



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

[TRANSLATION]

Citation: *N. C. v. Canada Employment Insurance Commission*, 2016 SSTGDEI 103

Tribunal File Number: GE-15-4212

BETWEEN:

N. C.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Normand Morin

HEARD ON: July 26, 2016

DATE OF DECISION: July 29, 2016

REASONS AND DECISION

PERSONS IN ATTENDANCE

[1] The appellant, Nickson Cleophat, did not participate in the telephone hearing (teleconference) held on July 26, 2016. A notice of hearing dated May 11, 2016 was sent to the Appellant to inform him that the hearing would be held on July 26, 2016 (Exhibits GD1-1 to GD1-4). Proof of delivery of the Notice of Hearing sent to the Appellant dated May 13, 2016 was sent to the Canada Social Security Tribunal (“the Tribunal”) on May 19, 2016.

[2] Satisfied that the Appellant had been notified of the hearing on July 26, 2016, the Tribunal proceeded in his absence, as permitted in such situations under section 12 of the *Social Security Tribunal Regulations*.

[3] It should be noted that the Tribunal waited more than 30 minutes after the start of the hearing on July 26, 2016 to allow for the Appellant to be present. The Appellant did not participate despite that waiting period.

[4] The Tribunal did not receive notice from the Appellant before the hearing that he would be unable to be present.

INTRODUCTION

[5] On January 24, 2012, the Appellant filed a claim for regular benefits effective January 15, 2012. The Appellant reported that he had worked for the employer, Sears Canada Inc., from January 17 to 23, 2012 inclusive and stopped working for that employer due to a shortage of work (Exhibits GD3-3 to GD3-12).

[6] On September 14, 2015, the Respondent, the Canada Employment Insurance Commission (“the Commission”), notified the Appellant that he had failed to inform it of all the income he had received as salary from the employer, Sears Canada Inc. The Commission indicated to the Appellant that it had adjusted his total income based on new information provided by his employer (Exhibits GD3-82 and GD3-83).

[7] On October 19, 2015, the Appellant filed an Employment Insurance Reconsideration request (Exhibits GD3-85 to GD3-95).

[8] On November 16, 2015, the Commission notified the Appellant that it was upholding the decision rendered in his case on September 14, 2015 concerning the allocation of his earnings (Exhibits GD3-97 and GD3-98).

[9] On December 17, 2015, the Appellant filed a Notice of Appeal with the Employment Insurance Section of the Tribunal's General Division (Exhibits GD2-1 to GD2-24).

[10] This appeal was heard by teleconference for the following reasons:

- a) the fact that the Appellant was to be the only party attending the hearing;
- b) the information in the file, including the need for additional information;
- c) this method of proceeding respects the requirement under the *Social Security Tribunal Regulations* to proceed as informally and quickly as circumstances, fairness and natural justice permit (Exhibits GD1-1 to GD1-4).

ISSUE

[11] The Tribunal must determine whether the amount received by the Appellant constitutes earnings under section 35 of the *Employment Insurance Regulations* ("the Regulations") and, if so, whether those earnings were allocated in accordance with section 36 of the Regulations.

THE LAW

[12] The provisions on "determination of earnings for benefit purposes" and "allocation of earnings for benefit purposes" are set out in sections 35 and 36 of the Regulations respectively.

[13] For the "determination of earnings for benefit purposes," section 35 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." Section 35 also specifies which income is considered earnings.

[14] Subsection 35(2) of the Regulations states the following:

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...

[15] Amounts received from an employer are therefore considered earnings and must be allocated unless they fall under the exceptions set forth in subsection 35(7) of the Regulations or are not from employment.

[16] Once this point is established, section 36 of the Regulations specifies the weeks to which the earnings must be allocated.

[17] Concerning the “allocation of earnings for benefit purposes,” subsection 36(4) of the Regulations states: “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

[18] The evidence in the file is as follows:

- a) A Record of Employment (ROE) dated February 7, 2013 indicates that the Appellant worked for the employer, Sears Canada Inc., from January 22, 2012 to January 18, 2013 inclusive and that he stopped working for that employer for another reason (Code K – Other) (Exhibit GD3-13).
- b) In a document entitled, "Full text screen – Telephone reporting service – Electronic reporting certificate," the Commission stated that claimants who use the telephone reporting service to make their reports receive verbal instructions on how to access the system, complete the electronic reports and make corrections as needed (Exhibits GD3-11 to GD3-13).

