



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

[TRANSLATION]

Citation: *R. G. v Canada Employment Insurance Commission*, 2019 SST 810

Tribunal File Number: GE-19-1627

BETWEEN:

R. G.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Catherine Frenette

HEARD ON: May 27, 2019

DATE OF DECISION: May 29, 2019

DECISION

[1] The appeal is allowed in part.

OVERVIEW

[2] The Appellant made an initial claim for regular benefits on January 15, 2013.

[3] The Appellant is a 30% shareholder in a construction company.

[4] During an investigation, the Canada Employment Insurance Commission (Commission) discovered that the Appellant had not reported company earnings, considering himself self-employed, during the benefit period beginning on December 23, 2012. Therefore, the company income had not been considered with respect to the payment of benefits. Furthermore, the Commission determined that the Appellant had received earnings from his company during the weeks in which he claimed Employment Insurance benefits, which resulted in an overpayment.

[5] The Tribunal must therefore determine whether the Appellant received earnings that can be considered company income that must be allocated.

PRELIMINARY MATTERS

[6] This file was handled at the same time as the Appellant's other two files—files 19-1628 and 19-1629.

[7] At the hearing, the Appellant's representative confirmed that the issue of reconsideration is not disputed. Therefore, the Tribunal will not consider it in its decision.

ISSUE

[8] How should the Appellant's company earnings be allocated?

ANALYSIS

[9] **How should the Appellant's company earnings be allocated?**

[10] Earnings are defined as "the entire income of a claimant arising out of any employment" (section 35(2) of the Regulations).

[11] In the case of a claimant who is self-employed, income include amounts payable to a claimant in respect of wages, but also the amount of the gross income from that employment remaining after deducting the operating expenses, other than capital expenditures, incurred therein (sections 35(2)(a) and (10)(c) of the Regulations).

[12] Therefore, when an amount paid has been qualified as earnings, this amount must be allocated over a certain period based on the reasons for its payment (section 36 of the Regulations).

[13] Earnings of a claimant who is self-employed that arise from the performance of services are allocated to the weeks in which those services are performed (section 36(6) of the Regulations).

[14] The Appellant does not dispute that the company's net profits constitute earnings within the meaning of section 35(10)(c) of the Regulations. What the Appellant disputes is the way in which the Commission calculated and allocated the earnings.

[15] The Commission used the months in which the company made a net profit and in which the Appellant filed for benefits. Then, the Commission divided the benefits by 30% and by the number of days in the month.

[16] Therefore, the Commission determined that the Appellant's earnings should be allocated based on the following calculations (net profit/ number of days per month x shares in the company):

- December 2012: $\$35,792.11 / 31 = \mathbf{\$1,154.58 \text{ per day}}$
- January 2013: $\$26,895 / 31 = \mathbf{\$867.58 \text{ per day}}$
- February 2013: no profit

[17] According to the report by the company's accountant, income taxes were \$9,097 and the amortization of capital assets was \$9,329 for the year ending March 31, 2013. To deduct these amounts from the computation of profit, the Commission made the following calculation:
 $\$9,097 + \$9,329 = \$18,426 / 52 \text{ weeks} = \$354.$

[18] The Commission multiplied the amounts by the number of days in each of the weeks, deducted the taxes and amortization per week (\$354), and multiplied by the Appellant's shares in the company (30%) to determine earnings per week. The company income must be calculated based on the amount of the gross income remaining after deducting the operating expenses, other than capital expenditure, incurred therein (section 35(10)(c) of the Regulations; *Lafave v Canada (Attorney General)*, 2003 FCA 66). Therefore, the Commission is of the view that the Appellant should have reported the following earning amounts:

- Week of December 23, 2012: $\$1,154.58 \times 7 = \$8,082$

$\$8,082 - \$354 = \$7,728$

$\$7,728 \times 30\% = \mathbf{\$2,318}$

- Week of December 30, 2012: $(\$1,154.58 \times 2 \text{ days in December} = \$2,309.16) +$
 $(\$867.58 \times 5 \text{ days in January} = \$4,337.90) = \$6,647.06$

$\$6,647.06 - \$354 = \$6,293.06$

$\$6,293.06 \times 30\% = \mathbf{\$1,887.91}$

- Week of January 6, 2013: $\$867.58 \times 7 = \$6,073$

$\$6,073 - \$354 = \$5,719.06$

$\$5,719.06 \times 30\% = \mathbf{\$1,715.71}$

- Week of January 13, 2013: $\$867.58 \times 7 = \$6,073$

$\$6,073 - \$354 = \$5,719.06$

$\$5,719.06 \times 30\% = \mathbf{\$1,715.71}$

- Week of January 20, 2013: $\$867.58 \times 7 = \$6,073$

$\$6,073 - \$354 = \$5,719.06$

$\$5,719.06 \times 30\% = \mathbf{\$1,715.71}$

- Week of January 27, 2013: $\$867.58 \times 5 \text{ days in January} = \$4,337.90$

$\$4,337.90 - \$354 = \$3,983.90$

$$3,983.90 \times 30\% = \mathbf{\$1,195}$$

[19] The Appellant's representative argues that the Commission made an error in the monthly breakdown of the company's net profits. The Appellant's representative explained that the calculation the Commission proposed is inaccurate because net profits per month are not the reflection of an actual profit generated by the company. Indeed, this income does not account for expenses generated in order to obtain an actual profit. Therefore, it is possible that, due to the purchase of equipment, the company ends one month with a deficit, but that the following month it makes a substantial profit because the client paid for the performance of the contract arising from the equipment purchase. Therefore, the amount of profit does not reflect the company's profit because it does not account for the expense incurred for this contract.

