[TRANSLATION]

Citation: ***M. B. v. Canada Employment Insurance Commission*****, 2015 SSTGDEI 190**

Date: November 9, 2015

File number: GE-15-1200

GENERAL DIVISION – Employment Insurance Section

Between:

M. B.

Appellant

and

Canada Employment Insurance Commission

Respondent

Decision by: Joanne Blanchard, Member, General Division - Employment Insurance Section

In-person hearing on August 24, 2015, Gatineau, Quebec

REASONS AND DECISION

PERSONS IN ATTENDANCE

The Appellant, M. B., attended the hearing.

INTRODUCTION

[1] The Appellant made an initial claim for employment insurance benefits effective January 13, 2008.

[2] The Employment Insurance Commission of Canada (the Commission) determined that the amounts paid to the Appellant as wages and vacation pay by the Centre de Santé et de Services Sociaux de X during the weeks starting on February 3, 10, 17 and 24, 2008, March 9 and 23, 2008, April 6 and 20, 2008, May 4 and 18, 2008, June 1 and 15, 2008, and August 17, 24 and 31, 2008, constituted earnings that had to be allocated under sections 35 and 36 of the *Employment Insurance Regulations* (the Regulations) (GD2-136 to GD2-138).

[3] The decision to allocate the earnings created an overpayment of $2418.00.
The Commission also found that the claimant made representations that she knew were false or misleading when she stated that she had not worked or received earnings for those weeks.
The Commission therefore imposed a non-monetary penalty, i.e. a warning letter (GD2-135).

[4] This appeal was heard in person for the following reasons:

a) The complexity of the issues.

b) The information in the file, including the need for additional information;

ISSUES

[5] The Appellant has appealed two issues:

1. Allocation of her earnings on the basis of sections 35 and 36 of the Regulations.

2. Imposition of a penalty under section 38 of the *Employment Insurance Act* (EIA) for committing an error or omission by making representations about her earnings that she knew to be false or misleading.

THE LAW

Issue No. 1: Allocation of earnings

[6] Section 35 of the Regulations provides the following definitions:

[7] "employment"

(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,

(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*.

[8] "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.

[9] Subsection 35(2) of the Regulations provides 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, subsection 21(3), 22(5), 152.03(3) or 152.04(4) or section 152.18 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, including

(a) amounts payable to a claimant in respect of wages, benefits or other remuneration from the proceeds realized from the property of a bankrupt employer;

(b) workers' compensation payments received or to be received by a claimant, other than a lump sum or pension paid in full and final settlement of a claim made for workers' compensation payments;

(c) payments a claimant has received or, on application, is entitled to receive under

(i) a group wage-loss indemnity plan,

(ii) a paid sick, maternity or adoption leave plan,

(iii) a leave plan providing payment in respect of the care of a child or children referred to in subsection 23(1) or 152.05(1) of the Act,

(iv) a leave plan providing payment in respect of the care or support of a family member referred to in subsection 23.1(2) or 152.06(1) of the Act, or

(v) a leave plan providing payment in respect of the care or support of a critically ill child;

(d) notwithstanding paragraph (7)(b) but subject to subsections (3) and (3.1), the payments a claimant has received or, on application, is entitled to receive from a motor vehicle accident insurance plan provided under a provincial law in respect of the actual or presumed loss of income from employment due to injury, if the benefits paid or payable under the Act are not taken into account in determining the amount that the claimant receives or is entitled to receive from the plan;

(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; and

(f) where the benefits paid or payable under the Act are not taken into account in determining the amount that a claimant receives or is entitled to receive pursuant to a provincial law in respect of an actual or presumed loss of income from employment, the indemnity payments the claimant has received or, on application, is entitled to receive pursuant to that provincial law by reason of the fact that the claimant has ceased to work for the reason that continuation of work entailed physical dangers for

(i) the claimant,

(ii) the claimant's unborn child,

(iii) the child the claimant is breast-feeding.

[10] Subsection 35(7) of the Regulations provides that the portion of the income of a claimant that is derived from any of the following sources does not constitute earnings for the purposes referred to in subsection 35(2):

(a) disability pension or a lump sum or pension paid in full and final settlement of a claim made for workers' compensation payments;

(b) payments under a sickness or disability wage-loss indemnity plan that is not a group plan;

(c) relief grants in cash or in kind;

(d) retroactive increases in wages or salary;

(e) the moneys referred to in paragraph (2)(e) if

(i) in the case of a self-employed person, the moneys became payable before the beginning of the period referred to in section 152.08 of the Act, and

(ii) in the case of other claimants, the number of hours of insurable employment required by section 7 or 7.1 of the Act for the establishment of their benefit period was accumulated after the date on which those moneys became payable and during the period in respect of which they received those moneys; and

(f) employment income excluded as income pursuant to subsection 6(16) of the Income Tax Act.