- c) On December 30, 2015, the Commission stated that, for the periods of January 15 to 28, 2012, February 26 to March 10, 2012, March 25 to May 5, 2012, June 3 to 16, 2012 and July 29 to August 11, 2012, the Appellant's automated telephone reports and the certification provided by an officer of the Commission (the copies of the questions and answers provided by the Appellant were reproduced on December 30, 2015) show that the Appellant did not report all earnings received or did not report them correctly during the periods in question (Exhibits GD3-17 to GD3-67).
- d) In a document entitled, "Request for Payroll Information—Demande de renseignements – Registres de paie," completed on April 26, 2013, the employer, Sears Canada Inc., reported making payments to the Appellant as salary for the weeks starting January 22, 2012 (\$59.80), February 26, 2012 (\$89.70), March 25, 2012 (\$89.70), April 1, 2012 (\$188.00), April 8, 2012 (\$275.04), April 15, 2012 (\$179.40), April 22, 2012 (\$358.80), April 29, 2012 (\$448.50), June 10, 2012 (\$448.50) and April 5, 2012 (\$380.10) (Exhibits GD3-68 and GD3-69).
- e) In a document entitled "Request for Clarification of Employment Information – Demande de renseignements sur l'emploi – Registres de paie," sent to the Commission on May 25, 2013, the Appellant indicated that he did not agree with the information the Commission had obtained from the employer, Sears Canada Inc. (Exhibits GD3-70 to GD3-81).
- f) On May 25, 2013, the Appellant sent the Commission a copy of a bank statement that he had (Account Activity – Historical Details), indicating the history of transactions made during the period from January 3 to August 31, 2012. That document indicates that deposits from the salary received from the employer ("SCI pay") were made on the following dates: January 13, 2012 (\$638.70), January 27, 2012 (\$339.26), February 10, 2012 (\$57.59), March 9, 2012 (\$85.47), April 5, 2012 (\$85.48), April 20, 2012 (\$426.13), June 1, 2012 (\$187.29), June 15, 2012 (\$10.73), June 29, 2012 (\$823.78), August 10, 2012 (\$663.03) and August 24, 2012 (\$709.42) (Exhibits GD3-72 to GD3-77).

- g) In a document entitled, “Request for Payroll Information – Demande de renseignements – Registres de paie,” completed by the employer, Sears Canada Inc., on June 4, 2013, the employer reported paying the Appellant earnings for the weeks starting January 22, 2012 (\$59.80), February 26, 2012 (\$89.70), March 25, 2012 (\$89.70), April 1, 2012 (\$188.00), April 8, 2012 (\$275.04), April 22, 2012 (\$358.80), April 29, 2012 (\$448.50), June 10, 2012 (\$448.50) and August 5, 2012 (\$380.10). In that document, the employer indicated that it had not paid the Appellant for the week starting April 15, 2012. The employer also noted that it had paid the Appellant a cash allowance of \$10.00 for the pay period of April 1 to 14, 2012 (Exhibits GD3-78 to GD3-81).
- h) In a document entitled, “Details on the Notice of Debt (DH009),” dated September 19, 2015 and reproduced on December 22, 2015, the total amount of the Appellant’s debt was established at \$933.00 (Exhibit GD3-84).
- i) In his Request for Reconsideration of an Employment Insurance decision, filed on October 19, 2015, the Appellant sent the Commission copies of his pay stubs from the employer, Sears Canada Inc., for the periods of January 22 to February 4, 2012 (\$59.80), February 19 to March 3, 2012 (\$89.70), March 18 to 31, 2012 (\$89.70) and May 13 to 26, 2012 (\$199.25) (Exhibits GD3-87 to GD3-94).
- j) In his Notice of Appeal filed on December 17, 2015, the Appellant sent copies of his pay stubs from the employer, Sears Canada Inc., for the periods of December 25, 2011 to January 7, 2012 (\$767.36), January 22 to February 4, 2012 (\$59.80), February 19 to March 3, 2012 (\$89.70), March 18 to 31, 2012 (\$89.70), April 1 to 14, 2012 (\$453.04), April 29 to May 12, 2012 (\$807.30), May 13 to 26, 2012 (\$199.25) and July 22 to August 4, 2012 (\$807.30) (Exhibits GD2-8 to GD2-24).

[19] The evidence adduced at the hearing is as follows:

- a) Neither of the two parties in this case participated in the hearing and no evidence was therefore presented at that time.

