



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

[TRANSLATION]

Citation: *M. L. v Canada Employment Insurance Commission*, 2019 SST 1423

Tribunal File Number: GE-19-3088

BETWEEN:

M. L.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Lucie Leduc

HEARD ON: October 30, 2019

DATE OF DECISION: November 8, 2019

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] The Appellant was diagnosed with cancer in December 2018, which required him to take a leave of absence. During his qualifying period, he worked as an assistant returning officer for provincial elections and accumulated enough hours of insurable employment to establish a benefit period for sickness benefits. As a result, he filed his benefit claim, which was established effective January 20, 2019.

[3] While filing his reports online, the Appellant realized that he was being asked to report all amounts of money he received. As a result, he wondered how he should report the amounts he was receiving as a board member of a mutual insurance company. After a few discussions and a considerable delay,¹ the Employment Insurance Commission (Commission) told the Appellant that those amounts constituted earnings within the meaning of the *Employment Insurance Act* (Act) and that they had to be allocated weekly.

[4] The Appellant is challenging the Commission's decision because he disagrees with the fact that the amounts arise from a contract of employment and that his position as a director constitutes employment.

PRELIMINARY MATTERS

[5] The Appellant has two appeal files before the Tribunal. The issues are distinct and independent and are therefore the subjects of two distinct decisions. However, according to section 3(1)(a) of the *Social Security Tribunal Regulations* and with the Appellant's agreement, I held a single hearing for both issues to proceed as informally and quickly as possible while upholding the rules of natural justice.

¹ The Commission issued its decision on the earnings on June 10, 2019, about six months after the Appellant's claim for benefits.

ISSUES

[6] The Tribunal must decide the following issues:

- a) Do the amounts the Appellant received as part of his position as a director on a board of directors constitute earnings within the meaning of the Act?
- b) If so, did the Commission allocate the amounts correctly?

ANALYSIS

[7] The general rule with Employment Insurance is that any amount considered earnings under the Act must then be allocated. Section 35 of the *Employment Insurance Regulations* (Regulations) sets out the rules for determining whether an amount constitutes earnings.

[8] Once an amount has been identified as earnings, section 36 of the Regulations governs when and how the earnings must be allocated.

Issue 1: Do the amounts the Appellant received as part of his position as a director on a board of directors constitute earnings within the meaning of the Act?

[9] In this case, the Appellant reported from the outset his position on the board of directors of X and the amounts that he receives as part of that office. He stated that he receives \$1,207.69 every two weeks, regardless of his activities. Furthermore, he may receive amounts for his attendance at meetings, which he calls [translation] “directors’ fees.”

[10] Based on the evidence and the current state of the law, I find that the sums the Appellant received as fees for his position as a director on a board of directors constitute earnings.

[11] I first asked myself whether the title of board member corresponds to the definition of employment set out in section 35(1) of the Regulations.

[12] The Commission argues that the sums at issue arise from employment under a contract of employment and that that is why they constitute earnings according to section 35(1) of the Regulations. It also argues that the amounts are paid for services he rendered to the board of

directors and therefore constitute earnings within the meaning of the section 35(2) of the Regulations.

[13] The Appellant dismisses the idea that being a member of a board of directors constitutes “employment.” In support of his position, he argues that there is no employment relationship, that he is not salaried or an employee, and that there is no contract of employment and no relationship of subordination with anyone, since he holds an elected position.

[14] I agree with the Appellant on that point. The Commission made a mistake by applying section 35(1)(a) to the director position to include that office in the definition of employment. The facts show that there is no employer or contract of employment in this case, and what we have here is therefore not a contract of service or a contract of employment.

[15] I find that section 35(1)(c) of the Regulations—that is, “the tenure of an office as defined in subsection 2(1) of the *Canada Pension Plan*”—applies in this case. In its definitions, the *Canada Pension Plan* (CPP) defines *office* as follows:

[T]he position of an individual entitling him to a fixed or ascertainable stipend or remuneration and includes a judicial office, the office of a minister of the Crown, the office of a lieutenant governor, the office of a member of the Senate or House of Commons, a member of a legislative assembly or a member of a legislative or executive council and any other office the incumbent of which is elected by popular vote or is elected or appointed in a representative capacity, and also includes the position of a corporation director, and *officer* means a person holding such an office.

