interpret it in a manner that is contrary to its plain meaning (*Canada (AG) v. Knee*, 2011 FCA 301).

[13] In **Michel Villeneuve (2005 FCA 440 – A-191-05)**, Justice Gilles Létourneau of the Court stated as follows: “*Finally, it is not necessary to elaborate on the issue at length, but forgiving, writing off or extinguishing a debt are not powers within the jurisdiction of an umpire sitting on a claimant's appeal against a decision by a board of referees upholding the Commission's allocation of the earnings: see Attorney General of Canada v. Filiatrault, A-874-97, September 18, 1998 (F.C.A.); Buffone v. Minister of Human Resources Development (Canada), A-666-99, 12 January 2001; Attorney General of Canada v. Mosher, 2002 FCA 355; Attorney General of Canada v. Idemudia, A-9-98, 11 February 1999. (...) Hopefully the respondent, who represented himself, who invested considerable time and effort into resolving this matter and who felt short-changed by the system, will finally be able to find the serenity that he has not had for a long time. It goes without saying*

that the Commission's write-off of the minimal amount owing would greatly assist in restoring that serenity.”

[14] Other decisions were rendered by the Court to the effect that the Tribunal is not able to rule on the matter of writing off an overpayment (**Muguette Filiatrault, A-874-97; Gladis H. Romero, A-815-96; and Jean-Roch Gagnon, A-676-96**).

EVIDENCE

[15] The evidence in the docket is as follows:

- (a) On January 17, 2013, the Appellant filed an initial claim for benefits, which took effect on January 13, 2013. The Appellant stated that he had worked for employer Gym de L'Extrême Boucherville from October 31, 2011, to December 3, 2012, inclusive. The Appellant also stated that he had worked for employer Avant-Garde Sécurité until October 29, 2011, inclusive (Exhibits GD3-2 to GD3-11).
- (b) On January 17, 2013, the Appellant stated that he had worked as a custodian for employer Gym de L'Extrême Boucherville from October 31, 2011, to December 3, 2012, inclusive, and that he had requested a Record of Employment to this effect (Exhibits GD3-12 and GD3-13).
- (c) On March 4, 2013, the Appellant sent documents to the Commission so that it could proceed [translation] “with the temporary Record of Employment.” He was informed that a formal request for a Record of Employment would be sent (Exhibits GD3-14 and GD3-15).
- (d) On March 1, 2013, the Appellant stated that he was unable to obtain his Record of Employment. On March 6, 2013, the Appellant requested that his file be processed, stating that he was in a difficult financial situation. On March 8, 2013, the Appellant was informed of the decision rendered in his case (Exhibit GD3-16).
- (e) On March 4, 2013, the Appellant sent to the Commission a letter from the employer, Centre de conditionnement L'Extrême, dated August 30, 2012, indicating that he had worked there for one year, for 40 hours a week, at an hourly rate of \$17.00. The Appellant also attached a pay stub for the period from June 18, 2012, to

July 1, 2012, indicating that he had worked 87 hours, at \$17.00 an hour, and that he had received cumulative earnings of \$11,822.00. The Appellant indicated that he had lodged a complaint with the Commission des normes du travail du Québec (CNT) [Quebec labour standards board] because his employer did not want to issue his Record of Employment. He stated that his employment had ended on December 3, 2012 (Exhibits GD3-17 to GD3-19).

- (f) Copies of a security guard card pursuant to the *Private Security Act*, a social insurance card, a health card and an identity card, all in the Appellant's name, as well as copies of the cheques issued by employer 9203-0048 Québec Inc. – Centre Extrême, dated July 19, 2013, August 16, 2012, and September 13, 2012, were added to the docket (Exhibits GD3-20 to GD3-23).
- (g) On March 5, 2013, the Commission asked employer 9203-0048 Québec Inc. – Gym L'Extrême (employer 9203-0048 Québec Inc. – Centre Extrême) to provide it with a Record of Employment for the Appellant's period of employment from October 31, 2011, to December 3, 2012, and to complete the questionnaire sent to it (Exhibits GD3-24 to GD3-26).
- (h) On March 7, 2013, employer 9203-0048 Québec Inc. – Gym L'Extrême (employer 9203-0048 Québec Inc. – Centre Extrême) informed the Commission that it had issued a Record of Employment to the Appellant on December 20, 2012 (Record of Employment no. **K00326523**, Exhibits GD3-27 to GD3-29).
- (i) A Record of Employment (Record of Employment no. **X00204547**), not dated, indicates that the Appellant worked as a custodian for employer Gym L'Extrême from November 3, 2011, to December 3, 2012, and that he stopped working for this employer because of a dismissal (code M - Dismissal). The total amount of the insurable earnings established on the basis of this Record of Employment is \$18,000.00, and the total number of insurable hours was established at 1,460 (Exhibit GD3-30).
- (j) A Record of Employment (Record of Employment no. **K00326523**), dated December 20, 2012, indicates that the Appellant worked as a custodian for employer Gym L'Extrême from November 3, 2011, to December 3, 2012, and that he stopped working for this employer because of a dismissal (code M - Dismissal).