SUBMISSIONS OF THE PARTIES

[20] The Appellant presented the following observations and submissions:

- a) The Appellant said he disagreed with the earnings amounts reported by his employer. He asked the Commission to examine the documents that he had sent it (e.g. history of transactions made from a bank account held by the Appellant, copies of pay stubs from the employer, Sears Canada Inc.) (Exhibits GD3-22 GD3-81).
- b) The Appellant explained that he did not have any other evidence apart from the copies of the pay stubs he had sent to the Commission. He indicated that he did not know why the employer had supplied the information it had and that the Commission should check with the employer. The Appellant stated that the employer had given different answers every time it was questioned and that he felt it “wasn’t right” that the answers it provided were inconsistent with the pay stubs. He submitted that the documents he had provided and those submitted by the employer (originals) should be compared. He indicated that he did not want to pay the amount that was claimed from him and that he was unable to do so. The Appellant said he thought it was malicious to ask him to pay the amount that was claimed from him (Exhibits GD3-70 to GD3-81 and GD3-96).
- c) The Appellant asked that his pay stubs be checked for every week or every two-week pay period (Exhibits GD2-1 to GD2-24).

[21] The Commission presented the following observations and submissions:

- a) The Commission explained that amounts received from an employer are considered earnings and must therefore be allocated unless they fall within the exceptions set forth in subsection 35(7) of the Regulations or do not arise out of employment (Exhibit GD4-3).
- b) The Commission stated that the Appellant had received money from the employer, Sears Canada Inc., and that that money had been paid to him as salary. It contended that that money constituted earnings under subsection 35(2) of the Regulations since it was remitted to the Appellant in payment for hours worked. It explained that it had correctly

allocated those earnings over the period during which the services had been performed in accordance with subsection 36(4) of the Regulations. The Commission explained that it had considered the copies of the bank transactions and pay stubs submitted by the Appellant and the information provided on two occasions by the employer concerning the earnings paid in the specific weeks of those two-week pay periods. The Commission indicated it had noted that the amounts were consistent with the pay stubs and the net amounts deposited to the Appellant's bank account on the dates indicated. It explained that the earnings allocation had therefore not been changed and had been maintained as follows.

Week starting	Reported earnings	Actual earnings
January 22, 2012	\$0.00	\$59.80
February 26, 2012	\$84.00	\$89.70
March 25, 2012	\$89.00	\$89.70
April 1, 2012	\$0.00	\$188.00
April 8, 2012	\$179.00	\$275.04
April 22, 2012	\$179.00	\$358.80
April 29, 2012	\$179.00	\$448.50
June 10, 2012	\$0.00	\$448.50
August 5, 2012	\$0.00	\$380.10

c) The Commission provided the following explanation of the overpayment of \$933.00:

Week starting	Benefit paid	Reported earnings	Actual earnings	Benefits payable	Over-payment
January 22, 2012	\$0.00	\$0.00	\$60.00	\$0.00	\$0.00
January 29, 2012	\$218.00			\$0.00	\$60.00
Feb. 26, 2012	\$218.00	\$84.00	\$90.00	\$215.00	\$3.00
March 25, 2012	\$216.00	\$89.00	\$90.00	\$215.00	\$1.00
April 1, 2012	\$218.00	\$0.00	\$188.00	\$117.00	\$101.00
April 8, 2012	\$126.00	\$179.00	\$275.00	\$30.00	\$96.00

April 22, 2012	\$126.00	\$179.00	\$359.00	\$0.00	\$126.00
April 29, 2012	\$126.00	\$179.00	\$449.00	\$0.00	\$126.00
June 10, 2012	\$218.00	\$0.00	\$449.00	\$0.00	\$218.00
August 5, 2012	\$218.00	\$0.00	\$380.00	\$16.00	\$202.00

- d) The Commission noted that the week of January 22, 2012 was the second week of the waiting period that the Appellant had to serve and in which no benefit was payable. It stated that earnings received during the waiting period are 100% deductible and are withheld from the first payment of EI benefits. It noted that, in this case, earnings of \$60.00 made in the second waiting period week of January 22, 2012 were withheld in the week of January 29, 2012, which resulted in an overpayment of \$60.00 (Exhibit GD4-4).

ANALYSIS

[22] The Federal Court of Appeal has 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 (AG)*, 2009 FCA 365).

[23] The Federal Court of Appeal has also confirmed the principle that amounts that constitute earnings under section 35 of the Regulations must be allocated under section 36 of the Regulations (*Boone et al.*, 2002 FCA 257).

