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

Citation: *R. K. v Canada Employment Insurance Commission*, 2019 SST 267

Tribunal File Number: GE-19-228

BETWEEN:

R. K.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Charlotte McQuade

HEARD ON: February 1, 2019

DATE OF DECISION: March 1, 2019

Canada

DECISION

[1] The appeal is allowed.

OVERVIEW

[2] R. K. (the "Appellant") had established an initial claim for regular Employment Insurance (EI) benefits on December 31, 2017. On August 20, 2018, during the period of his claim, the Appellant began a two-stage training process to become a table games dealer at a casino. The Appellant signed a "Participation Agreement" with the prospective employer (X) who was providing the training. Stage 1 of the training was for two weeks and was unpaid. A test was to be administered at the end of the period. The Participation Agreement provided that conditional upon passing the test, the Appellant may receive a conditional job offer as a table games dealer, and may be afforded the opportunity (upon the X's sole discretion) to continue for the remaining weeks of orientation. The Agreement also noted that if the Appellant was accepted into Stage 2 of the orientation, he would receive an acceptance bonus of $500.00. The Agreement further provided that Stage 2 of the training was paid at a per diem rate of $105.00 and if the Appellant was to successfully complete Stage 2, then he would receive another $500.00 signing bonus.

[3] The Appellant was accepted into the Stage 2 of the training on August 31, 2018 and in anticipation of receiving the initial $500.00 acceptance bonus, reported this payment to the Respondent in the week of September 1, 2018. The Respondent told the Appellant to report it when it was actually received, which he also did. The $500.00 acceptance cheque payment was not issued by X until September 11, 2018 and the Appellant received the cheque on September 12, 2018. The Appellant completed the Stage 2 of the training on September 25, 2018 and received a second $500.00 payment as a signing bonus sometime around October 4, 2015. He entered into a conditional offer of employment on September 17, 2018 and began employment on September 28, 2018 with X.

[4] At issue in this appeal is the $500.00 acceptance payment for being accepted into Stage 2 of the training. The Respondent determined that the $500.00 payment was "earnings" pursuant to subsection 35(2) of the *Employment Insurance Regulations* (EI Regulations) and allocated the

entire sum in accordance with paragraph 36(19)(b) of the EI Regulations to the week the Appellant was accepted into the second week of training, the week of August 26, 2018. The Respondent took the position this was the appropriate provision to allocate the earnings as the earnings arose from a transaction. This allocation created an overpayment of $250.00.

[5] The Appellant did not make any specific submissions concerning whether the payment was "earnings" or how the allocation should be done. He argues, rather, that the overpayment should be written off because he was honest in reporting the $500.00 payment and he tried to follow all the Respondent's agents' directions. He argues the Respondent's agents changed their position as to the allocation and the amount of overpayment a number of times and the overpayment is their fault for not understanding the EI Regulations. He asserts he has suffered financial hardship and stress as a result of the overpayment and the whole process he has gone through in trying to resolve the matter.

PRELIMINARY MATTERS

[6] The Appellant referred to his conditional employment contract dated September 17, 2018 in oral evidence at his hearing on February 3, 2019. At the Tribunal's request, the Appellant provided a copy of this document to the Tribunal on February 4, 2019. He also included supplementary submissions concerning his request for write-off of the overpayment. This post-hearing documentation was provided to the Respondent.

ISSUES

[7] Issue 1: Is the $500.00 payment received by the Appellant for being accepted into the second stage of training "earnings"?

[8] Issue 2: If so, how should the $500.00 payment be allocated?

[9] Issue 3: If an overpayment arises from the allocation of the $500.00 payment, can the overpayment be written off by the Tribunal?

ANALYSIS

[10] The *Employment Insurance Act* (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).

[11] Earnings are defined under subsection 35(2) of the *Employment Insurance Regulations* (EI Regulations) as the entire income of a claimant arising out of any employment.

[12] Sums received from an employer are presumed to be earnings and must therefore be allocated unless the amount falls within an exception in subsection 35(7) of the EI Regulations or the sums do not arise from employment.

