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

Citation: *A. H. v Canada Employment Insurance Commission*, 2020 SST 263

Tribunal File Number: AD-19-763

BETWEEN:

A. H.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Janet Lew

DATE OF DECISION: March 16, 2020

Canada

DECISION AND REASONS

DECISION

[1] The appeal is dismissed because the General Division considered the Claimant's arguments and, at the same time, correctly allocated the Claimant's earnings.

OVERVIEW

[2] The Appellant, A. H. (Claimant), a university professor, is appealing the General Division's decision that he had to repay $644 in Employment Insurance benefits.

[3] The General Division determined that the Claimant had earnings for the weeks of August 27, 2017, and September 3, 2017. Therefore, it also determined that he was not entitled to receive Employment Insurance regular benefits during these periods.

[4] However, the Claimant denies that he worked during the weeks of August 27, 2017, and September 3, 2017. He maintains that he did not start working for his employer until the school year started, on September 11, 2017. Because he did not report to work until September 11, 2017, the Claimant claims that he did not have any employment earnings before then. When he completed the Employment Insurance weekly reporting forms, he stated that he did not work or receive any earnings during the weeks from August 27 to September 9, 2017.[1]

[5] The Claimant argues that the General Division failed to consider his arguments that he did not work during the weeks of August 27, 2017, and September 3, 2017.

[6] I am dismissing the appeal. I find that the General Division considered his arguments that he began working only on September 11, 2017. I also find that the General Division did not make an error when it assessed whether the Commission had correctly allocated the Claimant's earnings.

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[1] See weekly report at GD3-13.

ISSUES

[7] The issues before me are as follows:

(a) Did the General Division fail to consider the Claimant's arguments that he did not have any earnings for the weeks of August 27 and September 3, 2017?

(b) Did the General Division correctly allocate the Claimant's earnings?

ANALYSIS

Issue 1: Did the General Division fail to consider the Claimant's arguments that he did not have any earnings for the weeks of August 27 and September 3, 2017?

[8] Yes. I find that the General Division considered the Claimant's arguments that he did not have any earnings for the weeks of August 27, 2017, and September 3, 2017.

[9] The Claimant argues that the General Division failed to consider his main argument that he could not have had any earnings for the weeks of August 27, 2017, and September 3, 2017, because he did not begin working until September 11, 2017.

[10] The Commission argues that the General Division did in fact address the Claimant's argument, at paragraph 11 of its decision:

> Putting aside for the moment the reason for which the employer broke down the monthly gross earnings to weekly earnings, I find based on the Claimant's evidence, that the $201.34 and $1,006.70 form part of the total $4,362.62 the employer paid him for September 2017. The Claimant submitted a copy of a teaching contract with the employer to teach two courses in the 2017 Fall Session, and the 2017/2018 Fall Session, respectively. I find, therefore, that the employer paid him for work done under contract of a service, and that there is sufficient connection between the Claimant's employment and the money the Claimant received.

[11] The amounts of $201.34 and $1,006.70 correspond with the amounts that the Claimant's employer reported that the Claimant earned for the weeks starting August 27, 2017, and September 3, 2017, respectively.[2]

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[2] See Request for Clarification of Employment Information, at GD3-25.

[12] The Claimant argues that this does not show that the General Division addressed his main arguments. After all, the Claimant does not deny that he received this money under the teaching contract. However, he denies that he earned this money before September 11, 2017. He asserts that he did not have any earnings from his employment before this date. He argues that this money therefore should not be allocated to any time before September 11, 2017.

[13] It is not apparent from paragraph 11 of the General Division decision whether it considered the Claimant's argument that he did not actually perform any work until September 11, 2017. The General Division did not mention any specific dates or the Claimant's claims that he did not begin working until September 11, 2017. The General Division simply accepted that the Claimant received this money as part of his teaching contract. The General Division concluded that there was a sufficient connection between the Claimant's employment and his earnings.

[14] Although the Commission referred only to paragraph 11, I see that the General Division also discussed the Claimant's arguments in paragraphs 15 to 17. There, the General Division noted the Claimant's arguments that:

- his earnings corresponded with physical work, "and if he did not work in a particular week, he did not have earnings in that week."[3]
- the start date of September 1, 2017, and the amounts identified in the Record of Employment, were for accounting purposes only.[4]
- his teaching contract[5] did not specify any particular start dates for work.

The Claimant's arguments about his teaching contract

[15] The teaching contract was for two teaching appointments as a course director. One course was for the fall 2017 session. The second course was for the fall/winter 2017/2018 session. The teaching contract did not mention a start date of September 1, 2017. The Claimant claims that the teaching contract supports his argument that the employer's choice of September 1, 2017, as the

[3] See General Division decision, at para 15.
[4] See General Division decision, at paras 16 and 17.
[5] See Contract Teaching – Offer of Appointment, dated 06/10/2017, at GD2-13 to GD2-16.

date when the Claimant began to receive any earnings was arbitrary and for accounting purposes only.