Amounts received by the Appellant from the employer

[24] The evidence in the file shows, first, that the Appellant worked for the employer, Sears Canada Inc., from January 22, 2012 to January 18, 2013 inclusive and that he received amounts of money from that employer (GD2-8 to GD2-24, GD3-13, GD3-17 to GD3-69, GD3-78 to GD3-81 and GD3-87 to GD3-94).

[25] The Tribunal finds that the monies paid to the Appellant clearly constitute earnings under section 35 of the Regulations since they were paid to him as salary.

[26] Paragraph 35(2)(a) of the Regulations clearly provides as follows:

. . .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. . .

[27] In this case, the monies the Appellant received were from the employment that he held with the employer, Sears Canada Inc., during the period of January 22, 2012 to January 18, 2013 (Exhibit GD3-13).

[28] Those monies do not fall within the exceptions provided under subsection 35(7) of the Regulations.

Allocation of earnings

[29] The Tribunal finds that the monies paid to the appellant as salary must be allocated in accordance with section 36 of the Regulations.

[30] The Tribunal cannot disregard the principle that amounts that constitute earnings under section 35 of the Regulations must be allocated under section 36 of the Regulations (*Boone et al.*, 2002 FCA 257).

[31] The Appellant explained that he disagreed with the amounts the employer reported having paid him.

[32] The Appellant noted that the information the employer had provided was inconsistent with the pay stubs indicating the earnings he had received from that employer.

[33] The Appellant argued that a check should be made based on the documents he had submitted to the Commission and the Tribunal (e.g. history of transactions made from the bank account held by the Appellant and pay stubs from the employer, Sears Canada Inc.) to compare the information from the documents he had sent with that provided by the employer.

[34] The Commission explained that it had correctly allocated the Appellant's earnings over the period during which the services were performed (Exhibits GD4-4).

[35] The Commission provided the following explanation:

[translation]

Considering the copies of the bank transactions and pay stubs provided by the claimant and the information submitted by the employer on two occasions concerning the earnings paid in the specific weeks of those two-week pay periods, the Commission noted that the amounts were consistent with the pay stubs and the net amounts deposited to the claimant's bank account on the stated dates (Exhibit GD4-4).

[36] The Tribunal finds that the Commission showed that the earnings the Appellant received from his employer had to be allocated in accordance with section 36 of the Regulations.

[37] However, the Tribunal disagrees with the Commission's statement that the information provided by the employer on two occasions concerning the earnings paid to the Appellant for the specific weeks of his pay periods were consistent with the amounts appearing on his pay stubs and with the net amounts deposited to the Appellant's bank accounts on the stated dates (Exhibit GD4-4).

[38] The Tribunal notes from the evidence presented by the Appellant, i.e. the copies of his pay stubs from the employer, Sears Canada Inc. (Exhibits GD2-8 to GD2-24), that the total of the amounts appearing on those pay stubs is inconsistent with the total of the amounts the employer reported having paid him, based on the document the employer sent to the Commission dated June 4, 2015 (Request for Payroll Information – Demande de renseignements – Registres de paie) (GD3-78 to GD3-81).

[39] The Tribunal finds that the copies of the pay stubs sent by the Appellant contain more specific and more reliable information on the earnings his employer actually paid him than the information provided by the employer on June 4, 2015.

[40] For example, the copies of the pay stubs the Appellant sent show that he received \$199.25 for the period from May 13 to 26, 2012 (Exhibit GD2-15), whereas the employer did not state that it had paid the Appellant that amount for that period (Exhibits GD3-78 to GD3-81). The Tribunal considers that an amount of \$195.25 was actually paid to the Appellant for the period in issue, as the copy of the pay stub in question shows.

[41] The history of the bank transactions conducted by the Appellant also shows that an amount of \$187.29 was deposited to his account on June 1, 2012. That amount corresponds to the net amount of the Appellant’s salary from the earnings of \$199.25 (gross amount) which he made during the period of May 13 to 26, 2012. The pay stub for that period was moreover issued on June 1, 2012, the date on which the net amount in question was deposited (Exhibits GD2-15 and GD3-76).

[42] The Tribunal finds that the employer also made errors in completing the document entitled “Request for Payroll Information – Demande de renseignements – Registres de paie,” dated June 4, 2013. In that document, the employer indicated that it had not paid any amount to the Appellant for the week starting April 15, 2012 (Exhibits GD3-78 to GD3-81), whereas it had previously stated, in a similar document completed on April 26, 2015, that it had paid him \$179.40 for that same week (Exhibits GD3-68 and GD3-69).

