Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

Citation: *N. W. v. Canada Employment Insurance Commission*, 2017 SSTGDEI 153

Tribunal File Number: GE-17-552

BETWEEN:

N. W.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Teresa Jaenen

HEARD ON: August 24, 2017

DATE OF DECISION: September 5, 2017

Canada

REASONS AND DECISION

OVERVIEW

[1] The Appellant made an initial claim for employment insurance maternity and parental benefits on June 21, 2014. On November 30, 2016, the Respondent adjusted the Appellant's earnings based on the wages she received the week beginning June 21, 2015, and June 28, 2015, which created an overpayment. The Appellant requested a reconsideration of this decision, and on January 12, 2017, the Respondent maintained its initial decision. The Appellant appealed the reconsideration decision to the *Social Security Tribunal* (Tribunal) on February 8, 2017.

[2] The Tribunal must decide whether the monies the Appellant received is considered earnings and if the Respondent correctly allocated the monies pursuant to sections 35 and 36 of the *Employment Insurance Regulations* (Regulations).

[3] The hearing was held by in person for the following reasons:

a) The complexity of the issue(s) under appeal.

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

c) The fact that the appellant or other parties are represented.

d) The form of hearing respects the requirement under the *Social Security Tribunal Regulations* to proceed as informally and quickly as circumstances, fairness and natural justice permit.

[4] The following people attended the hearing, N. W., the Appellant along with her representative, S. W..

[5] The Tribunal finds the monies the Appellant received constituted earnings in accordance with paragraph 35(2)(a) and the Respondent correctly allocated the monies in accordance with subsection 36(4) of the Regulations as they were earnings payable to a claimant under a contract of employment for the performance of services that shall be allocated to the period in which the services were performed. The reasons for this decision follow.

EVIDENCE

[6] The Appellant filed her application for maternity and parental benefits on June 21, 2014. At that time she stated her last day of work was June 20, 2015, and she would be returning to work on June 20, 2015. She indicated the expected date of birth was July 4, 2014, and she would want to receive the full 35 weeks of parental to commence following her maternity benefits. The Appellant also chose to be exempt from filing reports (GD3-4 to GD-16).

[7] A record of employment indicates the Appellant was employed by X on January 31, 2012, to June 20, 2014, and was leaving for maternity reasons (GD3-18).

[8] On June 25, 2014, the Respondent contacted the employer who corrected box 17A to include holiday pay of $1384.58 and issued a corrected record of employment (GD3-19).

[9] A schedule of payments indicates the Appellant's claim commenced the week of July 6, 2014, and ended June 28, 2015 (GD3-22 to GD3-23).

[10] On July 4, 2016, the employer provided the Respondent a request for payroll stating the Appellant received $961.15 in earnings the week of June 21, 2015, and June 28, 2015, because she had returned to work (GD3-25 to GD3-26).

[11] On February 8, 2017, the Appellant filed a Notice of Appeal with supporting documentation to support that had their claim began when they filed for employment insurance benefits there would not have been an overlap that created the overpayment (GD2-1 to GD2-23).

EVIDENCE AT THE HEARING

[12] The Appellant stated she filed her claim on June 21, 2014, and she had requested a year off from employment and her first day back at work was June 23, 2015. She stated this was clearly indicated on her application for benefits. She stated she understood the two week waiting period would be from June 21 to July 7, 2014, and she would be paid after that and the payments she received covered the 52-week period she was off work. She stated she never had any reason to question the last two pays she received.

[13] The Appellant stated that she did receive the vacation pay and that the Respondent was aware she had received it.

[14] The Appellant stated that at the time they had known of this they would have been able to adjust their finances and incorporate the two additional weeks into their budget. However receiving the notice almost 18 months later having to repay the monies will create undue financial hardship.

[15] The Appellant stated this was clearly the fault of the Respondent for not notifying them of their decision to delay her start date and they should be accountable.

SUBMISSIONS

[16] The Appellant submitted that:

a) She is not disputing the fact that she received wages from her employer when she returned to work on June 23, 2015, following her maternity and parental leave;

b) She is not disputing the fact that she received $1.384.58 in vacation pay;

c) She was never advised by Service Canada that they had delayed her start date of her claim which would have provided her the opportunity to notify her employer of her two additional weeks and to change her return date; and

d) Had they known they were going to incur an overpayment based on the Respondent's own initiative, change her start date, they would have been able to adjust their finances and incorporate the two additional weeks into their budget. However receiving the notice almost 18 months later having to repay the monies will create undue financial hardship.

