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

[TRANSLATION]

Citation: *G. B. v Canada Employment Insurance Commission*, 2018 SST 1322

Tribunal File Number: GE-18-3202

BETWEEN:

G. B.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Employment Insurance Section

DECISION BY: Charline Bourque

HEARD ON: December 13, 2018

DATE OF DECISION: December 27, 2018

Canada

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] The Appellant received $3,799.12 from his employer for participation in profits. The Commission considered the amount earnings and allocated it to his Employment Insurance benefits between February 1, 2017, and January 31, 2018. The Commission explains that it divided the amount received by the 42 weeks during which the Appellant worked. As a result, the Commission allocated $90 per week from December 24 to January 27, 2018.

[3] The Appellant disagrees with that decision. He explains that the Commission misrepresented the amount received. He adds that this puts him in conflict with taxes and that the Commission is changing the purpose of the amounts received. He indicates that it is not participation in profits because the amount is not directly based on profits but on various factors and the achievement of objectives.

PRELIMINARY MATTERS

[4] The Tribunal has considered the fact that the Appellant has raised a number of points relating to taxes. However, the Tribunal does not have the jurisdiction to interpret issues concerning the *Taxation Act* or any other issue related to it. The Tribunal can only direct the Appellant to the Canada Revenue Agency for those issues. As a result, the Tribunal will not address those questions in detail because it does not have jurisdiction.

ISSUES

[5] What is the amount received?

[6] Does this amount constitute earnings within the meaning of the *Employment Insurance Regulations* (EI Regulations)?

[7] If so, how should it be allocated?

ANALYSIS

Issue 1: What is the amount received?

[8] The Appellant states that the Commission is changing the nature of the amount received from the employer and that the amount received from X does not correspond to participation in profits. He explains that the amount is not based solely on profits, but that the purpose of this bonus is to increase the divisions' accountability in achieving profitability objectives. The employer's program therefore rewards objective achievement and is based on four factors (namely, earnings per share, costs, net working capital, and the [translation] "right first cost" indicator). He adds that the bonus rewarded workers for achieving those objectives on February 1, 2018, and that it is calculated based on the number of hours worked at the single rate of pay. Finally, he indicated that even though the bonus is paid on a specific date, this date is not related to when those objectives are achieved, which can occur at any point in the year.

[9] The Commission, in turn, is of the view that the Appellant first stated that the $3,799.12 received from the employer was a performance bonus (GD3-16 to GD3-17). He then explained to the Commission that the amount he received from the employer was part of the participation-in-profits plan (GD3-18). The Commission determined that the amount received from the employer did indeed come from a participation-in-profits plan as stated in the documents the Claimant provided (GD3-31 to GD3-32).

[10] The Appellant indicated that, when the Commission determined that the amount came from participation in profits, the Commission spoke to someone who did not have all the information on hand. The Appellant submits that the Commission therefore based its decision on erroneous information.

[11] The Tribunal notes that the letter from the employer confirming the receipt of the amount refers to [translation] "Results of the X bonus plan" (GD3-31) or the [translation] "AF17 bonus plan" (GD3-32).

[12] The Tribunal is of the view that the bonus is directly related to the company's good performance. Without success and profit, a bonus would not have been paid. Therefore, even

though the company uses various factors to measure achievement of [translation] “profitability objectives in Mission 2020,” the Tribunal is of the view that the amount paid as a bonus is part of participation in profits. It is directly based on the company’s profitability.

Issue 2: Does an amount received from the employer as participation in profits constitute earnings?

[13] The Tribunal is of the view that the amount received from the employer as participation in profits constitutes earnings within the meaning of section 35(2) of the Regulations.

[14] Earnings for benefit purposes are “income arising out of any employment, whether in respect of wages, benefits, or other remuneration” and must be taken into account unless it falls within an exception (sections 35(2) and 35(7) of the EI Regulations).

[15] Specifically, income is defined 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(1) of the EI Regulations).

[16] 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).

[17] The Appellant states that he received $3,799.12 as participation in profits.