[43] The table below shows the differences between the amounts indicated on the Appellant’s pay stubs (Exhibits GD2-8 to GD2-24) and those the employer reported having paid to the Appellant (Exhibits GD3-78 to GD3-81) during the period from the week starting January 22, 2012 to that starting August 5, 2012.

Pay periods indicated on pay stubs (Exhibits GD2-8 to GD2-24)	Gross amounts indicated on pay stubs (Exhibits GD2-8 to GD2-24)	Amounts employer reported paying to the Appellant (Exhibits GD3-78 to GD3-81)
December 25, 2011 to January 7, 2012 (Exhibit GD2-20)	\$767.36	N/A
January 22 to February 4, 2012 (Exhibit GD2-13)	\$59.80	\$59.80 (for the week commencing January 22, 2012)
February 19 to March 3, 2012 (Exhibit GD2-11)	\$89.70	\$89.70 (for the week commencing February 26, 2012)
March 18 to 31, 2012 (Exhibit GD2-8)	\$89.70	\$89.70 (for the week commencing March 25, 2012)
April 1 to 14, 2012 (Exhibit GD2-22)	\$453.04	\$188.00 (for the week commencing April 1, 2012) and \$275.04 (for the week commencing April 8, 2012) for a total of \$463.04 (\$188.00 + \$275.04 = \$463.04)

April 29 to May 12, 2012 (Exhibit GD2-18)	\$807.30	\$358.80 (for the week commencing April 22, 2012) and \$448.50 (for the week commencing April 29, 2012) for a total of \$808.00 (\$358.80 + \$448.50 = \$807.30)
May 13 to 26, 2012 (Exhibit GD2-15)	\$199.25	Not indicated.
July 22 to August 4, 2012 (Exhibit GD2-24)	\$807.30	\$448.50 (for the week commencing June 10, 2012) and \$380.10 (for the week commencing August 5, 2012) for a total of \$829.00 (\$448.50 + \$380.10 = \$828.60)
Total based on documents presented (for the period from the week starting January 22, 2012 to that commencing August 5, 2012) (NB The amount indicated for the period from December 25, 2011 to January 7, 2012 is not included in this calculation.)	\$2,506.09	\$2,338.14

[44] The above table shows an overall discrepancy of \$166.29 ($\$2,506.09 - \$2,338.14 = \167.95) between the total stated by the employer (\$2,338.14) and that from the copies of the Appellant's pay stubs (\$2,506.09) for the period from the week starting January 22, 2012 to that commencing August 5, 2012.

[45] The Tribunal finds that the observed difference may be explained above all by the amount of \$199.25 that the Appellant received for the period of May 13 to 26, 2012 (Exhibit GD2-15) and that the employer did not report to the Commission.

[46] Another, less significant difference may also be observed for the period from April 1 to 14, 2012, for which the Appellant's pay stub indicates that he received an amount of \$453.04, whereas the employer reported paying him \$463.04 for the same period. That difference may be explained by the fact that the employer stated that it had paid an allowance of \$10.00 for that period (Exhibits GD2-22, GD3-78 and GD3-79).

[47] Lastly, the employer stated that it had paid the appellant a total amount of \$828.60 for the weeks starting June 10, 2012 and August 5, 2012, whereas the copy of the Appellant's pay stub for the period from July 22 to August 4, 2012, which appears to correspond to the weeks commencing June 10, 2012 and August 5, 2012, indicates that he received an amount of \$807.30.

[48] Similarly, and having regard to the fact that these are net amounts rather than gross amounts, the amounts appearing on the history of transactions made by the Appellant in his bank

account do not correspond to all the amounts that he received from the employer, according to the copies of the pay stubs that he provided.

[49] The table below establishes the relationship between the amounts the Appellant received, according to the copies of the pay stubs he provided and the amounts deposited to his bank account and based on the history of transactions in the account in question for the periods at issue.