[17] The Respondent submitted that:

a) The Appellant received $1,384.58 vacation pay because of her separation from employment; therefore the money had to be allocated from June 21, 2014, from her normal weekly earnings which created an allocation from June 22, 2014, into the week ending July 5, 2014. The Appellant returned to work on June 22, 2015; therefore it would be impossible for the Appellant to be entitled to the full 50 weeks as there were not 50 full calendar weeks without any earnings between the two dates. Since the Appellant was paid for 50 weeks of benefit there is an overpayment of benefits;

b) It is unfortunate that the Appellant did know to check her My Service Canada account or that she was unaware of returning to work two weeks later that could have been paid her full entitlement. The Respondent admits that it would have been helpful if someone had contacted the Appellant and explained the situation to her. However this does not change the law. The Appellant's earnings must be allocated into the period that she worked and if she was paid EI benefits for the same period then there is an overpayment of benefits;

c) In the present case, the Appellant received money from X and this money was paid to the Appellant as wages. As such the Respondent maintains that this money constitutes earnings pursuant to subsection 35(2) of the Regulations. Therefore, in accordance with Regulation 36(4) it correctly allocated these earnings to the period in which the services were performed;

d) The Appellant stated she did not want the start date of her claim reconsidered and the only issue under appeal is the allocation of her earnings into the two-week period June 21, 2015, to July 4, 2015. The employer states she returned to work for those two weeks and had earnings of $961.15 in each week; and

e) It is still willing to reconsider the start date of the claimant's 2014 claim for maternity and parental benefits; to have it start earlier than July 6, 2014. If the claimant would like this to happen, the vacation pay will be rechecked with the employer to confirm if it was payable to her due to her separation from employment in June 2014. If the vacation pay amount is correct and it was payable then it will have to be allocated pursuant to

Subsection 36(8) (b) from the date of separation, as explained earlier in the representations. However it would reduce the overpayment amount.

ANALYSIS

[18] The relevant legislative provisions are reproduced in the Annex to this decision.

[19] The Appellant submitted that she is not disputing the fact that she received wages from her employer when she returned to work on June 23, 2015, following her maternity and parental leave.

[20] The Tribunal finds from the evidence on the file from the employer's payroll information and the Appellant's oral evidence there is no dispute that she did work and earn monies in the weeks in question.

[21] The Tribunal finds that in accordance to section 35(2) of the Regulations that wages paid to the Appellant from the employer constitute earnings. As it is earnings, it must be allocated to when those services are performed pursuant to subsection 36(4) of the Regulations (*Doblej v. Canada (AG)*, 2004 FCA 19 (CanLII)).

[22] The Appellant presents the argument that it is the fault of Service Canada as they failed to notify her that they had made a decision to change her start date of her claim, therefore she should not be penalized and have to repay the money.

[23] The Tribunal finds the situation is very unfortunate the Respondent clearly failed to notify the Appellant of their decision to delay her maternity and parental claim; however the Appellant received employment insurance benefits that by the legislation she was not entitled to receive and since she received the money, Service Canada's failure notify her does not excuse her from having to repay it. The Federal Court of Appeal is clear on that point (*Lanuzo v. Canada (AG)*, 2005 CAF 324 (CanLII).

[24] It is well established that bad advice or no advice from a Commission agent does not change the law which must be applied notwithstanding any wrong advice. This has unequivocally been decided by the Federal Court of Appeal in *Granger* (A-684-85) that the provision of misinformation by the Commission does not affect the application of legislative provisions.

[25] The Tribunal finds that under section 43 a claimant is liable to repay an amount by the Commission to the claimant as benefits (a) for any period for which the claims is disqualified; or (b) to which the claimant is not entitled.

[26] The Appellant presents the argument that she would like the overpayment to be written off and that repaying the money will cause her financial hardship

[27] The Tribunal has no authority under the Act and its Regulations to grant a write-off or to agree to an arrangement, since this authority rests solely with the Respondent. The Tribunal can only recommend to the Appellant to address her request directly to the Respondent, pursuant to Regulation 56, so that a decision is rendered by the Respondent on the issue of write- off. The Tribunal has concluded that it does not have the power to decide this issue; however the Tribunal could still issue a write-off recommendation if a request were submitted by an Appellant.

[28] The Tribunal relies on (*Michel Villeneuve* (2005 FCA 440 (CanLII) – A‑191‑05) where 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 earnings: 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).*

[29] The Tribunal is bound by the legislation and therefore cannot alter the provisions to exempt the Appellant from the requirements of the Act.

[30] The Tribunal relies on (*Canada (AG) v. Knee*, 2011 FCA 301 (CanLII)) where the Courts 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.

CONCLUSION

[31] The appeal is dismissed.

Teresa Jaenen
Member, General Division - Employment Insurance Section

ANNEX

THE LAW

Employment Insurance Regulations

35 (1) The definitions in this subsection apply in this section.

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 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*)

pension means a retirement pension

> **(a)** arising out of employment or out of service in any armed forces or in a police force;
>
> **(b)** under the *Canada Pension Plan*; or
>
> **(c)** under a provincial pension plan. (*pension*)

self-employed person has the same meaning as in subsection 30(5). (*travailleur indépendant*)

(2) 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;

36 (1) Subject to subsection (2), the earnings of a claimant as determined under section 35 shall be allocated to weeks in the manner described in this section and, for the purposes referred to in subsection 35(2), shall be the earnings of the claimant for those weeks.

(4) 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.