The total amount of the insurable earnings established on the basis of this Record of Employment is \$23,417.65, and the total number of insurable hours was established at 1,387 (Exhibit GD3-31).

- (k) On May 21, 2013, the Commission informed the Appellant that, after reviewing the new Record of Employment received from employer 9203-0048 Québec Inc. – Gym L'Extrême, his weekly benefit rate was established at \$315.00 rather than \$379.00 and the maximum number of weeks established for his claim was 27 weeks instead of 26 weeks (Exhibit GD3-32).
- (l) In a document containing details of the notice of debt (DH009), dated May 25, 2013, the total amount of the Appellant's debt was established at \$742.00 (Exhibit GD3-33).
- (m) On June 12, 2013, the Appellant asked the Commission for a copy of the Record of Employment issued by his employer, as well as a list of the corrections made in his case, so he could understand how the overpayment of \$742.00 was established (Exhibit GD3-34).
- (n) In a letter sent to the Commission, which it received on July 8, 2012, the Appellant explained that he was refusing to repay the overpayment of \$742.00. The Appellant also attached a copy of a document titled *Statement of Accounts / Relevé de compte(s)*, dated June 15, 2013, indicating a balance of \$742.00, in addition to a copy of a *Relevé 1 – Employment Income and Miscellaneous Income* indicating that he had received \$23,417.65 in employment income from employer 9203-0048 for the year 2012 (Exhibits GD3-35 to GD3-40).
- (o) On July 22, 2013, the Commission informed the Appellant that it was upholding the decision rendered on May 21, 2013, regarding the calculation of his benefit rate (Exhibit GD3-41).
- (p) On July 22, 2013, the Commission informed the Appellant that his weekly benefit rate had changed from \$379.00 to \$315.00 and that this situation resulted in an overpayment for each of the weeks from February 17, 2013, to May 5, 2013. The Commission informed the Appellant that he would receive a copy of his Record of Employment in the mail (Exhibits GD3-42 and GD3-43).

- (q) On August 16, 2013, the Appellant was informed by Service Canada that if he wanted to appeal from a decision rendered by the Commission, he had to appeal to the Social Security Tribunal (Exhibit GD2-1).
- (r) The Appellant filed a notice of appeal to the Employment Insurance Section of the Tribunal's General Division. This appeal was received on August 15, 2013, by Service Canada, and on August 23, 2013, by the Tribunal. In an explanatory letter, the Appellant gave the reasons for his appeal and attached a copy of the following documents:
 - o Letter from the Commission dated July 22 concerning his application for reconsideration (Exhibits GD2-3 and GD2-4);
 - o Letter from the Commission dated July 22, 2013, explaining the overpayment amount (Exhibit GD2-5);
 - o Record of Employment no. **K00326523** (Exhibit GD2-6);
 - o Notice of assessment from the Canada Revenue Agency to the Appellant for the 2012 taxation year (Exhibits GD2-7 and GD2-8);
 - o Notice of assessment from Revenu Québec to the Appellant for the 2012 taxation year (Exhibits GD2-9 to GD2-11, Exhibits GD2-1 to GD2-11).
- (s) On December 11, 2013, the Commission presented its arguments (Exhibits GD4-1 to GD4-10).
- (t) In a notice of hearing dated February 24, 2014, the Tribunal informed the parties that the hearing date was set for March 10, 2014 (Exhibits GD1-1 and GD1-2).

[16] The evidence presented at the hearing is as follows:

- (a) The Appellant reiterated the main elements in the docket and the reasons for his appeal.
- (b) He repeated the circumstances that resulted in the end of his employment for employer 9203-0048 Québec Inc. – Gym L'Extrême in December 2012 and the recourse to the CNT on this matter, considering that he had been the subject of [translation] “an arbitrary and discriminatory termination.”

- (c) He pointed out that his employer had dismissed him [translation] “suddenly” and refused to issue his termination of employment. He indicated that the Commission also encountered problems in trying to obtain the Record of Employment from this employer.
- (d) He related the content of a letter from the Commission indicating that his benefit claim had been approved.
- (e) He said he recognized that the Commission had made an effort to enable him to receive benefits, even relying on approximate data.
- (f) He indicated that he had started to repay part of the amount he owed.
- (g) He also mentioned that his benefit period had started but that he could not receive benefits because he was currently working approximately 40 hours a week.