[13] Amounts that are determined to be earnings under section 35 of the EI Regulations must be allocated according to section 36 of the EI Regulations (*Boone et al v. Canada (Attorney General)*, 2002 FCA 257).

Issue 1: Is the $500.00 payment received by the Appellant for being accepted into the second stage of training "earnings"?

[14] No. I find that the $500.00 payment received by the Appellant for being accepted into the second stage of training was not "earnings".

[15] The Respondent argues that the $500.00 payment was paid to the Appellant as an acceptance bonus. The Respondent argues that this money constitutes earnings pursuant to subsection 35(2) of the EI Regulations because the payment was made as a one-time bonus to the claimant for being accepted to Stage 2 of the orientation by the employer.

[16] The Appellant did not raise a specific dispute about the characterization of the payment as "earnings". Rather, his testimony focused on the fact that he had reported receipt of the payment to the Respondent and followed the Respondent's agents' instructions. However, he was given different information from different agents and instead of the information being acted upon when provided, an overpayment was created.

[17] For income to be considered earnings pursuant to subsection 35(2) of the EI Regulations, 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). In *Roch*, the Court noted that "an amount which is not in consideration of work done in the traditional sense and which is not expressly included in the Regulations" may be considered earnings within the meaning of the Regulations "on condition that this amount is comparable to earnings and that there is a 'certain connection' or a 'sufficient connection' between the claimant's employment […] and the sum received."

[18] The Appellant has the onus of proof to show that the wages is not money derived from employment and should not be allocated.

[19] The Appellant testified that he entered into a Participation Agreement on August 13, 2018 to be a participant in a training and orientation program that could possibly lead to a position as a table games dealer at a newly opening casino. The prospective employer, X, operated the casino and was providing the training.

[20] The Appellant explained that there were 2 stages to the training. He started the first stage on August 20, 2018 and attended for two weeks. This stage was unpaid. He was told on the last day of the first stage of training, on August 31, 2018, that he was accepted into the second stage of training. He was told the $500.00 acceptance bonus had been prepared. However, the cheque was not issued until September 11, 2018 and he did not get it until September 12, 2018. The Appellant testified that he had not been provided with any documentation concerning a conditional offer at that point of entering the second stage of training. It was his understanding at that time that he could still be let go at any point. The Appellant related that some of the people attending the training were just walked out during the stage 2 of the training. The Appellant confirmed that there was no discussion from X as to what the first $500.00 acceptance payment was for. He thought it was just a bonus for getting through the first two weeks for "nothing". Some people did not get through the first two weeks and did not get the bonus. He testified that he easily could have been told go away by X and he would have not have got anything if that happened.

[21] The Appellant explained that stage 2 of the training was for a month and was to be paid at rate of $105.00 per day, to be paid in a lump sum at the end of the training. About 2 weeks into the second stage of training, the trainees were asked to fill out applications, and give references and have credit checks done. He had to fill out an application for employment during this stage. He had only previously submitted his resume at a job fair to X. While participating in stage 2, the Appellant testified that he was given a conditional offer of employment on September 17, 2018 (GD7-2 to GD7-9). The Appellant testified that he signed it that day. He related that until he received that conditional offer of employment on September 17, 2018 he did not know he would be given the conditional offer of employment and even then, he was not certain he actually would be employed until he got his AGCO licence, which is a licence, required to do the job. The Appellant got that licence on September 25, 2018 and then he started his employment on September 28, 2018.

[22] The Appellant testified that he was paid the second $500.00 payment (the signing bonus) along with his one-month per diem lump sum payment. He received this payment on October 4 or 5, 2018. No statutory deductions were taken off either of the two $500.00 payments.

[23] I find the initial $500.00 payment for acceptance into the second stage of training is not earnings. There is no indication that the Appellant had done any actual work during this period for the prospective employer. The payment was not earned by labour or given in exchange for work. Rather it was related to completing Stage 1 of the training and being accepted into state 2 of the training.

