[TRANSLATION]

Citation: *M. A. v. Canada Employment Insurance Commission*, 2014 SSTGDEI 132

Appeal No.: GE-14-1052

BETWEEN:

M. A.

Appellant
Claimant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance

SOCIAL SECURITY TRIBUNAL MEMBER:	Charline Bourque
HEARING DATE:	September 23, 2014
TYPE OF HEARING:	Teleconference
DECISION:	Appeal dismissed

PERSONS IN ATTENDANCE

[1] M. A., the Claimant, participated in the teleconference hearing.

DECISION

[2] The Tribunal concludes that the money received by the Claimant constitutes earnings under section 35 of the *Employment Insurance Regulations* (the Regulations) and should be allocated pursuant to section 36 of the Regulations.

INTRODUCTION

[3] The Claimant filed an Employment Insurance claim effective April 1, 2012. On November 28, 2013, the Canada Employment Insurance Commission (the Commission) informed the Claimant that it had readjusted the total income from Union des Consommateurs that she had received as wages for the weeks from May 20, 2012, to September 2, 2012, and from January 13, 2013, to March 24, 2013. This created a $7,130 overpayment. On February 20, 2014, the Commission reconsidered its decision and informed the Claimant that the decision rendered November 28, 2013, was being upheld and that an overpayment of $6,971 had been established. The claimant appealed this decision to the Social Security Tribunal (the Tribunal) on March 7, 2014. On May 2, 2014, the Tribunal considered summarily dismissing the appeal but, after receiving the Claimant's response on May 14, 2014, the Tribunal decided to hear the appeal by teleconference.

TYPE OF HEARING

[4] The hearing for this appeal was held by teleconference on September 23, 2014, for the reasons given in the notice of hearing dated August 25, 2014.

ISSUES

[5] The issues are as follows:

(a) Does the money received constitute earnings within the meaning of section 35 of the Regulations?

(b) If the answer to (a) is yes, the question then is: Were these earnings allocated in accordance with section 36 of the Regulations?

APPLICABLE LAW

[6] Subsection 35(1) of the Regulations states the following:

> The definitions in this subsection apply in this section.
> "employment"
> "employment" means
> (*a*) any employment, whether insurable, not insurable or excluded employment, under any express or implied contract of service or other contract of employment,
> (i) whether or not services are or will be provided by a claimant to any other person, and
> (ii) whether or not income received by the claimant is from a person other than the person to whom services are or will be provided;
> (*b*) any self-employment, whether on the claimant's own account or in partnership or co-adventure; and
> (*c*) the tenure of an office as defined in subsection 2(1) of the *Canada Pension Plan*. (*emploi*)
> "income"
> "income" means any pecuniary or non-pecuniary income that is or will be received by a claimant from an employer or any other person, including a trustee in bankruptcy. (*revenu*)

[7] Section 35(2) of the Regulations reads as follows:

> Subject to the other provisions of this section, the earnings to be taken into account for the purpose of determining whether an interruption of earnings under section 14 has occurred and the amount to be deducted from benefits payable under section 19 or subsection 21(3), 22(5), or 23(3) of the Act, and to be taken into account for the purposes of sections 45 and 46 of the Act, are the entire income of a claimant arising out of any employment...

[8] Subsection 36(4) of the Regulations reads 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.

EVIDENCE

[9] The electronic reports filed by the Claimant for the weeks in question, except for reports filed by telephone with an officer.

[10] On June 4, 2012, the Claimant contacted the Commission to amend her original reports for the period from May 20, 2012, to June 2, 2012.

[11] On January 16, 2013, the Claimant contacted the Commission to file her original reports for the period from December 16, 2012, to December 22, 2012.

[12] On January 22, 2013, the Claimant contacted the Commission to file her original reports for the period from December 23, 2012, to January 19, 2013.

