[TRANSLATION]

Citation: *M. S. M. v. Canada Employment Insurance Commission*, 2014 SSTGDEI 6

Appeal No.: GE-13-1616

BETWEEN:

M. S. M.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance

SOCIAL SECURITY TRIBUNAL MEMBER:	Aline Rouleau
HEARING DATE:	December 16, 2013
TYPE OF HEARING:	Teleconference
DECISION:	Appeal dismissed

PERSONS IN ATTENDANCE

Appellant M. S.-M. did not participate in the hearing held on December 16, 2013, but was represented by Gaétan Guérard, Syndicat de l'enseignement des Deux Rives, 8381 Sous-le-vent Avenue, Charny, Quebec.

DECISION

[1] The Tribunal finds that the allocation made by the Commission was in accordance with section 35 and subsection 36(5) of the *Employment Insurance Regulations* (the Regulations).

INTRODUCTION

[2] Ms. S.-M., who is a part-time teacher bound by a contract of employment, applied for benefits effective July 3, 2011 (GD3-3 to GD3-12).

[3] The Appellant subsequently, in accordance with section 91 of the *Employment Insurance Regulations* (the Regulations), filed her reports over the Internet from August 14, 2011, to June 30, 2012, (GD3-17 to GD3-20, GD3-22 to GD3-153) to report her earnings for each of the relevant weeks between August 21, 2011, and June 30, 2012. Table 1 presented by the Commission summarizes the reports made by the Appellant (GD4-2).

[4] On July 12, 2012, the Commission scolaire des Découvreurs issued a Record of Employment (GD3-154) covering the period from August 25, 2011, to June 29, 2012, indicating the Appellant's weekly earnings.

[5] On December 11, 2012, the employer was asked for information about the payroll for the period from August 21, 2011, to June 30, 2012, (GD3-155 to GD3-158). In addition to answering this, the employer indicated that the Appellant had a contract for a 40% casual supply teaching position from August 25, 2011, to June 29, 2012, at an annual salary of $41,841, amended to $42,259 on April 3, 2012.

[6] A request for information was also made to the Appellant (GD3-162 to GD3-165) on March 7, 2013, asking her to explain the discrepancies between her reports and the information obtained from the employer.

[7] The Commission notified the Appellant (GD3-166 and GD3-167) that the earnings received from her employer had to be allocated to the period from August 21, 2011, to June 30, 2102, in accordance with sections 35 and 36 of the Regulations. The allocation resulted in an overpayment and an underpayment for a net amount of $963.

[8] The Appellant requested a reconsideration of the Commission's decision to allocate the earnings (GD3-169 to GD3-171). This decision was upheld by the Commission (GD3-179 and GD3-180), hence the present appeal before the Tribunal.

TYPE OF HEARING

[9] The hearing was held by teleconference for the reasons set out in the notice of hearing dated November 30, 2013.

ISSUE

[10] Were the earnings allocated in accordance with sections 35 and 36 of the *Employment Insurance Regulations* (the Regulations)?

APPLICABLE LAW

[11] Section 35 of the Regulations defines income, and section 36 describes the manner in which income must be allocated, that is, in which week these earnings are considered to have been earned by the claimant. Money received from an employer as salary is considered to be earnings and must be allocated unless it falls under one of the exceptions provided.

[12] Subsection 36(4) of the Regulations provides as follows: "Earnings that are payable to a claimant under a contract of employment for the performance of services shall be allocated to the period in which the services were performed."

[13] Subsection 36(5) of the Regulations provides as follows: "Earnings that are payable to a claimant under a contract of employment without the performance of services or payable by an employer to a claimant in consideration of the claimant returning to or beginning work shall be allocated to the period for which they are payable."

EVIDENCE

[14] The evidence in the docket indicates the following:

(a) The Appellant reported different earnings from those reported by the employer. In its submissions, the Commission summarized the discrepancies and explained the over- and underpayments thus created by means of tables (GD4-2, GD4-3 and GD4-6).

(b) The earnings represent the salary paid under the Appellant's teaching contract and for performing substitute teaching and providing homework assistance.

(c) The Appellant provided a table (GD2-10) showing her earnings based on pay slips for each of the weeks in question (GD2-11 to GD2-32).

