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

Citation: *R. G. v Canada Employment Insurance Commission*, 2019 SST 281

Tribunal File Number: GE-18-3474

BETWEEN:

R. G.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Employment Insurance Section

DECISION BY: Gerry McCarthy

HEARD ON: February 27, 2019

DATE OF DECISION: March 14, 2019

Canada

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] The Appellant established a claim for Employment Insurance sickness benefits (EI sickness benefits) on April 7, 2013. The Appellant worked for the "Workplace Safety and Insurance Board" (WSIB) and was dismissed on April 3, 2013. The Appellant indicated her union contested her dismissal and she was re-instated on August 25, 2014. The Respondent explained that the Appellant was paid 15-weeks of EI sickness benefits from April 21, 2013, to August 3, 2013. The Respondent further explained that the Appellant was paid 15-weeks of EI maternity benefits from August 4, 2013, to November 16, 2013, and 35-weeks of EI parental benefits from November 17, 2013, to July 5, 2014. The Appellant was issued a Record of Employment from her employer on October 14, 2015, which indicated she had insurable hours of 1,568.87 and insurable earnings of $35,218.67. The "Comments" section in the Appellant's Record of Employment stated: "February 8, 2013, to August 16, 2013, paid in July 2015." The Respondent explained that the Appellant had not been employed while she was receipt of EI benefits, but in 2015 she had received a retroactive payment which the employer called Short-Term Disability (STD). The Respondent indicated that the dates noted on the Appellant's Record of Employment (February 8, 2013, to August 16, 2013) were the start and end date for which the Appellant was eligible for the STD monies and from which the right to them arose.

[3] The Respondent determined that the Appellant's STD monies were earnings, because the lump-sum payment was to compensate the Appellant for a paid sick leave plan as it was paid to the Appellant by the employer (and not by a third party) for STD. The Respondent allocated these monies to the weeks the Appellant's right to the earnings arose specifically from February 13, 2013, to August 17, 2013. The Respondent further imposed a non-monetary penalty on the Appellant for knowingly making false representations. The Appellant requested a reconsideration. The Respondent maintained their decision on the allocation of earnings, but rescinded the non-monetary penalty. The Respondent further submitted that should the Tribunal dismiss the appeal, they would modify the start date of the Appellant's claim (the benefit period commencement) to after the allocation period. The Respondent explained this would create a

new benefit period within which the Appellant could, at minimum, reduce the overpayment by the 13-weeks of EI parental benefits that she had previously collected at the end of her initial claim with the possibility of further benefits being payable beyond the week of June 29, 2014 (her original end date) providing the Appellant would meet the entitlement conditions.

[4] The Appellant's counsel submitted that the lump-sum payment received by the Appellant was not properly linked to STD monies. The Appellant's counsel further submitted that the lump-sum payment the Appellant received in 2015 cannot be retroactively applied to the Appellant's termination of employment date. The Appellant's counsel also argued there were serious flaws in the Respondent's position. In the alternative, the Appellant's counsel submitted that the Respondent should makes changes to the Appellant's benefit period as specified in their submissions and reduce her overpayment. I find the lump-sum payment the Appellant received for Short-Term Disability was earnings and has been properly allocated.

ISSUES

[5] The Tribunal must decide the following issues:

> Was the lump-sum payment received by the Appellant earnings? If so, were the earnings properly allocated?

ANALYSIS

[6] The *Employment Insurance Regulations* (EI Regulations) defines income 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" is also defined in that subsection, as including any employment, under any express or implied contract of service. Earnings are the entire income of a claimant arising out of any employment [subsection 35(2) of the EI Regulations].

[7] Sums received by a claimant from an employer are presumed to be earnings and must 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. The Federal Court of Appeal has affirmed the principle that the entire income of a claimant arising out of any employment was to be taken into account

in calculating the amount to be deducted from benefits (*McLaughlin v. Attorney General of Canada*, 2009 FCA 365).

Was the lump-sum payment received by the Appellant earnings?

[8] I find the lump-sum payment received by the Appellant was earnings, because the payment was for Short-Term Disability and paid to the Appellant directly from her employer and not from a third-party. In short, the lump-sum payment received by the Appellant did arise from her employment and was earnings under section 35(2)(c) of the EI Regulations because the payment was made to compensate the Appellant for a paid sick leave plan. Furthermore, the lump-sum payment would not meet any of the exceptions listed in section 35(7) of the EI Regulations.