[16] As the Commission notes, the General Division examined some of the other documents to see whether they could show whether the Claimant had any earnings for the weeks of August 27, 2017, and September 3, 2017. These documents included the Record of Employment[6] and information from the employer:[7] The General Division noted that:

- the Record of Employment showed a start date of September 1, 2017. It also showed that the employer paid the Claimant monthly, around the 25th of each month. Payments were for $4,362.56 in each of four pay periods.
- The employer gave the Commission a breakdown of the monthly earnings. The employer stated that the Claimant had earnings of $201.34 in the week of August 27, 2017, and $1,006.70 in the week of September 3, 2017.

[17] Having examined these two particular documents, the General Division member concluded that the Claimant's contract started on September 1, 2017. The member gave a lot of weight to the Record of Employment and payroll information. This was despite the fact that the teaching contract did not specify any start dates, and the Claimant did not physically start working until September 11, 2017. The General Division rejected the Claimant's assertion that September 1, 2017, represented an arbitrary start date, used for accounting purposes only.

The Claimant's arguments that earnings had to correspond with physical work

[18] The General Division found that a start date of September 1, 2017, theoretically took into account the likelihood that university professors would need some preparation time before classes started. The General Division noted that, indeed, the Claimant confirmed that his employer paid for preparation time. The Claimant added that he had the Sunday and Monday to prepare. He had taught one of the classes before, so he did not need much preparation time.[8]

[6] See Record of Employment, dated January 5, 2018, at GD3-19 to GD3-20.
[7] See Request for Payroll Information and Investigation Information Sheet, at GD3-22 to GD3-24.
[8] See General Division decision, at para 23.

[19] The General Division found that it was reasonable for the university to provide for preparation time in the teaching contract before the Claimant taught his first class in September 2017. This was irrespective of whether he actually needed all of that time for preparation.

[20] Similarly, the university paid the Claimant up to December 31, 2017, even though he had finished teaching before then, because it was expected that he would need time to assess and mark papers and examinations.

[21] The Claimant's real dispute in this matter lies with his employer. After all, the Claimant's employer decided that the Claimant's earnings began on September 1, 2017, rather than some later date. The employer also decided that the Claimant's earnings ended on December 31, 2017. Clearly, there was some expectation by both parties that preparation and assessment were required and that the employer would compensate the Claimant for that time.

[22] Although the Claimant did not physically work on the university campus until September 11, 2017, the General Division found that the Claimant's contract with the university covered the period from September 1, 2017, to December 31, 2017.

[23] Given this analysis, I find that the General Division did in fact consider the Claimant's arguments that he did not begin work until September 11, 2017. The General Division assessed the evidence and considered whether the Claimant's earnings started on September 1, 2017, or some later date.

[24] Having determined that the General Division had in fact considered the Claimant's arguments, I turn now to examine the General Division's analysis of whether the Commission had correctly allocated his earnings to the weeks of August 27, 2017, and September 3, 2017.

Issue 2: Did the General Division correctly allocate the Claimant's earnings?

[25] Yes. I find that the General Division correctly allocated the Claimant's earnings by applying section 36(5) of the *Employment Insurance Regulations* (Regulations).

[26] The Regulations define how earnings are to be allocated. Section 36(5) of the Regulations states:

Allocation of Earnings for Benefits Purposes

> **36(5)** Earnings that are payable to a claimant under a contract of employment without the performance of services or payable by an employer to a claimant in consideration of the claimant returning to or beginning work shall be allocated to the period for which they are payable.

[27] Under section 36(5) of the Regulations, earnings do not have to be tied to actual physical work. Under a contract of employment, earnings can arise **without the performance of services**.

[28] If section 36(5) of the Regulations applies, and if the employer's information that the Claimant's teaching contract started on September 1, 2017, is accepted, then the Claimant will have earnings of $201.34 and $1,006.70, for the weeks of August 27, 2017, and September 3, 2017. These earnings would be allocated to the weeks of August 27, 2017, and September 3, 2017.

[29] The Claimant rejects the notion that any earnings should have been allocated to any period under the teaching contact before he actually started working on September 11, 2017.

[30] The Claimant argues that the General Division should have accepted that he did not have any earnings until September 11, 2017, for several reasons:

- The Employment Insurance reporting forms are misleading;
- The forms should be interpreted according to their plain meaning;
- It would be unreasonable and unconscionable not to accept his responses, particularly because Commission agents told him how he should complete the biweekly reports;
- The legal principle *contra proferentum* applies, so that any ambiguity in the forms should be interpreted in the Claimant's favour; and
- Principles of tort liability apply, in that the Commission breached its duty of care to him, for which he says he should be compensated.

