



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *G. D. v Canada Employment Insurance Commission*, 2019 SST 243

Tribunal File Number: GE-18-3247

BETWEEN:

G. D.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Teresa Jaenen

HEARD ON: November 27, 2018 and January 16, 2019

DATE OF DECISION: February 11, 2019

DECISION

[1] The appeal is dismissed. The Tribunal finds the money the Appellant received for wages constitutes earnings and were correctly allocated to the period in which the services were performed.

OVERVIEW

[2] The Appellant established a claim for employment insurance benefits December 15, 2015. An investigation by the Canada Employment Insurance Commission (Commission) revealed that during the benefit period, X employed the Appellant. The employer reported that the Appellant worked and had earnings starting the week of January 31, 2016, to the week of March 6, 2016. The Appellant did not declare that he worked or had expected earnings. The Commission gave the Appellant an opportunity to address the discrepancies. The Appellant explained he did not start working until February 8, 2016, and he was not paid any money until March 17, 2016. The Appellant explained that based on the advice of Service Canada he was not to report that he worked because he had not received any money. Following the request for reconsideration the Commission notified the Appellant that the money he received from X as wages constituted earnings and would be allocated to the week starting on February 7, 2016, to the week of March 6, 2016. The allocation resulted in an overpayment of \$2,339.00.

PRELIMINARY ISSUES

[3] The Appellant and his representative raised on numerous occasions throughout the hearings they felt they were treated unfairly and made to feel like criminals. In addition, they believed X is not abiding by the law and someone should go after them. The Tribunal sympathies with the Appellant. However, the Tribunal had no authority to address these circumstances.

ISSUES

[4] Did the money the Appellant receive from his employer for wages constitute earnings?

[5] If so, were the earnings correctly allocated?

ANALYSIS

[6] 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).

[7] For income to be considered earnings, the income must be earned by labour or given in return for work, or there must be a sufficient connection between the claimant's employment and the sum received (*Canada (A.G.) v. Roch*, 2003 FCA 356).

[8] The Appellant must disclose all monies paid or payable and has the onus of proving that the payments were not earnings and should not be subject to allocation (*Bourgeois v. Canada (Attorney General)*, 2004 FCA 117).

Issue 1: Did the money the Appellant receive from his employer for wages constitute earnings?

[9] Yes, the Tribunal finds the money the Appellant received, constitutes earnings, because it was money paid for work performed beginning the week of February 8, 2016, to the week of March 6, 2016.

[10] The Tribunal finds it is not disputed that the Appellant started working on February 8, 2016, and would have earned wages that were paid or payable to him from February 8, 2016, to March 12, 2016. The evidence of the payroll information provided by the employer supports that the Appellant received his first payment on March 17, 2016, and it was paid for wages and he received money going forward. The employer's statements support that Appellant was paid for any unpaid hours by January 2017.

[11] The employer submitted a request for payroll information showing the Appellant had earnings as follows: January 31, 2016 - February 6, 2016, = \$1,456.00; February 7, 2016 – February 13, 2016, = \$1,456.00; February 14, 2016 – February 20, 2016, = \$873.60; February 21, 2016 – February 27, 2016, = \$1,164.80; February 28, 2016 – March 5, 2016, = \$1,419.60; and March 6, 2016 – March 12, 2016, = \$582.40. The employer submitted that the Appellant worked during these periods but had not been paid for all the hours. The employer submitted that

following a review of the Appellant's hours that the information was correct and the employer attached a note on the payroll clarification indicating the Appellant was paid for any unpaid hours in January 2017.

[12] The employer submitted that the company merged in 2017 and all she has is time sheets that the Appellant provided and that his hourly rate was \$35.00 per hour and 4% vacation pay was included with each check. The employer submitted that she started to work after the merger and the books were a mess. The Appellant and his wife contacted her saying they were owed money for hours that he worked that he had not paid for. In the end, she paid him for hours owed, \$1990.58 (net) – she cannot recall if this amount was from her calculations or the Appellant (if she just took his word for it).

