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

[TRANSLATION]

Citation: *R. L. v Canada Employment Insurance Commission*, 2019 SST 1017

Tribunal File Number: GE-19-2845

BETWEEN:

R. L.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Employment Insurance Section

DECISION BY: Normand Morin

HEARD ON: September 18, 2019

DATE OF DECISION: September 20, 2019

Canada

DECISION

[1] The appeal is dismissed. I find that the money the Appellant received as wages constitutes earnings under section 35 of the *Employment Insurance Regulations* (Regulations) and that those earnings were allocated in accordance with the provisions set out in section 36 of the Regulations.

OVERVIEW

[2] On January 6, 2016, the Appellant filed a claim for benefits effective January 3, 2016. During his benefit period, the Appellant worked as a clerk-cashier for the employer X (employer), from March 3, 2016, to April 25, 2016, inclusive.

[3] The Respondent, the Canada Employment Insurance Commission (Commission), determined that the money the Appellant received as wages from the employer constituted earnings, and it was allocated. Those earnings were therefore deducted from the Appellant's benefits. This resulted in the Commission asking him for the amounts that were overpaid to him (overpayment).

[4] The Appellant argues that the employer made errors concerning the number of hours he had worked. He noted that the hours he had worked had not all been paid in the right weeks. The employer therefore paid him for fewer hours than he had worked during a pay period and the hours that had not been paid to him were paid to him in another pay period. The Appellant also noted that the employer had not paid him all the hours owed at the end of his period of employment. On August 6, 2019, the Appellant disputed the decision following the Commission's reconsideration of it. That decision is now being appealed to the Tribunal.

ISSUES

[5] I must determine whether the money the Appellant received as wages constitutes earnings under section 35 of the Regulations and, if so, determine whether the allocation of those earnings was made in accordance with the provisions set out in section 36 of the Regulations.

[6] To reach that conclusion, I must answer the following questions:

a) Does the money the Appellant received as earnings constitute earnings?

b) If so, how should those earnings be allocated?

ANALYSIS

[7] The provisions on the determination and allocation of earnings for benefit purposes are set out in sections 35 and 36 of the Regulations respectively. Section 35 defines what constitutes income and employment and specifies what types of income must be considered earnings, while section 36 states how earnings must be allocated.

[8] Under section 35 of the Regulations, earnings are a claimant's entire income arising out of any employment. An amount received will not be considered earnings if it falls under the exceptions set out in section 35(7) of the Regulations or if it does not arise from employment.

Does the money the Appellant received as wages constitute earnings?

[9] Yes. I find that the money the Appellant received as wages constitutes earnings under section 35 of the Regulations because that amount represents income that was owed to him after working for the employer.

[10] In its May 23, 2019, decision, the Commission determined that the Appellant's income for the weeks starting on March 6, 13, and 20, 2016, was to be established as follows:

- $231.00 (week starting on March 6, 2016);
- $231.00 (week starting on March 13, 2016);
- $286.00 (week starting on March 20, 2016).[1]

[1] GD3-40 to GD3-42.

[11] Those amounts correspond to the amounts the employer stated that it paid the Appellant for the weeks in question.[2]

[12] The Appellant acknowledged receiving $748.00 (gross amount) as wages from the employer X for the three weeks in question, that is, $231.00 for the week of March 6 to 12, 2016; $231.00 for the week of March 13 to 19, 2016; and $286.00 for the week of March 20 to 26, 2016.

[13] The Appellant did not dispute the fact that that amount represents earnings.

[14] I find that that amount constitutes earnings because it is part of the Appellant's entire income arising from his employment, as section 35(2) of the Regulations indicates.

[15] That amount is connected to the employment that the Appellant held with the employer X since he had a right to that amount and it was paid to him in return for work done for that employer.

[16] The case law indicates that a sum of money will be considered earnings if an employee earns it as a result of their work, or in return for their work, or if a "sufficient connection" exists between the claimant's employment and the amount received.[3]

[17] Furthermore, the amount the Appellant received does not fall under the exceptions set out in section 35(7) of the Regulations that would allow the amount not to be considered earnings.

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[2] GD3-36, GD3-37, and GD3-62.
[3] *Roch*, 2003 FCA 356.

How should those earnings be allocated?

[18] Section 36(4) of the Regulations provides that earnings that are payable to a claimant under a contract of employment for the performance of services must be allocated to the period in which the services were performed.

[19] The case law indicates that amounts that constitute earnings under section 35 of the Regulations must be allocated under section 36 of the Regulations.[4]

[20] I am of the opinion that the amount paid to the Appellant by the employer X must be allocated in accordance with section 36(4) of the Regulations because that amount was payable under a contract of employment in return for services rendered.

[21] The Appellant's statements and testimony indicate the following:

a) When the Appellant worked for the employer, it did not always record the hours worked in the right weeks. For example, for a given pay period, the employer paid him for fewer hours than the actual number of hours worked, and the hours for which he had not been paid for the same period were paid to him in another pay period. The employer regularly made errors concerning the hours worked and corrected them by recording them in the following week. Therefore, those hours were not recorded in the week corresponding to the hours worked. Ultimately, it corresponds to the same number of hours worked. The Appellant does not have documents showing that some of the amounts he received were earning from weeks other than those recorded on his Record of Employment.[5]

b) The Appellant noted on his Records of Employment whether he had received the right amounts and whether the number of hours recorded was accurate. For example, regarding the statement of earnings dated March 24, 2016, and referring to the period of March 6, 2016, to March 19, 2016 (gross amount of $462.00 and net amount of $435.02 for 42 hours of work), the Appellant wrote [translation] "work 52 pay 42