[31] If the Claimant did not have any earnings until September 11, 2017, then the earnings would not be allocated to the weeks of August 27, 2017 and September 3, 2017.

[32] I will describe the Claimant's arguments in detail below.

Interpretation of Employment Insurance application forms

[33] The Claimant acknowledges that, under section 36(5) of the Regulations, earnings can arise without the performance of services under a contract of employment. However, he argues that section 36(5) of the Regulations should not apply in his case. Instead, he argues that his interpretation of and response to the Employment Insurance reporting form questions should be accepted. One of the questions he answered was, "Did you work or receive any earnings during the period of this report? This includes work for which you will be paid later, unpaid work or self-employment."

[34] He argues that the Employment Insurance weekly reporting forms should be clear and straightforward because mostly laypeople fill out the forms. They should not be expected to be familiar with the *Employment Insurance Act* (Act) or the Regulations.

[35] To him, the question on the reporting form appeared simple and straightforward. He interpreted it and understood that he had to report earnings for a particular week **only** if he had physically worked that week. He claims that this was a logical and reasonable interpretation of the question.

[36] Even as a linguist, someone who specializes in language, the Claimant says that there is only one rational interpretation for this question. He argues that the question refers only to working hours, rather than to earnings. He notes that the question is in the past tense.[9] He argues that the question necessarily refers to work that has already been performed, or to earnings that he had already received. He argues that it could not possibly refer to anything other than actual work and that it should not include any earnings for which there was no associated work. For this reason, he says that he could not have had any earnings before September 11, 2017.

[37] The Claimant notes that the second part of the question starts with the word "this." He argues that the word "this" refers to work in the first question. It was work for which he would be paid later, unpaid work, and self-employment including farming. He argues that there can be

[9] See Claimant's letter dated October 24, 2019, and Appendix A, at AD1-2 to AD1-5.

no other valid interpretation of the question, other than to tie it to work. In other words, it would make no sense to consider earnings without any associated work.

[38] The Claimant argues that his interpretation should also be accepted because of the *contra proferentum* principle. The Claimant argues that, under this principle, if there is any ambiguity in the question, the question must be interpreted in his favour, against the party that drafted the forms. This would mean accepting his response to the question that he did not have any earnings until the week of September 11, 2017.

[39] If forms are unclear, the Claimant says it is reasonable to turn to the Commission's representatives for help and clarification and to be able to rely on that help, as he did. He argues that the Commission should be bound by the advice it gives to claimants, even if that advice turns out to be wrong.

[40] Finally, the Claimant argues that the Commission had a duty of care towards him. It was under a duty to ensure that it provided forms that were unambiguous and that it communicated clear and accurate advice to him. He argues that the Commission was in breach of that duty. He argues that the Commission's breach has resulted in damages to him. For instance, he has spent time and money and come under enormous stress and anxiety in pursuing this appeal. For these reasons too, he submits that the Commission should reverse its decision. He submits that it should accept that he did not have any earnings until the week of September 11, 2017.

[41] The Claimant argues that, if he misinterpreted the question, it would be unconscionable and unreasonable to enforce the rules under the Regulations against him. This is so, because he claims that the question led him to believe that he had to report only whether he had physically worked.

General Division's consideration of Claimant's arguments

[42] The Claimant made the same arguments before the General Division. The General Division addressed some of them. Indeed, the member stated that she agreed with portions of the Claimant's argument. But, she found that the Claimant's arguments centered on his earnings reports, any confusion that arose from the wording in the report form, and any erroneous advice

he might have received from Service Canada agents.[10] The member concluded that the Claimant's arguments did not have any impact on the issue of whether he had earnings that should be allocated. She found his arguments irrelevant.

[43] The Claimant argues that the General Division member's findings overlook a fundamental point that he made: Because of the wording in the report forms, claimants should have to report earnings only if they have actually worked. The General Division did not wholly disagree with this.

[44] The General Division did not decide the issue of the Claimant's earnings in a vacuum. The General Division largely relied on the Record of Employment and payroll information that the employer provided:

- The Record of Employment stated that the first day worked was September 1, 2017. The employer paid the Claimant on a monthly basis, so notionally payment was for the month, rather than for just a portion of the month.
- Payroll information from the employer gave a breakdown of the Claimant's earnings. The breakdown was for the weeks of August 27, 2017, and September 3, 2017.

[45] The General Division found that the Claimant's employer paid him before he physically started working on September 11, 2017, recognizing that there would be time for preparation.