<p align="center">Dates of pay stubs and amounts indicated thereon (gross and net amounts) (Exhibits GD2-8 to GD2-24)</p>	<p align="center">Dates of deposits made and amounts of deposits indicated (net amounts) (Exhibits GD3-72 to GD3-77)</p>
<p>January 13, 2012: gross amount of \$767.36 and net amount of \$638.70 for the period from December 25, 2011 to January 7, 2012 (Exhibit GD2-20)</p>	<p>January 13, 2012: \$638.70 (Exhibit GD3-72)</p>
<p>N/A</p>	<p>January 27, 2012: \$339.26 (Exhibit GD3-72)</p>
<p>February 10, 2012: gross amount of \$59.80 and net amount of \$57.59 for the period from January 22 to February 4, 2012 (Exhibit GD2-13)</p>	<p>February 10, 2012: \$57.59 (Exhibit GD3-73)</p>
<p>March 9, 2012: gross amount of \$89.70 and net amount of \$85.47 for the period from February 19 to March 3, 2012 (Exhibit GD2-11)</p>	<p>March 9, 2012: 85.47 (Exhibit GD3-74)</p>
<p>April 5, 2012: gross amount of \$89.70 and net amount of \$85.48 for the period from March 18 to 31, 2012 (Exhibit GD2-8)</p>	<p>April 5, 2012: 85.48 (Exhibit GD3-75)</p>
<p>April 20, 2012: gross amount of \$453.04 and net amount of \$426.13 for the period from April 1 to 14, 2012 (Exhibit GD2-22)</p>	<p>April 20, 2012: \$426.13 (Exhibit GD3-75)</p>
<p>May 18, 2012: gross amount of \$807.30 and net amount of \$678.68 for the period from April 29 to May 12, 2012 (Exhibit GD2-18)</p>	<p>N/A or not indicated</p>
<p>June 1, 2012: gross amount of \$199.25 and net amount of \$187.29 for the period from May 13 to 26, 2012 (Exhibit GD2-15)</p>	<p>June 1, 2012: \$187.29 (Exhibit GD3-76)</p>
<p>N/A</p>	<p>June 15, 2012: \$10.73 (Exhibit GD3-76)</p>
<p>N/A</p>	<p>June 29, 2012: \$823.78 (Exhibit GD3-76)</p>
<p>August 10, 2012: gross amount of \$807.30 and net amount of \$663.03 for the period from July 22 to August 4, 2012 (Exhibit GD2-24)</p>	<p>August 10, 2012: 663.03 (Exhibit GD3-77)</p>

N/A	August 24, 2012: 709.42 (Exhibit GD3-77)
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[50] The above table shows that deposits of amounts received by the employer were made to the Appellant's bank account on January 27, 2012 (\$339.26), June 15, 2012 (\$10.73), June 29, 2012 (\$823.78) and June 29, 2012 (\$823.78), although the Appellant did not submit copies of pay stubs to explain those deposits.

[51] However, the information from the history of transactions in the Appellant's bank account does not indicate that a deposit of \$678.68 (net amount) was made to his account corresponding to the pay stub dated May 18, 2012 (Exhibit GD2-18 and GD3-72 to GD3-77).

[52] The Tribunal also noted that, in the explanatory tables it presented in its argument (Exhibits GD4-2 and GD4-4), the Commission did not mention certain earnings that the Appellant reported having received when he completed his claimant reports.

[53] Thus, the Commission did not include in those tables the amount of \$179.00 that the Appellant reported having received for the week starting April 15, 2012 (week from April 15 to 21, 2012), when he completed his reports (Exhibit GD3-44) or the amount of \$442.00 that he also reported having received for the week starting July 29, 2012 (week of July 29 to August 4, 2012) (Exhibit GD3-64).

[54] In short, the Tribunal finds that the Commission showed that the earnings received by the Appellant as salary had to be allocated.

[55] However, the evidence adduced by the Appellant showed that there were differences between the amounts appearing on the copies of his pay stubs (Exhibits GD2-8 to GD2-24) and those that the employer reported having paid him (Exhibits GD3-78 to GD3-81).

[56] The Tribunal finds that the Appellant presented evidence that leads it to conclude that his earnings should result in an allocation different from that initially determined by the Commission.

[57] Based on the case law cited above, the Tribunal finds that the allocation of the earnings paid to the Appellant was not made in accordance with sections 35 and 36 of the Regulations.

[58] The appeal on the issue has merit in part.

[59] The Tribunal finds that, based on the evidence submitted by the Appellant, corrections must be made to the earnings that were considered by the Commission for allocation purposes under section 36 of the Regulations. However, those corrections may result in changes in the determination of the amount of the overpayment made to the Appellant.

CONCLUSION

[60] The appeal is allowed in part.

Normand Morin
Member, General Division - Employment Insurance Section