[18] The employer’s letter confirms that this amount was paid based on the percentage 4.32% for the 2017-2018 year. The employer explains that the calculation is based on the employee’s eligible profit for the 2017 fiscal year (GD3-31).

[19] The Commission indicates that the amount constitutes earnings under section 35(2) of the Regulations because it was paid to the Claimant to reward his good performance in order to receive the maximum profit. The payment of that amount is related to the services G. B. performed through his daily tasks, commitment, and hard work, which contributed to the results achieved for the 2017 fiscal year.

[20] As a result, the Tribunal is of the view that the amount received comes from the employer and that, as such, it is earnings within the meaning of section 35(2) of the *Employment Insurance Regulations*.

[21] The Tribunal explains to the Appellant that, even though he was not able to qualify the amount at the hearing and he believes that the Commission is trying to qualify the amount so that it corresponds to one section of the Regulations, the fact that the amount comes from the employer is not being challenged. Furthermore, according to the employer's documents, it is clear that the amount is connected with performance and therefore with the employees' work. As a result, the amount would still correspond to earnings because it comes from the employer (section 35(2) of the EI Regulations). The claimant is responsible for showing that an amount is not earnings.

[22] Based on the evidence and the parties' submissions, the Tribunal is satisfied that the amount received from the employer constitutes earnings within the meaning of section 35(2) of the Regulations. The Tribunal is of the view that this amount does not fall under the exceptions established in section 35(7) of the Regulations.

Issue 3: How should the earnings be allocated?

[23] The Tribunal is of the view that the Commission allocated the earnings correctly by allocating $90 per week to the weeks when services were performed between February 1, 2017, and January 31, 2018, the period for which participation in profits was paid.

[24] Amounts that constitute 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).

[25] The earnings of a claimant that are from participation in profits or commissions will be allocated to the weeks in which the services are performed (section 36(6) of the EI Regulations).

[26] The Commission submits that [translation] "the payment of the amount is connected with the services performed by the employee according to section 36(6). The amount for participation

in profits was allocated to the weeks in which the services were performed under section 36(6) of the Regulations."

[27] The Tribunal explains that it also considered section 36(6.1) of the Regulations, which refers to "[t]he earnings of a claimant [...] that are from participation in profits or commissions, that arise from a transaction [...]" and which may enable an allocation of earnings proportional to the amount of work completed. However, the Tribunal is of the view that this section cannot apply since this situation is not the result of a transaction (*opération*). The Tribunal is of the view that it cannot find that a transaction took place because there is no invoice, contract, or other document.

[28] Furthermore, when the employer decides to pay a bonus or participation in profits, it does so based on performance, the achievement of objectives. As a result, the Tribunal is of the view that this performance is directly related to the services performed by an employee. The Tribunal is therefore of the view that section 36(6) of the Regulations applies.

[29] As a result, as the Commission determined, the calculation must be done according to the number of weeks in which services were performed.

[30] The Records of Employment indicate that the Appellant worked from March 6, 2017, to November 17, 2017 (GD3-12), and from December 25, 2017, to February 1, 2018 (GD3-14). The Commission confirms that this is a total of 42 weeks. The Commission therefore calculated that $90 per week ($3,799.12 ÷ 42 weeks) should be allocated to the weeks in which services were performed between February 1, 2017, and January 31, 2018, the period for which participation in profits was paid.

[31] The Tribunal has considered the fact that the Appellant explains that a bonus is not paid for the vacation period. However, the Tribunal is of the view that no document makes that clarification. The letter issued by the employer mentions that the bonus is calculated based on eligible profits (GD3-31). The Tribunal is of the view that there is no documentation to the effect that the vacation days would not be considered during that period. The Tribunal states that the burden of proof is the claimant's where earnings are concerned.

[32] The Tribunal is of the view that the Commission allocated the earnings correctly under section 36(6) of the Regulations.

CONCLUSION

[33] The appeal is dismissed.

Charline Bourque
Member, General Division – Employment Insurance Section

HEARD ON:	December 13, 2018
METHOD OF PROCEEDING:	Videoconference
APPEARANCES:	G. B., Appellant