[24] I have also considered whether the sum is comparable to earnings and whether there is a ‘certain connection’ or a ‘sufficient connection’ between the Appellant’s eventual employment with X and the sum received.

[25] I find the $500.00 sum is not comparable to earnings. First, unlike earnings, the amount of the payment is not tied specifically to the amount of hours or days attended for training. It is rather a flat rate. Secondly, the payment was made paid in advance of any actual conditional employment contract or the assurance of entering into any such contract. The money was paid upon being accepted into stage 2 of the training. However, at the point the offer of a conditional contract was still a discretionary decision on the part of the prospective employer. Further,

unlike a usual earnings payment, there were no statutory deductions taken off the payment by the X, suggesting an intention on the part of X that this payment was not earnings. As well, the payment is not comparable to earnings in the sense that it was a discretionary payment. To earn the payment, X had to exercise its discretion to allow the Appellant into stage 2 of the training. Earnings payments in contrast are not discretionary. There is a legal obligation to pay earnings. Having regard to all these factors, I find that the $500.00 acceptance payment is not comparable to earnings.

[26] I have also considered whether or not there is a sufficient connection between the Appellant's eventual employment and the $500.00 payment. I find there was an insufficient connection between this payment and the Appellant's eventual employment for this sum to be considered earnings.

[27] In that regard, I have considered the terms of the Participation Agreement and the terms of the contract of conditional employment dated September 17, 2018.

[28] The Participation Agreement was signed on August 13, 2018. The preamble of the agreement notes, "The Parties have a relationship in which X has engaged the Participant as part of X's Table Games Dealer Orientation (described in greater detail below) (collectively, the "Orientation") in anticipation of training, teaching, testing, and possible certification and potential hiring, conditional upon the Participant passing certain mandated and necessary Orientation standards." The Orientation was noted to be in two stages. The agreement provides the following with respect to stages 1 and 2:

> "Stage l. The preliminary stage consists of two (2) weeks unpaid orientation. A test will be administered at the end of the two (2) week mark. Conditional upon passing the test, the participant may receive a conditional job offer as a Table Games Dealer, and may be afforded the opportunity (upon X's sole discretion) to continue for the remaining weeks of orientation. If the Participant is accepted into Stage 2 of the Orientation, they will receive an acceptance bonus of $500 gross."
>
> Stage 2. For the duration of the remainder of the Orientation the Participant will be provided a per diem of $105.00 per day attended which will be paid out following the

completion of the Orientation period. The conditional offer mentioned above is pending upon the following criteria being met to the satisfaction of X:

- satisfactory reference checks;
- obtaining an AGCO license; and
- successfully passing the weekly and final table tests.

Note: The Participant's eligibility to remain in the Orientation can be terminated by X at any point during Stage 2 should any of the criteria mentioned above not be met. If the Participant is successful in the completion of the Orientation, they will receive a signing bonus of $500 gross.

[29] The Participation Agreement goes on to note various other information about the orientation including a series of table tests of the various games, which will occur each week during the duration of the Orientation, for which a passing grade will have to be maintained to remain in the Orientation. The Agreement noted that Participants who cannot maintain a passing grade at a level determined by X (acting reasonably) will be immediately excused from the Orientation, and from any further training/testing.

[30] I note that the Appellant was not actually conditionally employed until he signed the conditional offer of employment on September 17, 2019. The Participation Agreement provides that the first $500.00 payment is for acceptance into stage 2 of the training. However, acceptance into stage 2 did not necessarily mean a conditional offer of employment would be made. The Participation Agreement provides that conditional upon passing the test at stage 1, the participant "may" receive a conditional job offer as a Table Games Dealer. As such, when the payment of the first $500.00 was made, the offer of conditional employment was still a discretionary decision in the hands of the employer.

