



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *B. S. v Canada Employment Insurance Commission*, 2019 SST 1030

Tribunal File Number: AD-19-490

BETWEEN:

B. S.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Shirley Netten

DATE OF DECISION: October 15, 2019

DECISION AND REASONS

DECISION

[1] The appeal is allowed.

BACKGROUND

[2] B. S. (Claimant) worked as a salesperson, and was paid both wages and commissions. She was laid off in February 2019 and applied for employment insurance benefits. The Canada Employment Insurance Commission (CEIC) determined her weekly benefit rate of \$310 by using an averaging formula found in section 23(3) of the *Employment Insurance Regulations* (EI Regulations). That formula applies when a person was paid solely by commissions, or by “salary and irregularly paid commissions.”

[3] The Claimant appealed her benefit rate to the Tribunal’s General Division. The Claimant said that her commissions were not irregularly paid, and that her benefit rate should be higher. The General Division dismissed her appeal. I gave the Claimant permission to appeal to the Appeal Division, because there was an arguable case that the General Division had applied the wrong legal test.

CONCESSION

[4] The CEIC has conceded this appeal. Both parties now accept that the General Division erred by not addressing whether the Claimant’s commissions were regularly or irregularly paid, and by implicitly determining that s. 23(3) of the *Employment Insurance Regulations* (Regulations) applied. The parties also agree that the Claimant’s commissions were in fact paid regularly, and that her benefit rate should be calculated accordingly.

REASONS

[5] I agree with the parties that the General Division made an error of law¹ by failing to consider and correctly apply s. 23(3) of the Regulations. I also agree that the Claimant’s

¹ This is one of the permitted grounds of appeal to the Appeal Division, found in s 58(1)(b) of the *Department of Employment and Social Development Act* (DESDA)

commissions were not “irregularly paid.” The evidence was undisputed that the Claimant received payment for commissions biweekly, even though these were offset from payment of her wages. A finding that these commissions were paid regularly is also consistent with the Federal Court of Appeal’s interpretation of a related provision in the Regulations:²

In my respectful view, the word "regular", when used to modify the phrase "salary, wages or commissions," indicates clearly those payments that are normally or routinely paid to an employee on a continuous basis.

[6] The Appeal Division can substitute its decision for that of the General Division.³ I conclude that the Claimant’s weekly benefit rate should not have been calculated using the allocation formula in s. 23(3) of the Regulations. The Claimant’s benefit rate must be recalculated accordingly.

CONCLUSION

[7] The appeal is allowed. The Claimant’s weekly benefit rate of \$310 was not correctly calculated. It must be recalculated on the basis that commissions were regularly, not irregularly, paid to the Claimant.

Shirley Netten
Member, Appeal Division

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| METHOD OF PROCEEDING: | On the Record |
| APPEARANCES: | B. S., Appellant S. Prud’homme, Representative for the Respondent |

² S 23(1.1) of the Regulations, discussed in *Canada (Attorney General) v Barnes*, 2002 FCA 413, which was submitted by the CEIC representative

³ See s 59(1) of the DESDA