[15] The evidence submitted at the hearing revealed the following:

(a) It was acknowledged that the earnings must be allocated over 222 days, that is, the number of days set out in the school calendar.

(b) Explanations were given of the methods used to calculate the payment of payable and paid earnings and of the result of the calculations performed by the Appellant and her representative.

(c) The Appellant acknowledged that she made errors in her reports.

SUBMISSIONS OF THE PARTIES

[16] The Appellant made the following submissions:

(a) When she filed her appeal, that the decision of the Commission was unfounded in fact and in law.

(b) The document entitled [translation] "Allocation of earnings under the part-time contract" (GD2-9) comes from a file programmed according to the instructions of the Federal Court of Appeal in *Bruneau* (A-113-98) on the allocation of teachers' earnings.

(c) The Appellant was convinced that the earnings appearing in the table she provided (GD2-10) were actual earnings that had to be considered for the allocation and that, according to this table, the overpayment amounted to $705 rather than the $963 established by the Commission.

(d) Despite the mistakes in her reports, the Appellant submits that the Commission also erred in its method of calculating her weekly salary (GD4-5). In fact, she submitted that the earnings of $16,736.40 for the period from August 25, 2011, to April 2, 2012, were divided by 222 days even though the Appellant received these earnings for only part of the year and the Commission should have divided it by 158 days. She also submitted that, according to the Commission's calculations, the increase in her weekly salary effective April 3, 2012, was only $3.80 a week, but that the actual increase was much greater, as reflected in Exhibit GD2-9.

(e) The calculations performed by the Appellant and her representative were more accurate and a better reflection of reality.

(f) The Appellant asked the Tribunal to rule that her actual earnings were those indicated for each of the weeks in question in Exhibit GD2-10 and not those provided by the Commission in Exhibit GD3-166.

(g) The Appellant acknowledged the applicable allocation principles, but submitted that there was a problem in the calculation method.

[17] The Commission, the Respondent, made the following submissions:

(a) The money paid to the Appellant by the employer constituted earnings under subsection 35(2) of the Regulations, and, in accordance with subsections 36(4) and (5), these earnings were correctly allocated to the weeks of the contract, regardless of whether or not services were performed.

(b) According to the case law, it is up to the Appellant to show that the amounts provided by the employer are incorrect and she failed to provide any evidence to this effect.

(c) The Commission could not use the pay slips to determine earnings because the only exact amounts indicated there are those for the days of substitute teaching for which dates are provided.

(d) The Commission cannot consider the table of actual earnings provided by the Appellant (GD2-10) to be valid evidence as the employer did not confirm these earnings.

(e) The earnings received by the Appellant must be applied over the entire duration of the contract, that is, from August 25, 2011, to June 29, 2012, because contract teachers are paid for working days, professional development days and statutory holidays. For the 2011–2012 school year, the annual earnings were allocated over 222 days, the number of days in the school calendar.

(f) The Commission correctly allocated the earnings received by the Appellant to the weeks during which she was bound by the contract, as required by subsections 35(2), 36(4) and 36(5) of the Regulations.

(g) In *Bruneau* (A-113-98), when dealing with the issue of allocating the earnings of a part-time teacher bound by a contract of employment, the Federal Court of Appeal held that the salary received by a part-time teacher should be allocated to each of the weeks of the employment period, regardless of whether or not the teacher provided services in each of those weeks.

ANALYSIS

[18] The parties agree on the number of days in the 2011–2012 school calendar, namely, 222. The parties also agree that the principles set out in the Federal Court of Appeal's decision in *Bruneau* (A-113-98) apply.

[19] The Appellant is not challenging the earnings she received in addition to her basic salary for the substitute teaching she did and homework assistance services she provided, as indicated by the employer in Exhibit GD3-159. Her only challenge relates to how the weekly salary payable to her under her contract of employment and considered in the allocation was calculated.

[20] To determine the Appellant's weekly salary, the Commission considered her teaching contracts. Her annual salary was amended during the year, and the Appellant had a 40% position. The Commission first determined her daily rate by taking 40% of the annual salary and dividing it by the number of days in the school calendar (222), and then multiplying the result by five days a week. This came to a weekly salary of $376.90 for the period from August 25, 2011, to April 2, 2012, and $380.70 for the period from April 3 to June 29, 2012. These figures match what the employer provided in Exhibit GD3-159.