[13] On August 1, 2013, Service Canada sent a Request for Payroll Information to the Union des Consommateurs (the employer), which returned the completed document and indicated the gross earnings that the claimant had received when she worked for the weeks from May 20, 2012, to September 2, 2012, and from January 13, 2013, to March 24, 2013.

[14] On August 9, 2013, Service Canada sent a Request for Employment Information to the Claimant to obtain her explanation of the information provided by the employer. She confirmed the information sent by the employer. The Claimant indicated that she had reported her hourly wage, thinking that this rate would be multiplied by the number of hours worked. She indicated that the Commission did not come across these mistakes by chance. She pointed out that she could not reasonably report earning $24 a week for her work because this is not legal and she believed that her hourly rate would be multiplied by 21 hours a week.

[15] In response to a request by the Tribunal, the Commission sent a detailed calculation of the overpayment on September 24, 2014.

[16] On October 6, 2014, the Claimant sent additional information after her hearing. She submitted a list of telephone calls that she had made to Employment Insurance officers and some notes regarding these discussions. She also sent a copy of an invoice for dental care. She

indicated that these costs are connected to the stress she was under because of the Employment Insurance situation.

SUBMISSIONS OF THE PARTIES

[17] The claimant pointed out the following:

a) The Claimant indicated that she was appealing the decision because there had been negligence on the part of Employment Insurance services. She indicated that she contacted Commission officers several times during the period in which the overpayments were made. These include contacting the Commission to ensure that her hours were reported correctly, to determine the terms and conditions regarding her lecturer position in the fall of 2012, to determine the terms and conditions for reporting that she was leaving the country for three weeks in December 2012 and January 2013, and, at the request of Employment Insurance, to verify technical details.

b) She indicated that during each call, the officers who checked her file never saw anything unusual and she continued to file her reports by following the recommendations that she was given. The Claimant argued that there was [translation] "complacency in the system that monitored the amounts paid by Employment Insurance, and a lack of clarity in the forms provided for making claimant's reports" (GD2-8).

c) She maintained that the astronomical amount that she was being asked to repay was the result of negligence on the part of Employment Insurance officers in terms of monitoring, and a result of incorrect advice that she was given regarding her reports. It was obvious that the officers did not manage her file in a reasonable manner by misleading her on several occasions. Consequently, the Claimant asked that her debt be reduced to a fair and reasonable amount, given all the communications that took place to ensure her reports were correct.

d) The Claimant maintained that the Commission always had all the information needed to correctly calculate the amount of benefits to which she was entitled. In fact, a weekly wage of $24 for 21 hours of work implies a rate of scarcely more than a dollar an hour.

The Claimant stated that she believed, in good faith, that the Employment Insurance services would calculate her weekly wages rather than concluding that the hourly rate was 10 times less than the minimum wage in effect in the Canadian provinces. She maintained that the electronic reporting system should not allow a claimant to report an hourly wage that is 10 times less than the minimum wage and that Employment Insurance should impose a minimum of control of the amounts paid and check with claimants if such a report has been filed to determine whether the amounts to report are sufficiently clearly indicated.

[18] The Respondent argued as follows:

a) The Claimant received money from the Union des Consommateurs and she received this money in the form of wages. The Commission maintained that this money constituted earnings according to subsection 35(2) of the Regulations since it was given to the Claimant as payment for wages. Consequently, pursuant to subsection 36(4), the Commission correctly allocated these earnings to the period during which the services were provided.

b) The Commission wanted to point out that, when filing her claim for benefits, the Claimant was informed by the section on rights and responsibilities that she had to accurately report her earnings.

c) The Commission also maintained that it is clearly indicated that the total amount of earnings before deductions must be entered on the reports completed by a claimant. There is no indication or specification on the report that she should indicate her hourly rate.

d) In this case, the Claimant reported her hourly rate instead of her gross earnings. As mentioned in CUB 78807, the questions asked of the Claimant are very clear. The Claimant was asked to report her gross earnings and not her hourly rate.