SUBMISSIONS OF THE PARTIES

[17] The Appellant presented the following submissions and arguments:

- (a) He argued at the hearing that he was contesting the liability to repay the overpayment because this situation was [translation] “not his fault.” He said he had complied with the Act and Regulations in effect concerning his benefit claim. He also requested that measures be taken to [translation] “bring [his employer] back to order.” He explained that he was refusing to pay the \$742.00 overpayment and that his employer should pay this amount (Exhibits GD3-37 and GD3-38).
- (b) He submitted that the notice of termination of employment should have been provided by his employer no later than December 20, 2012, and that it was sent in May 2013. He declared that he stopped working for employer 9203-0048 Québec Inc. – Gym L’Extrême on December 3, 2012, and that this employer refused to issue a notice of termination of employment to him, did not pay his two weeks’ vacation, and did not give him 15 days’ notice. He indicated that he had submitted his case to the CNT (Exhibit GD3-36).

[18] The Commission presented the following submissions and arguments:

- (a) It explained that subsection 14(1) of the Act stipulates that the rate of weekly benefits payable to a claimant is 55% of their weekly insurable earnings (Exhibit GD4-3).
- (b) It made the following clarifications regarding the Appellant's rate calculation period: [translation] *"The rate calculation period is the period of not more than 26 consecutive weeks in the claimant's qualifying period ending with the week before the claimant's benefit period begins, pursuant to subsection 14(4) of the Act. This amount is divided by a divisor as specified in subsection 14(2) of the Act. This divisor is the larger of the following: 1. the number of weeks during the rate calculation period in which the claimant had insurable employment; or 2. a number equivalent to the variable entrance requirement plus two, up to a maximum of 22."* (Exhibit GD4-3).
- (c) It indicated that it had determined that the Appellant's rate calculation period was from June 16, 2012, to December 8, 2012, during which time there were 25 weeks in which he received insurable earnings (Exhibit GD4-3).
- (d) With regard to the Appellant's statements that his employer should repay the overpayment, given that it was the employer which delayed in submitting the Record of Employment, the Commission explained that [translation] *"the benefit claims processing system is a complex system that automatically manages certain data, and a number of human interventions are sometimes required to correct errors made by the claimants themselves, by the employers or by Commission employees"* (Exhibits GD4-4 and GD4-5). It added that, despite this situation, the Commission does not pay benefits based on an erroneous rate calculation or during weeks in which a claimant is not entitled to receive them (Exhibit GD4-5).
- (e) It submitted that, under the provisions of section 56 of the Regulations, it cannot write off the overpayment. It also submitted that the Tribunal is not able to rule on the matter of writing off an overpayment (**Muguette Filiatrault, A-874-97; Gladis H. Romero, A-815-96; and Jean-Roch Gagnon, A-676-96**) (Exhibit GD4-5).
- (f) It also submitted that, under section 43 of the Act, the Appellant is liable to repay any overpayment amounts received (Exhibit GD4-5).

- (g) It explained that it had made a tentative calculation based on the data provided by the Appellant (Exhibits GD3-18 to GD3-23). It stated that the Appellant had been notified of the tentative calculation, which had been used to establish his claim and prevent further delays (Exhibits GD3-14 and GD3-15, Exhibit GD4-5).
- (h) It explained that, although the Appellant received an overpayment of benefits because the employer delayed in providing the Record of Employment, the Appellant cannot receive benefits which he is not entitled to receive. It added that, as a result, despite all the sympathy it has in this case, it has no choice but to recover the overpayment of benefits received by the Appellant (Exhibit GD4-5).

ANALYSIS

[19] Subsection 14(1) of the Act stipulates that “*the rate of weekly benefits payable to a claimant is 55% of their weekly insurable earnings.*”

[20] Section 43 of the Act stipulates that “*a claimant is liable to repay an amount paid by the Commission to the claimant as benefits for any period for which the claimant is disqualified; or to which the claimant is not entitled.*”

[21] Subsection 56(1) of the Regulations also states, under certain conditions, that “. . . an amount payable under section 43, 45, 46, 46.1 or 65 of the Act, or the interest accrued on the penalty or amount, may be written off by the Commission . . .”

[22] The Act defines a claimant’s weekly insurable earnings as their insurable earnings in the rate calculation period divided by a number.

