



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *SR v Canada Employment Insurance Commission*, 2019 SST 1723

Tribunal File Number: GE-18-3116

BETWEEN:

S. R.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Audrey Mitchell

HEARD ON: January 2, 2019

DATE OF DECISION: January 8, 2019

DECISION

[1] The appeal is dismissed with modification. The wages paid to the Appellant are earnings and the Respondent correctly allocated the earnings to the weeks in which the work was performed, except for the weeks beginning October 14, 2012 and October 21, 2012.

OVERVIEW

[2] The Appellant worked while collecting employment insurance benefits. As a result of the Respondent's investigation, the Appellant's four employers reported wages that they paid to the Appellant. The Respondent gave the Appellant an opportunity to explain the discrepancy between the information the employers gave the Respondent and the amounts that she reported in her bi-weekly claims. The Respondent adjusted the allocation of the Appellant's earnings based on information it got from the Appellant's employers. The Appellant submitted time sheets, payroll information and pay statements from three of her employers. She argued that the Respondent's reporting system is not compatible with how and when employees are paid and that the Respondent did not consider the extenuating dynamics of having four different employers and four different pay schedules including monthly advances.

PRELIMINARY MATTERS

[3] Although the Appellant requested that the hearing be held in person, the Tribunal decided that a videoconference was an appropriate method of hearing for reasons of efficiency and given that credibility was not anticipated to be an issue.

[4] The hearing was scheduled for November 28, 2018, but because Appellant requested that the hearing be adjourned due to illness, in the interests of natural justice, the Tribunal granted the adjournment (subsection 11(1), *Social Security Tribunal Regulations*). The Tribunal rescheduled the hearing to January 2, 2019. Although the notice of hearing was returned to the Tribunal because it was not claimed by the Appellant, the Tribunal left the Appellant a voicemail with the details of the scheduled hearing.

[5] On December 27, 2018, the Appellant contacted the Tribunal by phone to request that the hearing scheduled for January 2, 2019 be postponed to the week of February 4, 2019, for health

reasons. The Appellant did not follow-up her request in writing with more details concerning her request, and the Tribunal's attempts to speak to the Appellant or leave a voicemail message asking her to request the adjournment in writing with reasons for the request were unsuccessful. In the absence of more detail or supporting reasons from the Appellant establishing that exceptional circumstances exist based on which the hearing can be adjourned, the Tribunal refused to grant the adjournment (subsection 11(2), *Social Security Tribunal Regulations*).

[6] The Tribunal joined the videoconference at the scheduled date and time but the Appellant did not. There is no evidence that the Appellant contacted the Tribunal after the hearing to confirm that she could not attend the videoconference. Because the Tribunal previously granted an adjournment at the Appellant's request and is satisfied that the Appellant received the notice of hearing, the Tribunal proceeded in her absence (subsection 12(2), *Social Security Tribunal Regulations*).

ISSUES

[7] Did the Appellant's wages from the employer constitute earnings?

[8] If so, did the Respondent correctly allocate the Appellant's earnings?

ANALYSIS

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

Issue 1: Did the Appellant's wages from the employer constitute earnings?

[10] The Tribunal finds that the wages the Appellant received from the employers are earnings.

[11] Employment is defined as any employment, whether insurable, not insurable or excluded employment, under any express or implied contract of service or other contract of employment (subsection 35(1), *Employment Insurance Regulations*). 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 (subsection 35(1), *Employment Insurance Regulations*).

Earnings include the entire income of a claimant arising out of any employment (subsection 35(2), *Employment Insurance Regulations*).

[12] A claimant's income is considered earnings if it is earned by labour or is given in return for work or if there is sufficient connection between the claimant's employment and the sum of money received (*Canada (AG) v. Roch*, 2003 FCA 356).

[13] As a result of an investigation that it conducted, the Respondent determined that the Appellant worked for four separate employers while she was collecting employment insurance benefits, but she declared only some of the wages that the employers paid her. The Appellant did not appear to dispute having had earnings while she collected benefits; rather she argued that the Respondent did not consider the "extenuating dynamics" of having four different employers, four different pay schedules, and monthly advances. The Appellant submitted timesheets, payroll information, paycheque inquiry information and pay statements for three of the four employers for whom she worked while collecting employment insurance benefits.