[9] I realize the Appellant's counsel submitted that the lump-sum payment received by the Appellant in 2015 was not properly linked to STD monies. Specifically, the Appellant's counsel cited a letter from the Appellant's employer (Exhibit GD14-4) which indicated that the Appellant had not worked enough consecutive days in 2013 to receive her new STD days. Nevertheless, this letter would pre-date the payment of the STD monies by 15-months as the Appellant confirmed during the hearing she received her lump-sum payment from the employer in December 2015. On this matter, I would agree with the Respondent that the employer's letter dated August 22, 2014 (Exhibit GD14-4) was prior to their decision to release Short-Term Disability monies to the Appellant and had no effect on the monies paid to the Appellant at a later date.

[10] I further recognize the Appellant's counsel submitted that there was no T4A slip issued to the Appellant for the STD monies. Specifically, the Appellant's counsel submitted that the proper Canada Revenue Agency (CRA) form was lacking and there was a lack of payment for pension contributions and health care coverage. However, the Appellant has not been able to show that her Record of Employment and the statements from the employer about her Short-Term Disability monies was incorrect (Exhibit GD3-79 to GD3-81). I realize the Appellant's counsel speculated that perhaps the lump-sum payment was provided to settle a grievance filed by the Appellant's union while the Appellant was on extended leave. Nevertheless, this was only

speculation and there was no “Minutes of Settlement” provided in the Appeal Docket that might demonstrate the lump-sum payment was for something other than Short-Term Disability.

[11] I do realize the Appellant’s counsel further argued there were flaws in the Respondent’s submission which cast some doubt on whether the Appellant’s lump-sum payment was for Short-Term Disability. However, I prefer the employer’s documented information in the Record of Employment (which was payroll information) that the lump-sum monies paid to the Appellant in 2015 were for Short-Term Disability. As cited above, the Appellant’s counsel speculated that the lump-sum payment might have been provided to settle a grievance filed by the Appellant’s union. Nevertheless, this argument was speculative and unsupported by any documentary evidence.

Were the earnings properly allocated?

[12] I find the Appellant’s earnings were properly allocated to the weeks that the Appellant’s right to the earnings arose which was February 13, 2013, to August 17, 2013. The Appellant’s counsel argued that the Appellant’s lump-sum payment could not be retroactively applied to the Appellant’s termination of employment date. The Appellant’s counsel further submitted that the Appellant’s lump sum payment was received in late 2015 which was outside her claim period. Nevertheless, I wish to emphasize that it was the reason for the payment (and not the date of the payment) which determined when the earnings were to be allocated. In this case, the Appellant’s earnings were properly allocated to the weeks in which the payments were paid or payable under a sick leave plan pursuant to section 36(12)(a) of the EI Regulations.

[13] I do realize the Appellant was frustrated, displeased, and unhappy with the allocation of her lump-sum payment. However, I must apply the EI Regulations to the evidence. In other words: I cannot ignore, re-fashion, circumvent, or re-write the EI Act and EI Regulations even in the interest of compassion (*Knee v. Attorney General of Canada*, 2011 FCA 301).

[14] I do wish to emphasize the Respondent has submitted that should the Tribunal dismiss the appeal they would modify the start date of the Appellant’s claim (the benefit period commencement) to after the allocation period. The Respondent explained this would create a new benefit period within which the Appellant could, at minimum, reduce the overpayment by

the 13-weeks of EI parental benefits that she had previously collected at the end of her initial claim with the possibility of further benefits being payable beyond the week of June 29, 2014 (her original end date) providing the Appellant would meet the entitlement conditions.

[15] In their supplementary submissions (dated February 12, 2019), the Respondent specifically explained that the Appellant's new benefit period commencement would be August 18, 2013. The Respondent indicated this would result in a benefit period that would run from August 18, 2013, to the week beginning August 10, 2014. The Respondent submitted that the effect of this change on the Appellant's current overpayment would be a reduction of the overpayment by 13-weeks of benefits that would be payable from April 6, 2014, to June 29, 2014, and the benefit rate was $501.00 per week.

[16] In summary: I find the Appellant's lump-sum payment was earnings and has been properly allocated.

CONCLUSION

[17] The appeal is dismissed. However, the Respondent submitted that should the Tribunal dismiss the appeal they would modify the start date of the Appellant's claim to after the allocation period. The Respondent further submitted that the effect of this change on the Appellant's current overpayment would be a reduction of the overpayment by 13-weeks of benefits that would be payable from April 6, 2014, to June 29, 2014, and the benefit rate was $501.00 per week.

Gerry McCarthy

Member, General Division - Employment Insurance Section

HEARD ON:	February 27, 2019
METHOD OF PROCEEDING:	Videoconference
APPEARANCES:	R. G., Appellant Andrew Langille (Staff Lawyer for Scarborough Community Legal Services), Representative for the Appellant