



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *D. A. v. Canada Employment Insurance Commission*, 2018 SST 351

Tribunal File Number: GE-17-2005

BETWEEN:

**D. A.**

Appellant

and

**Canada Employment Insurance Commission**

Respondent

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**SOCIAL SECURITY TRIBUNAL DECISION**  
**General Division – Employment Insurance Section**

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DECISION BY: Katherine Wallocha

VIDEOCONFERENCE ON: March 29, 2018

DATE OF DECISION: April 25, 2018

## DECISION

[1] The appeal is dismissed. The claimant received employment insurance (EI) benefits that she was not entitled to and must repay the overpayment.

## OVERVIEW

[2] The claimant was receiving maternity and parental EI benefits when she returned to work. The Canada Employment Insurance Commission (Commission) determined that the income the claimant received was considered earnings and applied to certain weeks during her benefit period. This resulted in an overpayment. The claimant appealed to the Social Security Tribunal (Tribunal).

## ISSUE

1. Are the payments received by the claimant from an employer considered earnings for benefit purposes?
2. If so, how should the earnings be allocated?
3. Is the claimant required to repay the overpayment as a result of the allocation?

## ANALYSIS

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

[4] The *Employment Insurance Act* (EI Act) sets up an insurance scheme to protect against the loss of income resulting from unemployment. Therefore, the purpose is to compensate for a loss and not to pay benefits to those who have not suffered any loss (*Canada (Attorney General) v. Walford*, A-263-78).

[5] Earnings are defined under subsection 35(2) of the *Employment Insurance Regulations* (Regulations) as the entire income of a claimant arising out of any employment (*McLaughlin v. Canada (Attorney General)*, 2009 FCA 365). Amounts that are determined to be earnings under 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).

[6] The claimant must disclose all monies paid or payable. The burden is on the claimant to establish that all or part of the sums received amounted to something other than earnings (*Bourgeois v. Canada (Attorney General)*, 2004 FCA 117).

**1. Are the payments received by the claimant from an employer considered earnings for benefit purposes?**

[7] To be considered earnings, the income must be arising out of any employment or there is a “sufficient connection” between the claimant’s employment and the sums received (*Canada (Attorney General) v. Roch*, 2003 FCA 356).

[8] The Tribunal finds the money the claimant received are earnings because they were paid to the claimant as wages for work she performed starting on October 15, 2014. The claimant was in receipt of EI benefits starting April 6, 2014. She testified that she returned to work in October, 2014. She agreed with the information provided by the employer in the Request for Payroll Information and the Record of Employment (ROE). Therefore, the Tribunal is satisfied that, according to the ROE, the claimant returned to work on October 15, 2014. Further, the Tribunal finds the income information provided by the employer is accurate.

[9] The claimant has the burden of proving that the money received from the employer was for something other than employment and should not be allocated. The claimant has failed to prove the wages she received are not earnings and should not be allocated to her benefit period. Therefore, the Tribunal concludes that the money the claimant received as wages is considered earnings according to subsection 35(2) of the Regulations.

**2. How should the earnings be allocated?**

[10] When wages are payable to the claimant in respect for services performed they shall be allocated to the period in which the services were performed according to subsection 36(4) of the Regulations (*Boone et al v. Canada (Attorney General)*, 2002 FCA 257).

[11] The Tribunal finds the earnings were paid to the claimant as wages under an employment contract starting October 15, 2014, and must be allocated according to subsection 36(4) of the Regulations. The earnings must be allocated to the period when the services were performed.

[12] The Tribunal accepts the claimant's testimony that she returned to work for two employers in October 2014, and received money as wages from both employers for work performed. The claimant confirmed she returned to work with the employer who submitted the ROE. This was classified as casual work but she ended up working almost full-time until the end of the school year. She further testified that she returned to work for another employer at the same time. This work was part-time, working mostly in the evenings and on weekends, and she continues to work with this employer. The Tribunal is satisfied that the money the claimant received from the employer was paid to her as wages; therefore, the Commission correctly allocated the earnings under subsection 36(4) of the Regulations.

**3. Is the claimant required to repay the overpayment as a result of the allocation?**

[13] A claimant is liable to repay an amount paid by the Commission to the claimant as benefits to which the claimant is not entitled under paragraph 43(b) of the EI Act.

[14] The Tribunal finds that the claimant is required to repay any overpayment resulting from the allocation of her earnings. The claimant was working and received wages. These wages are considered earnings for benefits purposes and must be allocated to the period when the services were performed; therefore, the claimant received EI benefits that she was not entitled to and these benefits must be repaid.

[15] The Tribunal does not accept the claimant's statements and testimony that she contacted the Commission to stop her EI benefits when she returned to work. The claimant stated that she contacted the Commission at the beginning of October 2014 and informed that she would be returning to work in two weeks. She testified that after she returned to work she went in to Service Canada and signed a form that stated she returned to work. She further stated that after she noticed EI benefits were still being deposited into her bank account, that she again contacted the Commission to stop her EI benefits.

[16] However, the Commission provided evidence showing that the claimant contacted the Commission in September 2014, when her benefits stopped because of an error the claimant made when completing her application for EI benefits. The Commission provided evidence showing that the claimant contacted the Commission in January 2015 to declare earnings for all

of November 2014 and most of December 2014. The Tribunal finds that the Commission documented each time the claimant contacted the Commission but there is no evidence showing the claimant contacted the Commission at the beginning of October 2014 or after she returned to work. Therefore, the Tribunal is not convinced that the claimant contacted the Commission to stop payment of her EI benefits because she had returned to work.

[17] Furthermore, even if the claimant had contacted the Commission to stop her EI benefits, the benefits were not stopped. The claimant continued to receive EI benefits after she had returned to work. The EI Act is designed to compensate for a loss of income, but the claimant did not have a loss of income because she was receiving income from employment.

[18] The claimant argued that she does not have the money. She stated that she is a single mother with two children, she has returned to school, and her income is not enough to take care of herself and her children. While the Tribunal is sympathetic to the claimant's situation, the Tribunal is not permitted to rewrite the legislation or interpret it in a manner contrary to its plain meaning (*Canada (Attorney General) v. Kneé*, 2011 FCA 301).

## **CONCLUSION**

[19] The Tribunal concludes that the money the claimant received as wages from her employer are considered earnings and must be allocated to when the services were performed. Consequently, the claimant received EI benefits that she was not entitled to and the overpayment must be repaid.

[20] The appeal is dismissed.

*K. Wallocha*

Member, General Division - Employment Insurance Section

## ANNEX

### THE LAW

#### *Employment Insurance Act*

**43** A claimant is liable to repay an amount paid by the Commission to the claimant as benefits

- (a) for any period for which the claimant is disqualified; or
- (b) to which the claimant is not entitled.

#### *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*)

(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;

(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;

(7) That 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 (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*.

**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.