[14] Employer one spoke to the Respondent by telephone and gave details of weekly gross earnings for 38 of the 41 weeks between September 16, 2012 and June 29, 2013. The Appellant submitted pay statements with wage information for bi-weekly pay periods that correspond to the 38 weeks. In all but seven of the bi-weekly pay statements, the gross wages are equivalent to the corresponding two weeks of gross wages reported by the employer to the Respondent. Details of the weeks in which the bi-weekly pay statement gross wages are different from the corresponding two weeks of gross earnings reported by the employer are as follows:

- For the weeks commencing September 30, 2012 and October 7, 2012, the employer told the Respondent that the Appellant had gross earnings of \$76.68 and \$170.71, respectively, for a total of \$247.39, but the bi-weekly pay statement gross earnings is \$247.40, a difference of \$0.01;
- For the weeks commencing October 14, 2012 and October 21, 2012, the employer told the Respondent that the Appellant had gross earnings of \$145.43 and \$89.90, respectively, for a total of \$235.33, but the bi-weekly pay statement gross earnings is \$247.24, a difference of \$11.91;

- For the weeks commencing November 25, 2012 and December 2, 2012, the employer told the Respondent that the Appellant had gross earnings of \$199.64 and \$195.67, respectively, for a total of \$395.31, but the bi-weekly pay statement gross earnings is \$395.32, a difference of \$0.01;
- For the weeks commencing December 9, 2012 and December 16, 2012, the employer told the Respondent that the Appellant had gross earnings of \$251.20 and \$256.49, respectively, for a total of \$507.69, but the bi-weekly pay statement gross earnings is \$507.70, a difference of \$0.01;
- For the weeks commencing December 23, 2012 to January 5, 2013, the employer told the Respondent that the Appellant had gross earnings of \$282.41 and \$197.16, respectively, for a total of \$479.57, but the bi-weekly pay statement gross earnings is \$479.56, a difference of \$0.01;
- For the weeks commencing June 16, 2013 and June 23, 2013, the employer told the Respondent that the Appellant had gross earnings of \$55.53 and \$0, respectively. Although the Appellant submitted separate bi-weekly pay statements that correspond to each of the respective weeks noted above, each of the two pay statements include one week in which earnings is not an issue.

[15] Given the discrepancies in gross wages, and because the Respondent recorded details as dictated by the employer by telephone, the Tribunal gives more weight to the pay statements submitted by the Appellant in the first five discrepancies noted above. For the last two differences noted above, the Tribunal gives more weight to the weekly gross earnings that the employer dictated to the Respondent because there is insufficient information on the pay statements to determine the amount of gross earnings paid for each week in the bi-weekly period.

[16] Notwithstanding the discrepancies in gross wages, because the Respondent rounded the earnings to the nearest dollar, the Tribunal finds that the only discrepancy of consequence is the one in which the pay statement shows a difference in wages of \$11.91 from those reported by the employer. As a result, the Tribunal finds that the employer paid the Appellant gross wages in the amounts that it reported to the Respondent in each of the weeks in question, except for the weeks

of October 14, 2012 and October 21, 2012, where the Appellant was paid \$247.24 for the two weeks combined. The Tribunal finds that the wages employer one paid to the Appellant in the 38 weeks between September 16, 2012 and June 29, 2013, was for work that she performed for the employer in each of the respective weeks.

[17] Employer two issued a record of employment that showed that between the Appellant's first day of work on February 19, 2013, and the last day for which she was paid on March 15, 2013, she had \$1,154.55 in insurable earnings. Employer two responded to the Respondent's request for payroll information, stating that in the weeks of February 17, 2013, February 24, 2013, March 3, 2013 and March 10, 2013, it paid the Appellant gross wages in the amounts of \$175.21, \$521.11, \$157.24, and \$300.99, respectively, for a total of \$1,154.55.

[18] The Appellant submitted copies of timesheets for employer two on which there were hand-written notes of hours worked and what appears to be wages that match those that the employer reported to the Respondent. As a result, and in the absence of evidence that the wages that employer reported to the Respondent are incorrect, the Tribunal finds that employer two paid the Appellant wages as reported to the Respondent for work that the Appellant completed in the weeks identified.

[19] Employer three confirmed gross wages that it paid to the Appellant for the months of April 2013 to June 2013. The employer said that it paid the Appellant \$3,200.00 on May 15, 2013 for work she performed in April 2013, \$3,200.00 on June 15, 2013 for work she performed in May 2013, and \$4,012.06 on July 15, 2013 for work she performed in June 2013. The Appellant submitted paycheque inquiry information that is consistent with the information that the employer gave the Respondent, except that the date of the cheque issued in June was June 14, 2013, and not June 15, 2013 as reported by employer three.

[20] The Appellant stated that the employer paid her advances to allow her to eat and pay her rent while beginning the new job. While these advances are identified with handwritten notations on the paycheque inquiries dated April 30, 2013, May 31, 2013, June 28, 2013 and July 31, 2013, the Tribunal notes that there is no gross pay identified for any of these dates. It appears that the advance amounts were deducted from the gross amounts paid to the Appellant on May 15, 2013, June 14, 2013 and July 15, 2013. Again, as a result, and in the absence of

evidence that the wages that the employer reported to the Respondent are incorrect, the Tribunal finds that employer three paid the Appellant wages as reported to the Respondent for work that she completed in the months identified.