[31] Even entering stage 2 of the orientation did not provide the Appellant any certainty of the realization of an employment relationship. The Participation Agreement notes under the stage 2 portion of the document that the conditional offer of employment was predicated upon a number of specified conditions, including successfully passing the final table tests. Pursuant to the terms of the Participation Agreement, theoretically, therefore, an individual could successfully

complete the first two weeks of the training and obtain the first $500.00 bonus, enter the second part of the training but then not be given an offer of conditional employment and never end up employed. The payment of the first $500.00 was not tied to any assurance or certainty of employment, nor does it appear to have been an inducement to enter into employment. The $500.00 payment appears to be no more than a recognition of successful completion of stage 1 of the training, the completion of which offered no more than a chance of potential employment.

[32] While I acknowledge that absent completion of the first stage of training, a person would have no chance at becoming employed with the employer, completion of the first stage of training and entering into the second stage offered no more than a chance at employment. As the Appellant testified, it was not until he actually received the offer of conditional employment on September 17, 2018 that he knew he was conditionally employed. In my view, the $500.00 payment representing acceptance into the second stage of training is not sufficiently connected with the Appellant's eventual employment. An individual could receive the $500.00 payment for entering the second stage and still not end up employed.

[33] A "signing bonus", in some circumstances, can be considered to be "earnings" within the meaning of section 35 of the EI Regulations. In *Budhai v. Canada (Attorney General)*, A-610-01, at issue was the characterization of a $1,000 "signing bonus" that a claimant's employer had agreed to pay to laid off employees if they ratified the collective agreement that union had negotiated with the employer. The signing bonus was only payable to employees who had not been terminated on the date of the agreement, who had worked for the employer during a specific period of time and only if the collective agreement was ratified. The signing bonus was actually contained in the contract of employment. The parties agreed that the "signing bonus" was "earnings". The only question was whether the sum was earnings payable under to a claimant under a contract of employment for the performance of services such that it should be allocated under subsection 36(4) of the EI Regulations to the period in which the services were performed or whether the "signing bonus" arose "from a transaction" (namely, the ratification of the collective agreement), in which case it was to be allocated to the period when the collective agreement was ratified under paragraph 36(19)(b) of the EI Regulations.

[34] The Federal Court of Appeal held that the terms on which the "signing bonus" was payable suggested that it was intended to reward employees for work already done, and to induce those employees to vote for ratification of the new collective agreement. The Court found it was not unreasonable for the Board to conclude that the "signing bonus" was payable "for the performance of services" and to allocate the sum under subsection 36(4). In so reaching its conclusion, the Court stated that the characterization of a signing bonus depends on the facts of each individual case.

[35] I find the facts in the Appellant's case to be distinguishable from the *Budhai, supra* case in that the $500.00 acceptance payment was not a "signing bonus". It was not made to reward the Appellant for work already done or to induce him to enter into a contract. Rather it was for paid to acknowledge his acceptance into the second stage of training and nothing more. There was no certainty at all of even conditional employment because the Appellant was accepted into the second stage of training or because this payment was made.

[36] It was not until the actual conditional offer of employment was made on September 17, 2018 and agreed to by the Appellant that an employment relationship crystallized between these parties. Up until that point, there was no certainty at all that an employment relationship would come into fruition.

[37] Accordingly, I find the $500.00 acceptance payment is not earnings within the meaning of subsection 35(2) of the EI Regulations. It was not earned by labour or given in exchange for work. It is not comparable to earnings and the payment does not have a sufficient connection with the Appellant's ultimate employment with the company to be considered earnings.

Issue 2: How should the $500.00 payment be allocated?

[38] Having found the $500.00 payment was not "earnings", the payment is not to be allocated to the Appellant's claim. Accordingly, the $250.00 overpayment arising from the Respondent's allocation is to be eliminated.

Issue 3: Can the overpayment arising from the allocation be written off by the Tribunal?

[39] Given the finding that the $500.00 payment is not "earnings" and is not to be allocated to the Appellant's claim, I do not find it necessary to decide this issue.

CONCLUSION

[40] The appeal is allowed.

Charlotte McQuade
Member, General Division - Employment Insurance Section

HEARD ON:	February 1, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	R. K., Appellant