[4] *Boone et al*, 2002 FCA 257.
[5] GD2-2, GD3-45, and GD3-61.

missing 10 hr (sic)," meaning that, according to him, he had been paid for 42 hours and 10 hours were missing, but those 10 hours had been paid to him in another pay period.[6] Regarding the statement of earnings dated April 7, 2016, and referring to the period from March 20, 2016, to April 2, 2016 (gross amount of $603.90 and net amount of $554.36 for 52 hours of work and 2.9 hours for a holiday), he wrote [translation] "OK verified [...]" and he had initialed,[7] meaning that the number of hours worked and declared was correct, including the $286.00 that the employer reported to have paid him for the week of March 20 to 26, 2016.[8]

c) In his claimant's statements, the Appellant indicated that he had received $198.00 for 18 hours worked the week of March 6 to 12, 2016, and that he had received nothing for the period from March 13 to 26, 2016.[9]

d) In a statement to the Commission, dated July 3, 2019, the Appellant explained that he had made a gradual return to work as of March 8, 2016, that is, two days per week. During that gradual return, the employer had given him work that was within his capabilities.[10]

e) According to the Appellant, the hours the employer had not paid him for do not concern the weeks starting on March 6, 13, and 20, 2016, for which the Commission carried out an allocation. Those unpaid hours refer to his last week of employment in April 2016. The employer had not given him his last pay.[11]

f) The Appellant considers that he was penalized by the fact that his hours worked were not always recorded in the right weeks. Employment Insurance accuses him of having received $537.00 too much in benefits (overpayment).[12]

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[6] GD3-58.
[7] GD3-57.
[8] GD2-2, GD3-57, and GD3-58.
[9] GD3-21, GD3-22, and GD3-30.
[10] GD3-61.
[11] GD3-38, GD3-39, and GD3-61.
[12] GD2-2 and GD3-43.

[22] The evidence on file, the statements, and the Appellant's testimony show that he received earnings of $748.00 for the weeks starting on March 6, 13, and 20, 2016.

[23] Even if, for the period from March 6 to 19, 2016, that is, for the weeks starting on March 6 and 13, 2016, the Appellant submitted that he had worked 52 hours, that is, 10 hours more than those for which he had been paid. He did not provide evidence to that effect.

[24] It remains that, for those two weeks, he received $462.00, or $231.00 each week, for the 42 hours worked during that period.

[25] I put the most weight on the documentary evidence gathered by the Commission to establish that the Appellant received $462.00 for those weeks (for example, statement of earnings dated March 24, 2016, and proof of deposit into the Appellant's bank account the same day).[13]

[26] I find contradictory the information provided by the Appellant regarding the hours he reported having worked those two weeks and the amounts he reported having received from the employer for those periods. Indeed, in his claimant's statements, he indicated he had received $198.00 for the 18 hours worked during the week of March 6 to 12, 2016,[14] and that he had not received earnings during the period from March 13 to 26, 2016.[15] Then, in a statement he made to the Commission on July 3, 2019, the Appellant indicated that he had made a gradual return to work as of March 8, 2016, that is, two days per week, and that the employer had given him work that was within his capabilities during that gradual return.[16] Finally, at the hearing, he submitted that he had worked 52 hours during the period from March 6, 2016, to March 19, 2016.

[27] Case law informs us that the burden of proof for disputing the employer's pay information is on the claimant (Appellant), and that mere allegations are not enough.[17]

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[13] GD3-54 and GD3-58.
[14] GD3-21 and GD3-22.
[15] GD3-30.
[16] GD3-61.
[17] *Déry*, 2008 FCA 291.

[28] As for the week beginning on March 20, 2016, the Appellant acknowledged at the hearing that he had received $286.00 in earnings and that that amount was included in the $603.90 he had received for the period from March 20, 2016, to April 2, 2016.

[29] I find that the Appellant received total earnings of $748.00 for the period in question, and that those earnings must be allocated to the period during which services were rendered, as section 36(4) of the Regulations indicates.

[30] Therefore, the following amounts must be allocated: $231.00 to the week starting on March 6, 2016, an identical amount for the week starting on March 13, 2016, and $286.00 to the week starting on March 20, 2016.

[31] Those amounts must be deducted from the benefits paid to the Appellant because they come from the employment that he held with the employer X. Those amounts are part of the Appellant's entire income arising from his employment, as section 35(2) of the Regulations indicates.

[32] Case law indicates that, when calculating the amount to be deducted from benefits, the claimant's entire income arising out of any employment must be considered.[18]

[33] I find that the $748.00 in earnings that the Appellant received was correctly allocated under section 36(4) of the Regulations.[19]

[18] *McLaughlin*, 2009 FCA 365.
[19] *Boone et al*, 2002 FCA 257; *McLaughlin*, 2009 FCA 365.

CONCLUSION

[34] I find that the $748.00 that the Appellant received in wages during the period in question constitutes earnings under section 35(2) of the Regulations and must be allocated under section 36(4) of the Regulations for the period during which services were provided, that is, $231.00 to the week starting on March 6, 2016, an identical amount to the week starting on March 13, 2016, and $286.00 to the week starting on March 20, 2016.

[35] I find that those earnings were allocated in accordance with the provisions set out in sections 35 and 36 of the Regulations.

[36] The appeal is dismissed.

Normand Morin
Member, General Division – Employment Insurance Section

HEARD ON:	September 18, 2019
METHOD OF PROCEEDING:	In person
APPEARANCE:	R. L., Appellant