[11] Subsection 36(1) 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.”

Issue No. 2: Penalty

[12] Under section 38 of the EIA, “The Commission may impose on a claimant, or any other person acting for a claimant, a penalty for each of the following acts or omissions …” Section 38 specifies that the claimant must have known the statement to be false.

EVIDENCE

[13] The Appellant made an initial claim for employment insurance benefits effective January 13, 2008 (GD2-21 to GD2-29). The Appellant filed her online reports from February 3, 2008, to September 20, 2008. The Appellant stated that she did not work or receive a training allowance during that period (GD2-46 to GD2-134).

[14] The Commission requested additional information from the employer and determined that the Appellant did not report her earnings correctly (GD2- 30 to GD2-40).

[15] On December 10, 2012, the Commission informed the Appellant that she had incorrectly reported the earnings she had received in wages and vacation pay from the employer CSSS X and Bruyère Continuing Care Inc. (GD2-136 to GD2-138). That decision gave rise to an overpayment of $2140.00 (GD2-139). The Commission did not identify any attenuating circumstances in the calculation of the non-monetary penalty that was issued (GD2-135).

[16] On December 31, 2012, the Appellant contested the Commission’s decision with the board of referees (GD2-140 to GD2-141). She stated that employment insurance had agreed to pay for a course for her in Montreal from January 2008 to June 2008. There were some delays in receiving her benefits. She therefore found a job on the weekend to make up the financial shortfall. She subsequently received benefits and repaid the resulting overpayment (GD2-4 to GD2-5).

[17] On February 20, 2013, the board of referees dismissed the issues (GD2-6 to GD2-10).

[18] On April 9, 2015, the Tribunal's Appeal Division granted an appeal and referred the matter to the Tribunal's General Division for reconsideration (GD2-180 to GD2-184).

[19] At the hearing the Appellant filed additional documents, including a Notice of Debt and some pay stubs (GD4-1 to GD4-9).

[20] When asked to comment on the documents filed at the hearing, the Commission informed the Tribunal that this additional information did not change its position regarding this issue in any way (GD6-1 to GD6-5).

PARTIES' ARGUMENTS

Appellant's Arguments

[21] The Appellant argued that she had come to Canada as a skilled professional, i.e. a nurse. She worked as an orderly for approximately two years. The Ordre des infirmières asked her to take a six-month course to become a member of the nursing profession. Emploi Québec had approved this equivalency course. She was therefore eligible for benefits since she had accumulated a sufficient number of hours.

[22] She started her course in January 2008 and received earnings as well. She was living in X but had to go to Montreal to take the course. Because she did not receive her benefits on time, she had to work on Saturdays from morning until midnight and then take the bus very early on Monday morning to take her training. She did this for two months, but she was becoming burnt out. After she raised this with the director of Emploi Québec, she was paid her benefits retroactively.

[23] There are two contentious issues with employment insurance. First, after her training, she was hired on August 22, 2008, but she was dismissed two weeks later.

[24] She maintains that she was misled by an Emploi Québec officer who told her not to report the amounts because she was entitled to earn approximately $200 without reporting it. She denies having worked. The $600 amount was received following negotiations with the

union to provide compensation for a salary increase. She has already repaid $680 for overpayments that she received.

Respondent's arguments

[25] The Respondent submitted as follows:

> [Translation]
> "Subsection 35(1) of the Regulations defines "income" as "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." The Regulations also specify what types of income constitute earnings. Section 36 of the Regulations explains how earnings are to be allocated once they have been established; in other words, during which week they constitute earnings for the claimant.
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> Monies received from an employer can be considered earnings. Such amounts must be allocated unless they are covered by the exceptions set out in subsection 35(7) of the Regulations or are not from employment. In this case, the claimant received money from CSSS X and Bruyère Continuing Care. This money was paid to the claimant as wages and vacation pay. The Commission maintains that this money constitutes earnings within the meaning of subsection 35(2) of the Regulations. Therefore, in accordance with subsections 36(4) and 36(8) of the Regulations, vacation pay was not paid to the claimant for a specific vacation period or for a termination of employment; she was paid at a fixed date payable to employees once per year. In such cases, it is paragraph 36(8)(b) that applies, and vacation pay must therefore be allocated on the basis of the week in which it is payable. The claimant received her vacation pay during the week of July 6, 2008, in the amount of $857.20, in addition to four hours of work in the amount of $79.84, for a total of $937.04. The vacation pay was allocated as of that week at a rate of $238.00 per week, with a balance of $222.00 during the week of July 27, 2008.
>
> The claimant also indicates that she has just finished repaying an overpayment and now she is being asked for another $2140.00. The Commission checked in its systems, and the overpayment the claimant has just finished was an overpayment of $682.00 for

weeks of work in January 2008 that were not reported. This decision is not part of this appeal.