[20] In support of her claim, the Appellant's representative submitted the decision *Canada Employment Insurance Commission v R. T.*, 2017 SSTA DEI 155, in which the Tribunal's Appeal Division member referred to a Federal Court of Appeal decision, *Canada (Attorney General) v Talbot*, 2013 FCA 53.

[21] In *Talbot, supra*, the Federal Court of Appeal rightly questioned the period during which earnings should be allocated. The Court determined that the income described under section 35(10)(c) of the Regulations was not the company's annual income: "Rather, one must calculate the income generated during the period in which the services were performed and allocate that amount to the number of weeks in that period in accordance with subsection 36(6) of the Regulations" (*Talbot, supra*).

[22] Based on *Talbot, supra*, the Appellant's representative argues that the Appellant's share of the company's annual net profits should be divided by 365 days and allocated over 365 days. Therefore, from April 1, 2012, to March 31, 2013, the company's net profit was \$6,553 multiplied by 30% and divided by 365 days, for a total of \$5.39 per day. Therefore, the Commission should allocate \$5.39 each day.

[23] However, the Commission is of the view that *Talbot, supra*, does not apply to this case because earnings must be determined and allocated by week—the base period used in the legislation. Furthermore, the Commission is of the view that the allocation of income arising

from company operations must be based on net income received over the course of each week during the benefit period, even if the claimant may have sustained a net loss over the course of operations for a longer period.

[24] In the Commission's view, if the Appellant had reported his earnings in his claim for benefits, the earnings would have been allocated on a weekly basis from the beginning. When the Commission has to allocate earnings retroactively, it uses the method to calculate net income that is as close as possible to the results obtained if the earnings had been declared in the claim. Furthermore, it is also an issue of fairness in that a claimant should not benefit from the fact that they did not declare their self-employment income.

[25] The Tribunal is of the view that the calculation the Commission proposed is inaccurate. Indeed, the monthly calculation the Commission proposed does not account for income generated during the period in which services were performed. Rather, it accounts only for the net profits of certain months in the total operating period (section 36(6) of the Regulations and *Talbot, supra*). Just because the company made a profit one month does not mean the services were performed in that same month.

[26] The Tribunal is also of the view that the reasoning the Appellant's representative proposed to allocate the amounts over 365 days is inconsistent with the provisions of the Regulations and case law. Earnings must be allocated to the weeks in which services were performed (section 36(6) of the Regulations). Therefore, earnings must be allocated in terms of weeks and not days. Furthermore, earnings should not be randomly allocated over a year, but instead to the number of weeks the company is in operation, that is, to the weeks in which services are performed (*Talbot, supra*; section 36(6) of the Regulations).

[27] What does that mean for this case? At the hearing, the Appellant explained that his company usually operates from May to December, but that it is possible for the company to have contracts outside this period. Therefore, the Appellant was unable to specify the exact period of operation for 2012.

[28] Therefore, the Tribunal allocated earnings from the April 1, 2012, to March 31, 2013, fiscal year, that is, 52 weeks.

[29] Next, the Tribunal notes that the amounts used by the Appellant's representative are inaccurate because they were for the fiscal year ending March 31, 2012 (GD3-29).

[30] According to the financial report, the company's gross income on March 31, 2013, was \$116,226. We must then deduct \$44,059 in operating expenses and \$9,097 in taxes from that amount. The amount of company income to be allocated is therefore \$63,110. This amount must be multiplied by the percentage of shares in the company—30%—and divided by 52 weeks for a total of \$364.10 per week. Therefore, the Commission must add \$364.10 to the weekly earnings the Appellant declared between April 1, 2012, and March 31, 2013.

[31] The appeal is allowed in part.

CONCLUSION

[32] The appeal is allowed in part.

[33] The Tribunal is of the view that the earnings and allocation the Commission proposed were inaccurate. The Tribunal adjusted the calculation based on *Talbot, supra*, and finds that the company income was \$364.10 per week between April 1, 2012, and March 31, 2013.

Catherine Frenette
Member, General Division – Employment Insurance Section

HEARD ON:	May 27, 2019
METHOD OF PROCEEDING:	Videoconference
APPEARANCES:	R. G., Appellant France Simard, Representative for the Appellant