[13] The employer confirmed that the Appellant's first check was not issued until March 17, 2016, and it covered the pay period from February 8 – 22, 2016, and for the amount of \$2,105.45. The employer explained that she has an entry with 40 hours recorded for the Appellant from January 23 to February 7, 2016, but she cannot locate a stamped time sheet for these weeks as she has for the others.

[14] The Appellant was provided an opportunity to respond to the discrepancies and he stated that he did not receive any pay in February and there was always a dispute with his employer of the time worked. The Appellant stated in his request for reconsideration that he was not paid on the dates X reported, he did not start the job until February and he received his first check on March 17, 2016.

[15] The Appellant initially agreed that paycheck he received in March was for the hours he worked from February 8, 2016, to February 22, 2016, and he received paychecks going forward.

[16] The Appellant's representative submitted to the Commission a check stub indicating the Appellant received a check for \$2,105.45 and it was for the pay period February 8, 2016 – February 22, 2016 (GD3-34). She also provided copies of time sheets that showed the Appellant worked for weeks starting on February 8, 2016, to March 27, 2016 (GD3-35 to GD3-45).

Hearing Date: November 27, 2018

[17] The Appellant at the hearing now argues that the check he received on March 17, 2016, was for the hours he worked for the previous two weeks in March and then he was paid going forward. He stated there was no back pay and he was not even sure if the employer still owed him money.

[18] The Appellant's representative submitted that she was the one who wrote on the check stub (GD3-34) that this payment was the first check received on March 17, 2016, for the pay period from February 8th to February 22, 2016, and she was the one who sent in the time sheets. She stated that when she wrote the check was for February she had checked with X, but he was all doped up. She submitted that they did not have the books and at this time and X was in the hospital. She stated that this is all messed up and the employer's accounting is terrible. The Appellant's representative submitted they can prove that X was in the hospital during the investigation and she hurried up and sent the information she did.

[19] The Appellant's representative now submits that the check they received is for a period starting March 1, 2016.

[20] The Appellant's representative stated this is all just going in circles and she cannot prove anything. She stated the employer could doctor up their books. She stated X never should have worked there and he did not get any money and she cannot prove it.

[21] The Appellant along with his representative submitted that if they have to pay the money back they will not be able to do it all at once and they will go to the next level. The representative submitted they had nothing further to add but wanted clarification on what happens next. The Member provided the Appellant and his representative, a final opportunity if they would like additional time to obtain any information that would prove the money he received was for a different period. They both agreed they wanted the extra time to contact the employer and find any other related documents.

[22] The Member granted the Appellant and his representative an adjournment to obtain documentation to support their new argument.

January 16, 2018, Hearing

[23] The Appellant's representative submitted that they were not able to get any new information from the employer. She stated that she went to her on-line banking but she cannot go back to 2016.

How are the earnings to be allocated?

[24] 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 in accordance with subsection 36(4) of the Regulations (*Boone et al v. Canada (Attorney General)*, 2002 FCA 257).

[25] In determining the method for the allocation, it is the reason or motive for the payment and not the date of the payment, which determines the date from which the allocation must begin (*Sarrazin* 2006 FCA 313).

[26] The Commission, following the reconsideration modified the Appellant's allocation date to the week February 7, 2016, to reflect the Appellant's start date of February 8, 2016, as the employer was unable to confirm a start date of February 1, 2016.

[27] The Appellant has the onus of proving that the payments were not earnings and they should not be subject to allocation (*Bourgeois v. Canada (Attorney General)*, 2004 FCA 117).

[28] The Appellant is disputing the Commission allocating the money to the period starting on February 8, 2016, in which he worked but was never paid for. The Appellant argues that the money he received on March 17, 2016, was for a period beginning March 1, 2016, and should be allocated as such.

[29] The Tribunal finds from the Appellant testimony he started working on February 8, 2016, this is confirmed by the employer. The evidence of the time sheets prove that the Appellant had hours worked for the weeks beginning February 8, 2016, to the week of March 6, 2016, that was either paid or payable.