[21] Based on the information employer three provided, the Respondent pro-rated the monthly gross earnings to weekly earnings by dividing monthly wages by the number of work days in each month to get the daily rate, and then multiplying the daily rate by five days that the employer reported that the Appellant worked each week. The Tribunal finds that the Respondent's calculation of the Appellant's weekly wages is reasonable, and that the pro-rated wages that employer three paid the Appellant was for work that she performed in each week from the week commencing March 31, 2013 to the week commencing June 23, 2013.

[22] Employer four responded to the Respondent's request for payroll information by identifying gross wages it paid to the Appellant from the week commencing September 16, 2012, to the week commencing October 21, 2012. The Appellant did not submit anything concerning the payroll information that employer four gave to the Respondent. In the absence of evidence that the payroll information of employer four is incorrect, the Tribunal finds that the Appellant had gross wages of \$106.81, \$88.00, \$87.99, \$86.46, \$86.46 and \$114.27 in each week respectively, from the week commencing September 16, 2012 to the week commencing October 2012, and that these wages were paid to her for work that she performed for the employer in those weeks.

[23] The Appellant argued that she had been diligent in reporting every cent paid to her, but that it was impossible to know how hours in a two week pay period were broken up, and that having multiple employers who paid her on a different schedule than that of the employment insurance reporting periods was confusing. The Tribunal acknowledges that in the Appellant's particular circumstance, having four separate employers, all with different pay periods that did not all line up with the Respondent's reporting periods, it would be difficult to report with complete accuracy. However, there is no evidence before the Tribunal that the Appellant sought advice of the Respondent as she was completing her bi-weekly reports, or that she attempted to amend her reports, especially given the level of detail on the pay information the Appellant has now submitted. In any event, the Tribunal notes that the Respondent did not penalize the

Appellant for the discrepancies between what the employers paid her and what she reported in her bi-weekly claims.

[24] The Appellant also submitted that there were “dramatic inconsistencies” in the amounts of earnings from the Respondent’s initial letter of May 4, 2018, in which it asked the Appellant for additional information concerning her earnings, and its decision letter of June 28, 2018, in which it notified the Appellant that it had adjusted the allocation of her earnings. The Tribunal does not find that there are any discrepancies in the earnings amounts listed by the Respondent in the two letters; rather, the Tribunal finds that whereas in the first letter, the earnings were broken down by employer for each week in question, the decision letter combined the earnings from the respective employers in each of the weeks for which wages were paid, rounding the earnings to the nearest dollar.

[25] Because the Appellant did not dispute that she had earnings in the weeks detailed by the Respondent, but suggested that it was difficult to manage reporting her earnings as a result of having multiple employers with different pay periods and methods of payment, the Tribunal finds that there is sufficient connection between her employment and the wages paid to her. For the same reason, the Tribunal also finds that the wages arose out of the Appellant’s employment with the four employers, and therefore finds that the wages constituted earnings within the meaning of the *Employment Insurance Regulations*.

Issue 2: Did the Respondent correctly allocate the Appellant’s earnings?

[26] Having found that the wages paid to the Appellant by the four employers are earnings, the Tribunal also finds that the Respondent has correctly allocated the earnings, with the exception of the weeks beginning October 14, 2012 and October 21, 2012.

[27] Earnings to be paid to a claimant who is under a contract of employment to perform services must be allocated to the period in which the services are performed (subsection 36(4), *Employment Insurance Regulations*).

[28] The Respondent allocated the Appellant’s earnings to the weeks from the week beginning September 16, 2012 to the week beginning June 23, 2013. Although the Appellant submitted that it was difficult to determine how to report wages from multiple employers, including

advances, in report periods that were different from the employers' pay periods, the Tribunal finds that there is insufficient evidence to conclude that the earnings were not paid for services performed for the employer in the weeks in question. The Tribunal therefore finds that the earnings must be allocated.

[29] As noted above, the Tribunal has found that for the weeks beginning October 14, 2012 and October 21, 2012, employer one paid the Appellant \$247.24 for the two-week period based on information contained in the pay statement, and not \$235.33 as the employer reported to the Respondent. The Tribunal therefore directs the Respondent to contact employer one to obtain a correct breakdown of weekly earnings for this two-week period and correct the allocation of earnings for these two weeks to reflect payment for services in each of the respective two weeks.

[30] The Tribunal finds that the Respondent correctly allocated the Appellant's earnings to the weeks from the week commencing September 16, 2012 to the week commencing June 23, 2013, in which the services were performed for the employers, except for the weeks beginning October 14, 2012 and October 21, 2012.

CONCLUSION

[31] The appeal is dismissed with modification. For clarity, the Respondent correctly allocated the Appellant's earnings in each week except for the weeks beginning October 14, 2012 and October 2012, which are to be adjusted once the Respondent obtains a corrected breakdown of weekly earnings from employer one.

Audrey Mitchell

Member, General Division - Employment Insurance Section

HEARD ON:	January 2, 2019
METHOD OF PROCEEDING:	Videoconference
APPEARANCES:	