[23] Subsection 14(2) of the Act thus defines the **weekly insurable earnings** as follows: “*a claimant’s weekly insurable earnings are their insurable earnings in the calculation period divided by the larger of the following divisors: (a) the divisor that equals the number of weeks during the rate calculation period in which the claimant had insurable earnings; and (b) the divisor determined in accordance with the following table by reference to the applicable regional rate of unemployment.*”

TABLE

Regional Rate of Unemployment	Divisor
not more than 6%	22
more than 6% but not more than 7%	21
more than 7% but not more than 8%	20
more than 8% but not more than 9%	19
more than 9% but not more than 10%	18
more than 10% but not more than 11%	17
more than 11% but not more than 12%	16
more than 12% but not more than 13%	15
more than 13%	14

[24] The **rate calculation period** that was applied in this case (Tribunal’s note: the “rate calculation period” is now referred to as the “calculation period” following amendments to the Act in February 2014) is defined as follows in paragraph 14(4) of the Act: *“The rate calculation period is the period of not more than 26 consecutive weeks in the claimant’s qualifying period ending with the later of (a) the week : (i) before the claimant’s benefit period begins, if it begins on the Sunday of the week in which the claimant’s last interruption of earnings occurs, or (ii) in which the claimant’s last interruption of earnings occurs, if their benefit period begins on the Sunday of a week that is after the week in which the claimant’s last interruption of earnings occurs, and (b) the week before the claimant’s benefit period begins, if the claimant has an insurable employment at the beginning of that period.”*

[25] In this case, the Commission determined that the **rate calculation period** was from June 16, 2012, to December 8, 2012 (Exhibit GD4-3).

[26] During this period, the Commission explained that there were 25 weeks in which the Appellant received insurable earnings (Exhibit GD4-3).

[27] The Commission therefore determined that the **divisor** used would be 25, since this was the greater of the number of weeks during the **rate calculation period** in which the

Appellant received insurable earnings (25 weeks) and the number provided in the table in subsection 14(2) of the Act (between 14 and 22 weeks) (Exhibit GD4-3).

[28] The Commission then explained that it established the Appellant's weekly Employment Insurance benefit rate at \$379.00, based on the temporary Record of Employment from employer 9203-0048 Québec Inc. – Gym L'Extrême (Record of Employment no. **X00204547** – Exhibit GD3-30), using the following calculations:

- $\$17,213.00$ (insurable earnings during the rate calculation period) \div 25 (divisor) = $\$689.00$ (average weekly insurable earnings) \times 55% = $\$379.00$ (benefit rate) (Exhibit GD4-4).

[29] Then, after obtaining the actual data from a new Record of Employment from this employer (Record of Employment no. **K00326523** – Exhibits GD3-31 and GD2-6), the Commission established the new benefit rate at \$315.00, using the following calculations:

- $\$14,340.00$ (insurable earnings during the rate calculation period) \div 25 (divisor) = $\$574.00$ (average weekly insurable earnings) \times 55 % = $\$315.00$ (benefit rate) (Exhibit GD4-4).

[30] In its arguments, the Commission explained that the Appellant received benefits for 15 weeks, at a weekly rate of \$379.00, before the corrections were made to this benefit rate (Exhibit GD4-4). This situation caused the Appellant to receive an overpayment of \$742.00 (Exhibits GD2-5, GD3-42 and GD4-4).

[31] At the hearing, the Appellant did not present reasons or new facts that could lead the Tribunal to conclude that the calculation of the Appellant's benefit rate was erroneous or incorrect following the corrections made to it by the Commission based on the new information given to it.

[32] Although the Appellant argued that it was not his fault if the employer did not submit, within the prescribed time, the Record of Employment containing the real data on his earnings, the fact remains that an overpayment of benefits was made to this Appellant. The

Tribunal cannot accept his argument that he should not have to repay the amounts in question and that his employer should repay them.

[33] The Tribunal finds that it is not the employer who benefitted from the overpayment of Employment Insurance benefits but, rather, the Appellant, and section 43 of the Act stipulates that an overpayment of Employment Insurance benefits must be repaid.

[34] Although it is entirely sympathetic to the Appellant's situation, the Tribunal is bound by the very clear legislative provisions concerning the Appellant's liability to repay the overpayment amounts that he received. The Appellant cannot be exempt from the requirements of the Act on this matter (**Knee, 2011 FCA 301**).

[35] In addition, the Tribunal notes that only the Commission has the authority to write off an amount owed under section 56 of the Act and that it is not able to rule on this matter (**Muguette Filiatrault, A-874-97; Gladis H. Romero, A-815-96; Jean-Roch Gagnon, A-676-96**).

[36] Based on the explanations provided by the Commission and the calculations it made, the Tribunal finds that it correctly established the Appellant's weekly benefit rate and complied with the requirements of the Act on this matter (**Manoli, 2005 FCA 178**).

[37] Based on the case law mentioned above, the Tribunal finds that the Appellant's weekly benefit rate was calculated in compliance with the provisions set out in section 14 of the Act.

[38] The appeal on this issue has no merit.

CONCLUSION

[39] The appeal is dismissed

Normand Morin
Member, General Division

DATE OF REASONS: March 12, 2014