[46] As arbitrary as the start and end dates may seem, even the Claimant acknowledged that his employer paid him for preparation, teaching, and assessments.[11] While there may not have been any discussion or anything set out in the teaching contract about start and end dates, clearly the employer felt the teaching contract did not start the day that the Claimant physically attended the university campus on September 11, 2017, or that the teaching contract ended on the day of examinations. The General Division noted this.

[10] See General Division decision, at para 27.
[11] See General Division decision, at para 23.

[47] The General Division considered the employer's information, the Record of Employment, the fact that there was a teaching contract, and the nature of the Claimant's employment. From this, the General Division concluded that the Claimant's employment under the teaching contract began on September 1, 2017. The General Division considered the evidence and weighed the likelihood as to when the Claimant's employment began. The General Division found that section 36(5) of the Regulations applied in the Claimant's case. The General Division cited the section at paragraph 14 of its decision. As the trier of fact, the General Division was entitled to assess and weigh the evidence. The General Division determined that earnings included those that were payable under a teaching contract, even without the performance of any services, such as in the Claimant's case. The General Division's conclusions were reasonable, based on the evidence before it.

Findings

[48] The Claimant argues that the General Division should have accepted the responses that he gave on his weekly Employment Insurance reports, irrespective of the fact that his employer said he effectively started his employment on September 1, 2017, or when he earned money from his employment. The Claimant accepts that he received money under his teaching contract. However, he maintains that he did not earn money under the contract until after he began working. He argues that this money should be allocated to a period that coincides with when he worked. After all, the Employment Insurance weekly report forms ask claimants whether they worked.

[49] Now that this appeal is before me, the Claimant argues that I should accept his responses on the weekly reporting forms that he did not have any earnings for the weeks of August 27, 2017, and September 3, 2017. This would mean disregarding section 36(5) of the Regulations.

[50] This is problematic for two reasons: one, the question on the reporting form clearly refers to earnings, and two, the Act and the Regulations prevail.

[51] If the question on the reporting form required a claimant to report only actual work, that would have stripped the second half of the question of any meaning. If the second half of the question did not have any independent meaning, the question could have ended at "Did you

work?" Rather, the question asked whether a claimant worked OR whether that claimant received any earnings.

[52] The second half of the question asks claimants whether they received any earnings during the period of the report. The reference to earnings in the question signals that there is a difference between work and earnings. In other words, there could have been earnings without necessarily having performed work. This addressed the Claimant's situation.

[53] I agree that the question could have been better phrased. Or, the question could have been more detailed. As the Claimant notes, the question is in the past tense. As it relates to earnings, the question is "Did you receive any earnings during the period of this report?"

[54] There was no second part to this question, as there was for the question relating to work. The question, "Did you work?" was followed by a sentence that defined what that work included. The work included work for which a claimant would be paid later, unpaid work, or self-employment.

[55] For earnings, there was nothing to define whether that included other earnings. These could have included earnings that the Claimant had yet to receive. These could have also included earnings of which he was unaware, or even earnings for which he had not performed any work.

[56] Even so, I find the question in the reporting form clear. The question, as phrased, shows a clear distinction between work and earnings. Generally, the two concepts might seem the same. After all, work tends to generate earnings, and earnings typically arise after work. But, if "work" and "earnings" were the same, there would have been no need to ask whether a claimant received any earnings, if the question had already been asked whether a claimant worked.

[57] Clearly, there are occasions when they do not coincide, such as when there is a contract of employment. An employer might be obligated to pay an employee under a contract of employment, for whatever reason, without requiring that the employee physically attend at a particular workplace. This is addressed by section 36(5) of the Regulations.

[58] Despite the Claimant's arguments, the Act and the Regulations govern. The Claimant is bound by the rules and requirements set out under the Act and the Regulations. Claimants seeking benefits under the Act have to, of course, abide by the rules and requirements under the Act. This is so, irrespective of whether claimants are familiar with or unaware of those rules and requirements. As unfair as it may seem, it is no excuse to plead reliance on erroneous advice from Commission staff or on unclear forms.

[59] Neither the Act nor the Regulations suggest that applicants' responses on weekly reporting forms are determinative as to whether and when they had earnings. Ultimately, the Commission can look to external considerations, such as records of employment, payroll information, teaching contracts, or other, to determine when applicants had earnings.

[60] I find that the General Division correctly allocated the Claimant's earnings by applying section 36(5) of the Regulations.

CONCLUSION

[61] The appeal is dismissed.

Janet Lew
Member, Appeal Division

HEARD ON:	February 4, 2020
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	A. H., Appellant Melanie Allen, Representative for the Respondent