ANALYSIS

[19] Subsection 35(2) of the Regulations indicates that the entire income of a claimant arising from any employment, whether wages, benefits or other remuneration, must be taken into account unless it comes under one of the exceptions set out in subsection 35(7) of the Regulations.

[20] The Claimant confirmed that she had reported her hourly rate instead of her gross earnings when filing her reports. She indicated that because she is European, she did not understand that she was being asked for her total earnings since the terms net and gross do not appear in the question. She thought that she had to enter her hourly rate. She indicated that she was in contact with the Commission more than seven times before an officer spotted the error and she questioned why the system did not block her reports when she made such an error since the calculation would indicate that she was earning scarcely more than $1 an hour.

[21] The Commission maintains that the questions are clear and that there is no indication that the hourly rate should be reported.

[22] In *McLaughlin*, the Federal Court of Appeal stated the principle that "the entire income of a claimant arising out of any employment" is to be taken into account in calculating the amount to be deducted from benefits (*McLaughlin v. Canada (Attorney General)*, 2009 FCA 365).

[23] The Federal Court of Appeal also confirmed the principle that any sums that constitute earnings pursuant to section 35 of the Regulations must be allocated according to section 36 of the Regulations (*Boone et al v. Canada (Attorney General)*, 2002 FCA 257).

[24] The Claimant is not disputing that she received earnings as wages from her employer. The employer confirmed the Claimant's gross earnings (GD3-19). The earnings were paid to the claimant as wages. The error is in the reports filed by the Claimant and in the fact that the Commission did not spot these errors despite the Claimant's multiple calls. Therefore, the nature of the earnings is not at issue in this appeal.

[25] Consequently, since the nature of the sums is not at issue, the Tribunal is satisfied that these sums indeed constitute earnings within the meaning of section 35 of the Regulations and that these earnings must be allocated pursuant to subsection 36(4) of the Regulations.

[26] The last paragraph indicates that the earnings payable to the Claimant under a contract of employment in exchange for services rendered are allocated to the period during which the services were performed. Therefore, the Tribunal is satisfied that the earnings must be allocated to the weeks during which they were received.

[27] The Commission allocated the earnings on the basis of the amounts reported by the claimant. The table on pages GD10-1 and GD10-2 properly shows the allocation of the earnings as well as the connected overpayment. Consequently, the Tribunal is satisfied that the earnings were allocated in accordance with subsection 36(4) of the Regulations.

[28] The Claimant also asked the Tribunal to write off her overpayment given the harm that she has suffered. In fact, she contacted the Commission on several occasions to ensure that she was following the Employment Insurance rules. Although these calls did not always have anything to do with her reports, it seems surprising that the Commission did not notice the error before April 2013. The Claimant showed that she had had numerous contacts with the Commission to ensure that everything was correct, but no officer who had access to her file realized the error. Moreover, the error seems obvious since the hourly rate is unlikely. She indicated that she suffered harm and a great deal of stress that led to bruxism. She submitted her dentals costs connected with this situation. She argued that, because she is European, the question asked on her reports did not seem clear, especially since she had asked earlier how to proceed. She believed, in good faith, that the number of hours would be multiplied by the hourly rate.

[29] The Claimant indicated that she wanted part of the overpayment to be cancelled. This request was made to the Commission on December 31, 2013, since the Claimant indicated [translation] “This is why I am asking that the Commission acknowledge that the current situation is not my fault nor caused by an error on my part, and I am asking that the Commission exonerate me from the debt I allegedly owe” (GD3-215).

[30] The Commission has not rendered a decision on this subject.

[31] The Tribunal is not authorized to rule on a decision that is not the subject of a review. The Tribunal also does not have the authority to decide on write-offs. The Claimant must make a specific request in this regard in order to have the Commission consider the issue and render a decision.

CONCLUSION

[32] The appeal is dismissed.

Charline Bourque
Member, General Division

DATE OF RESONS: November 27, 2014