[16] I am of the view that the Appellant’s office as a director corresponds to the definition of “office” in the CPP. It is agreed that he was elected to his position, and I consider X to be a corporate entity. While there is not an abundance of case law on the issue of directors, some umpires have ruled on the issue.

[17] For example, in CUB 36937, the position held by an elected city councillor was considered to meet the definition of office in section 35(1)(c) of the Regulations and was therefore considered “employment” for the purposes of the Act. Furthermore, in CUB 34087, the applicant was a shareholder and a company director. Judge Stevenson decided that the fees paid

to directors were for services rendered and therefore that directors constituted a category of “employment.”

[18] These decisions have convinced me that the position of director of X held by the Appellant constitutes employment because it constitutes an office as stated in section 35(1)(c), despite the absence of an employer-employee relationship. While I accept the position held by the Appellant involved a decision-making role rather than a clerical one and that his involvement fluctuated from one week to another, it remains no less true that the Appellant was receiving an amount for his services as a director (the office held).

[19] Section 35(2) of the Regulations indicates that the entire income arising out of any employment constitutes earnings to deduct from benefits. This was confirmed by the Federal Court of Appeal.²

[20] Additionally, the Federal Court of Appeal specified that the amounts earned are considered to be earnings if there is a sufficient connection between the employment and the amount received.³ I am satisfied that, in this case, the \$1,207.69 that the Appellant receives every two weeks has an established connection with his office as a director. I find the same for the amounts received periodically as [translation] “directors’ fees.” He receives them when he attends meetings as part of his employment, that is his office as a director.

[21] I therefore find as the Commission did that the amounts constitute earnings within the meaning of the Regulations, but based on different grounds.

Issue 2: Did the Commission allocate the amounts correctly?

[22] Regarding allocation, the Federal Court of Appeal has confirmed the principle that amounts that are earnings under section 35 of the Regulations must be allocated under section 36 of the Regulations.⁴ I must therefore determine how the amounts paid to the Appellant, which are at issue in this case, should be allocated to his benefit period.

² *McLaughlin v Canada (Attorney General)*, 2009 FCA 365.

³ *Canada (Attorney General) v Roch*, 2003 FCA 356.

⁴ *Boone et al v Canada (Employment Insurance Commission)*, 2002 FCA 257.

[23] For the reasons that follow, I find that the Commission did not allocate the Appellant's earnings according to the Act.

[24] The Commission argues that the amounts arising from fees paid to the Appellant for his office as a director should be allocated according to section 36(4) of the Regulations. Yet, that provision indicates that the earnings are "payable [...] under a contract of employment." As I determined previously, we are not, in this case, in a situation of a contract of employment. Consequently, I find that this section does not apply to the Appellant's circumstances in terms of how to allocate the income.

[25] Instead, I am relying on section 36(19)(a) of the Regulations because the amounts paid for board members' duties are not specifically set out in the other provisions of section 36. The provision reads as follows:

Where a claimant has earnings to which none of subsections (1) to (18) apply, those earnings shall be allocated

(a) if they arise from the performance of services, to the period in which the services are performed;

[26] I have already determined that services are rendered as part of the Appellant's office, and therefore the amounts should be allocated to the period during which the services are rendered. The Appellant testified that the fee received every two weeks was in fact an annual fee. He was paid at various frequencies at different times, from an annual payment to payments every three months, as well as every month. I find that the payment frequency does not change the fact that the fee is paid for the annual tenure of the office. The amounts received over each annual term should therefore be allocated at the rate of an identical amount for each week of the year. When the amounts in question are paid is not important, and the allocation must be done over the period during which the services were rendered. In this case, the annual fees paid to the Appellant for his office as a director must be allocated over an annual basis. Following the same logic, when the Appellant receives one-off amounts for his meetings (directors' fee), the allocation is based on when the event takes place (the service rendered), not when the fee is paid.

[27] As a result, I have arrived at the same conclusion as the Commission: the amounts are allocated to the period when the services are rendered, that is, over 52 weeks at the rate of \$604 per week. However, the Commission did not apply the proper provisions. In this case, section 36(19)(a) of the Regulations should apply.

CONCLUSION

[28] The appeal is dismissed.

Lucie Leduc
Member, General Division – Employment Insurance Section

HEARD ON:	October 30, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	M. L., Appellant