[21] The Appellant used a different method to calculate her weekly salary. She acknowledged that 40% annual salary represented $16,736.40 for the period from August 25, 2011, to April 2, 2012, and $16,903.60 for the period from April 3 to June 29, 2012. After this, things get tricky. It seems that the method used by the Appellant is based on 200 days of work, as the only way in which the Tribunal was able to arrive at an alleged weekly salary of $370.75 for the period from August 25, 2011, to April 2, 2012, and of $396.20 for the period from April 3 to June 29, 2012, is as follows:

(a) For the period from August 25, 2011, to April 2, 2012, the annual salary ($16,736.80) is divided by 200 (days of work), giving a daily salary of $83.68; this multiplied by 140 days of work over this period gives a result of $11,715.76, divided by 158 days, the number of calendar days over which the earnings are spread for this period. The final

result is $74.15 in daily earnings, multiplied by five days to give weekly earnings of $370.75.

(b) For the period from April 3 to June 29, 2012, $16,903.60 divided by 200 equals $84.51 a day. This, multiplied by 60 days for this period equals $5,071.08 which, divided by 64 school calendar days amounts to $79.24. This amount multiplied by five days gives weekly earnings of $396.19.

[22] The Tribunal cannot accept the Appellant's argument that the Commission's calculations are incorrect because the increase in weekly salary effective April 3, 2012, was higher than $3.80 a week. According to the Appellant, the increase was $25.45 (GD2-9) a week. Given the amount of the annual salary increase of $418 and the 40% position, the Tribunal declined attempting to find the method used to arrive at this result, apart from subtracting the former weekly earnings from the new ones, and is not satisfied that this exercise which, overall, is fairly simple, reflects the much more complicated method described above, and which does not give the same result for the number of days remaining on the calendar.

[23] This is what the Federal Court of Appeal held in *Bruneau* (A-113-98):

(a) The case was chosen by the Employment Insurance Commission and the Centrale de l'enseignement du Québec as a test case for the Court to specify how to allocate the earnings of a teacher who has signed a contract under the agreement between the Catholic school boards management bargaining committee and the teachers' union represented by the Centrale de l'enseignement du Québec.

(b) Under this agreement, teachers are hired under an annual contract and receive an annual salary that includes working days, statutory holidays, non-working days and vacation days.

(c) The issue was whether the salary received had to be allocated to each of the weeks of the teacher's employment period, under subsection 36(5) of the Regulations, OR whether

the salary had to be allocated only to those weeks in which services were performed, under subsection 36(4) of the Regulations.

(d) Vacations and statutory holidays are weeks for which earnings are payable under a contract of employment without the performance of services.

(e) Consequently, the provisions of subsection 36(5) of the Regulations apply, and these provisions seem clear.

[24] The conclusions in *Bruneau* did not rely on the clever mathematical gymnastics performed by the parties.

[25] In the Tribunal's opinion, *Bruneau* simply teaches the following:

(a) The Appellant's annual salary applies to the entire school year, which has 222 calendar days, even if there are only 200 working days. In fact, under the agreement between the union and the school boards' management bargaining committee, the annual salary includes working days, statutory holidays, non-working days and vacation days.

(b) Since Employment Insurance is based on weekly benefits but annual salary is established for a certain number of days, namely, the 222 days of the school calendar, when earnings must be allocated for Employment Insurance purposes, the Commission must first determine the daily earnings and then calculate the weekly earnings required to calculate the allocation. That is what the Employment Insurance Commission did in the present case.

[26] The Appellant did not establish that the amounts provided by the employer were incorrect.

[27] To arrive at her figures, the Appellant seems to have considered 200 days of work but paid over 222 days, which is contrary to the principles recognized in the case law and subsection 36(5) of the Regulations. The Appellant did not satisfy the Tribunal of the validity of her calculation.

[28] For this reason, the Tribunal finds that the allocation calculated by the Commission was done in accordance with section 35 and subsection 36(5) of the *Employment Insurance Regulations*.

CONCLUSION

[29] The appeal is dismissed.

Member, General Division

DATE OF REASONS: January 16, 2014