[30] The Tribunal considered the Appellant's argument that he never received any money until March 17, 2016, which is undisputed. However, the Appellant is now changing his initial statements that this money was for services performed from March 1, 2016, and that he was never paid for his hours worked in February.

[31] The Tribunal finds that this argument is contradicted by the Appellant initial statements to the Commission along with the written documentation provided by the Appellant's representative that the money he received on March 17, 2016, was for the period of February 8 – 22, 2016. In addition, this fact was confirmed by the employer's evidence on the file.

[32] The Tribunal finds that the employer's evidence in the request for payroll clarification supports that the Appellant had earnings and he was paid on March 17, 2016, for the period of February 8, 2016, to February 22, 2016. In addition, it states that the Appellant was paid by January 2017 for any unpaid hours he had worked. The employer's statements to the Commission reconfirmed that after the Appellant and his wife approached her for unpaid hours, the Appellant was paid in January 2017, for unpaid hours, he had worked.

[33] The Tribunal considered the Appellant's testimony that the check he received on March 17, 2016, was for the hours he worked for the previous two weeks in March and then he was paid going forward. He stated there was no back pay.

[34] The Tribunal, based on the Appellant's new argument, the Appellant and his representative were granted an adjournment and the opportunity to provide documentation to support that his employer never paid him for the hours worked in February 2016. The representative agreed that a deadline of December 31, 2018, would be enough time to get the information.

[35] The Appellant's representative submitted that they were not able to provide any new evidence to support his new argument that he was never paid for the hours he worked in February. Therefore, the Tribunal prefers the Appellant's initial statements along with his representative that he agreed he began receiving paychecks on March 17, 2016, for the period starting February 8, 2016, and he was paid going forward. The check stub and time sheets that was provided by the Appellant and his representative substantiate this.

[36] The Tribunal accepts the employer's evidence that the check paid on March 17, 2016, was for hours from February 8 – 22, 2016, the Appellant received money going forward and he was fully compensated by January 2017 for any other hours he had not been paid for.

[37] The Tribunal finds the employer's evidence credible and forth coming regarding the situation that the books were a mess. She provided a plausible explanation to confirm the Appellant's start date was February 8, 2016, and not on January 23, 2016, because she could not locate a stamped time sheet for this period (like she had for the other weeks). The employer was also consistent with the facts that the Appellant worked and did not start receiving any money until March 2016. In addition, there were hours the Appellant worked that were unpaid until a later date and after the Appellant and his wife contacted her saying they were owed money for hours that he worked that he was never paid for.

[38] The Appellant along with his representative explained that when he started at X he was told he would have to wait to be paid and he still believes they owe him. He stated that he went to a Service Canada office on 50th street and explained his situation and they told him to keep filling out his reports and claim he was not making any money so that is why he filed the way he did. The Appellant stated that he did not start working until February 8, 2016.

[39] The Appellant's representative submitted that her husband is sick and they filed the EI reports the way they were instructed to do by Service Canada. She stated she understands the Commission's position but they only did what they were told to do.

[40] The Tribunal considered the Appellant's testimony and his representative's submissions that they relied on advice from the Commission when they completed their reports saying they did not have any earnings.

[41] The Tribunal finds it extremely unfortunate when a claimant relies on the advice of the Commission and then later discovers that advice was not accurate. However, the Appellant received employment insurance benefits that by the legislation, he was not entitled to receive and it must be repaid.

[42] 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.

[43] The Tribunal does not have the authority to re-write the legislation. The law is clear that neither the Commission nor the Tribunal or Court has authority to exempt a claimant from the qualifying provisions of the Act no matter how sympathetic or unusual the circumstances. (*Levesque* 2001 FCA 304.)

CONCLUSION

[44] The Tribunal concludes that the money the Appellant received from his employer constituted earnings because he received the money for services performed and they must be allocated to when the services were performed for weeks beginning February 7, 2016, to the week ending on March 6, 2016.

[45] The appeal is dismissed.

Teresa Jaenen

Member, General Division - Employment Insurance Section

HEARD ON:	November 27, 2018 and January 16, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	G. D., Appellant D. D., Representative for the Appellant