Lastly, the claimant alleges that her payments were late and that she had to work on weekends to support herself. She was nonetheless obliged to report any work during the time when she was claiming benefits. The Commission maintains that this money constitutes earnings under subsection 35(2) of the Regulations. Accordingly, under paragraph 36(8)(b) she correctly allocated these earnings to the week during which she was needed and was paid."

ANALYSIS

Allocation of earnings

[26] Under subsection 35(2) of the Regulations, the Appellant's entire income "arising out of any employment" is to be taken into account as earnings. Moreover, monies received from an employer are considered to be earnings and must therefore be allocated, unless they are covered by the exceptions set out in subsection 35(7) of the Regulations or are not from employment.

[27] For the period from February 3, 2008, to September 20, 2008, the Appellant filed electronic reports stating that she had not worked or received a training allowance. At the hearing the Appellant asserted that she had relied on an Emploi Québec officer who had misled her. She said that she had been informed that she could earn approximately $200 without having to report it. In light of the specific circumstances of her case and the delay in receiving her allowance, she felt that the information she had presented was truthful.

[28] The Appellant's testimony corroborates the information presented by the employer to the effect that she had worked periodically for CSSS X and Bruyère Continuing Care from February 3, 2008, to August 31, 2008. She also received $857.20 in vacation pay on July 12, 2015. In this case, the evidence clearly indicates that the Appellant received money from CSSS X and Bruyère Continuing Care from February 3, 2008, to August 31, 2008. This money constitutes earnings within the meaning of subsection 35(2) of the Regulations because it was remitted to the Appellant for hours worked. The Tribunal finds that these earnings were

properly allocated over the period in which the services were rendered, in accordance with subsection 36(4) of the Regulations.

[29] Regarding the overpayment that has already been repaid, the Tribunal has verified the evidence presented. In fact, the $682.00 amount repaid by the Appellant pertains to weeks of work not reported in January 2008. That period is not represented in this case.

Penalty

[30] To determine whether the penalty should be imposed, the Tribunal must establish whether a false or misleading representation was made, whether this was done knowingly and, if applicable, whether the Commission properly exercised its discretion in calculating the amount of the penalty.

[31] The burden of proof that rests on the Commission entails establishing whether the claimant knowingly made a false or misleading representation, and the required standard of proof is a balance of probabilities.

[32] In *Canada (Attorney General) v. Mootoo,* 2003 FCA 206, the Federal Court of Appeal affirmed the principle that a false or misleading representation is made only when the claimants subjectively know that the information they have given or the representations they have made are false. Given that mere scepticism about a representation does not necessarily mean having to bear the burden of proof, it seems appropriate to consider the Appellant's intention at the time the representations were made. To find that a penalty is justified, the Commission must prove that the Appellant knew subjectively that her information was incorrect.

[33] During her testimony at the hearing the Appellant stressed the fact that she had been misled by an Emploi Québec program officer. It would in fact appear that the Appellant completed her declarations with the officer. Because of her training program, she was informed that she did not have to report the monies received. Furthermore, because there was a delay in the reimbursement of her training costs, it would appear the Appellant received benefits retroactively. Therefore, the Appellant's reliance on the Emploi Québec officer made the situation especially confusing for her.

[34] Having regard to the specific circumstances in this case, the Tribunal cannot find on a balance of probabilities that the Appellant subjectively knew that she was making a false representation or neglecting to present accurate information regarding her earnings (*Canada (Attorney General) v. Mootoo,* 2003 FCA 206). Given that she completed her returns in the presence of an Emploi Québec officer, and given that her benefits were paid retroactively after she started her training, the Tribunal cannot find that the representations were made knowingly. Therefore, the Tribunal finds that the Commission failed to discharge its burden in respect of the issuing of the non-monetary penalty.

CONCLUSION

[35] The appeal in respect of the earnings is dismissed.

The appeal in respect of the penalty is allowed.

Joanne Blanchard
Member, General Division — Employment Insurance Section