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

Citation: *R. C. v Canada Employment Insurance Commission*, 2019 SST 732

Tribunal File Number: GE-19-1800

BETWEEN:

R. C.

Appellant/Claimant

and

Canada Employment Insurance Commission

Respondent/Commission

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Candace R. Salmon

HEARD ON: May 28, 2019

DATE OF DECISION: May 31, 2019

DECISION

[1] The appeal is dismissed. I find the Appellant's weekly benefit rate was calculated in compliance with the provisions of the *Employment Insurance Act*.

OVERVIEW

[2] The Appellant, who I will refer to as the Claimant, made an initial claim for employment insurance (EI) benefits. The Canada Employment Insurance Commission, which I will refer to as the Commission, established the claim based partially on the number of hours of insurable employment accumulated by the Claimant in the qualifying period. The Claimant requested reconsideration of the Commission's calculation, arguing the earnings reflected on the Record of Employment did not include his true earnings and submitting that his benefit rate should be higher. The Commission upheld its decision. The Claimant appeals the decision to the Social Security Tribunal (Tribunal), arguing all of his earnings should be included in the Commission's calculation.

ISSUE

[3] Has the rate of weekly benefits been correctly calculated?

ANALYSIS

[4] A claimant's rate of weekly benefits is calculated as 55% of their weekly insurable earnings.[1] The maximum weekly earnings for claims starting after the year 2000 is the maximum yearly insurable earnings divided by 52, representing the number of weeks in a year.[2]

[5] The Claimant resided in the Toronto region at the relevant time, and the rate of unemployment in this region was 6% from February 10, 2019, until March 9, 2019. The weekly insurable earnings are the insurable earnings in the calculation period divided by a certain number of weeks, where the number of weeks (the divisor) is determined by reference to the applicable regional rate of unemployment in the Claimant's area of residence and a chart at subsection 14(2)

---

[1] *Employment Insurance Act*, subsection 14(1)
[2] *Employment Insurance Act*, subsection 14(1.1)(b)

of the *Employment Insurance Act*. A benefit period was established effective March 3, 2019. Based on subsection 14(2) of the *Employment Insurance Act*, the divisor for the benefit period was 22 weeks, meaning the Commission used the best 22 weeks in the Claimant's qualifying period to establish the rate of weekly benefits. The qualifying period in this case is March 4, 2018, until March 2, 2019.

[6] The Claimant's Record of Employment states he accumulated 1382 hours of insurable employment between February 14, 2018, and March 1, 2019, and $19,074.48 of insurable earnings. As the EI system automatically used the best—highest earning—22 weeks of insurable earnings to calculate the Claimant's rate of weekly benefits, it calculated the insurable earnings of $19,862 divided by the best 22 weeks, which equals $903. This number, $903, represents the average weekly insurable earnings. The Commission then multiplied this by 55%, to come to a benefit rate of $497.

[7] The Claimant disputes the Commission's calculation because he believes the Commission failed to consider all of his earnings from the employment. He submitted to the Commission that he had credit card tips, event tips, and cash tips, which he claimed on his taxes and which should all be considered in his earnings. The Claimant stated that in the previous 12 month period, his earnings were $51,526, which is much higher than the $19,862 used by the Commission in calculating his benefit rate.

[8] The employer issued a letter on March 11, 2019, confirming the Claimant's gross income information and monthly voluntary gratuity for 2018 and 2019. The Claimant added the 2018 and 2019 amounts, $31,115, to the additional credit card tip amounts of $15,292 and cash tip amount of $5,119 to come to an annual earnings of $51,525. The Commission contacted the employer on March 29, 2019, who stated the monthly credit card tip amounts are direct tips, paid directly to the Claimant by the customer and are non-taxable and non-insurable.

[9] At the hearing, the Claimant testified that he received multiple different types of gratuities. He stated the event tips were collected by the employer and were included on his paycheques. The Claimant stated these event tips were taxed by the employer. The Claimant states his credit card tips were paid out separately, and reflected tips left by patrons directly to him. Additionally, the Claimant stated he made cash tips which were also directly provided to him. The Claimant testified

that he tracks all forms of gratuities, and submits the information to his account to claim on his tax return.

[10] On the Record of Employment, box 15c PP – 1, for the pay period ending March 2, 2019, states the Claimant accumulated $1153.50 in insurable earnings. The Claimant included the pay stubs relating to this entry, which shows gross earnings in the amount of $1,033.22 and $120.28, with gross earnings including payment for hourly pay and event gratuities. This shows that the portion of the tips collected by the employer and paid to the Claimant was included in the calculation of the benefit rate.

[11] The Claimant submitted that his tips should be factored into his total earnings as they were the primary source of his income. The Claimant did not dispute the hours accumulated on the ROE, or any details with respect to his region or the regional rate of unemployment.

[12] The Commission submitted the benefit rate has been calculated with reference to the insurable earnings, and the additional tips are not insurable and cannot be considered in establishing the benefit rate.

[13] I note that the Claimant provided multiple documents, including character references and medical reports and opinions, which are not relevant to this decision. When asked why the Claimant believed the additional gratuities are insurable earnings, he stated that he declared the money and that it was the primary source of his income.

[14] The issue as I see it is that the Claimant has mischaracterized a portion of his earnings as insurable earnings. Income from gratuities can be insurable earnings, but are not always so. If the gratuities are controlled tips, meaning the employer controls and possesses the tips and pays them to an employee, these are part of the employee's insurable remuneration because the employer paid them to the employee. These are insurable, and are reflected on the Claimant's pay stubs as the gratuities portion of his pay. It also means, for clarity, that EI premiums were deducted on this income.

[15] By contrast, direct tips are paid directly from the customer to the employee. The employer is not in control of these tips, though it may pay the tips to the employee if the gratuity was provided by credit card. The overarching consideration is that the employer did not control the gratuity, and

is only the facilitator in ensuring the employee receives the gratuity. These direct tips are not insurable earnings. The gratuity amounts were not subject to EI premiums. While the Claimant argued that he paid tax on these additional amounts, tips and gratuities may be considered income with respect to the *Income Tax Act*, but the determination of whether gratuities are insurable earnings under the *Employment Insurance Act* depends on different considerations.

[16] In this case, only the controlled tips are part of the Claimant's insurable earnings. I find there is no error in the Commission's calculation of the benefit rate, and the Claimant is not entitled to the consideration of his additional gratuities in the calculation of the benefit rate because the additional monies he describes are direct tips and are not insurable earnings. While the Claimant submitted it was unfair and unreasonable to not include the additional gratuities in his insurable income, I find the benefit rate has been calculated in accordance with the law and the Claimant is not entitled to use non-insurable income, for which he did not pay EI premiums, in the calculation of his EI benefit rate.

CONCLUSION

[17] The appeal is dismissed. I find the Claimant's weekly benefit rate was calculated in compliance with the provisions set out in Section 14 of the *Employment Insurance Act*.

Candace R. Salmon
Member, General Division - Employment Insurance Section

HEARD ON:	May 28, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	R. C., Appellant