



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *SR v Canada Employment Insurance Commission*, 2020 SST 1136

Tribunal File Number: GE-19-2123

BETWEEN:

S. R.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Bonnie Ozirny

HEARD ON: February 12, 2020

DATE OF DECISION: June 28, 2020

DECISION

[1] The appeal is dismissed with modification.

OVERVIEW

[2] For 8.5 months in 2012 and 2103 during the Claimant's benefit period, the Claimant worked for four different employers. She worked for two employers in some weeks.

[3] The Commission's conducted an investigation that showed apparent discrepancies between the Claimant's gross earnings reported by the employers and what the Claimant reported in her bi-weekly claims. The Commission says that the Claimant declared only some of her earnings for the weeks starting September 16, 2012, up to and including the week starting June 23, 2013. The Commission adjusted the allocation of the Claimant's gross earnings based on the information it received from the four employers. The Commission allocated the Claimant's gross earnings, which resulted in an overpayment of benefits paid to her.

[4] The Claimant provided time sheets from one employer, and payroll information and pay statements from three employers. She acknowledges that there are discrepancies, and says she disagrees with the Commission's allocation. She says that the EI system is not compatible with requirements to report earnings because of extenuating dynamics of her situation in which she had four employers and four different pay periods, which do not align with the bi-weekly claim periods. The Claimant submits that the Commission did not allocate pay advances correctly. She disputes the Commission's calculation of the weekly gross wage for the employer that paid her monthly.

[5] The General Division made a decision on the record when the Claimant did not appear for the hearing for which the Claimant believed she had been granted an adjournment. She appealed the decision to the Appeal Division. The Appeal Division returned the appeal to the General Division for a hearing¹.

ISSUE

¹ 2019 SST 493.

[6] I have to decide:

1. Did the Claimant's wages from the employer constitute earnings?
2. If the wages are earnings, did the Commission allocate the Claimant's earnings correctly?

ANALYSIS

[7] The Commission conducted an investigation into the Claimant's earnings during a period while she was collecting EI benefits. The investigation showed that the Claimant was working for four different employers at various times during the period starting with the week beginning September 16, 2012 up to and including the week beginning June 23, 2013 (the period), and that the Claimant declared only some of the wages the employers paid her. It allocated the earnings which resulted in an overpayment of \$2,903.00 of benefits to the Claimant.

[8] The Claimant submits that the employment insurance system is not compatible with the differences in the four employers' pay periods and that one employer paid salary advances. She says that the different dynamics related to when and how the employers paid her wages made it impossible for her to know how many hours she worked in each week of the bi-weekly claims she submitted.

Did the Claimant's wages from the employer constitute earnings?

[9] The law says that earnings are the entire income of a claimant arising out of any employment.² The law defines both "income" and "employment". "Income" includes any income that a claimant did or will get from an employer or any other person, whether it is in the form of money or something else.³ "Employment" includes any employment under any kind of contract of service or employment.⁴ When a claimant receives earnings during a period for which benefits are claimed, an amount must be deducted from the benefits.⁵

² Subsection 35(2) of the *Employment Insurance Regulations* (EI Regulations).

³ Subsection 35(1) of the EI Regulations.

⁴ Subsection 35(1) of the EI Regulations.

⁵ Section 19 of the EI Act.

[10] Yes, the wages the Claimant received from the four employers at various times during the period in issue are earnings from employment pursuant to subsection 35(2) of the *Employment Insurance Regulations* (EI Regulations), because the payments were made to compensate her for work she performed. The Claimant worked for four employers at various times during the weeks in issue: a clothing store; a medical clinic; an automobile dealership; and, a drugstore. In some weeks, she worked for two employers.

Employer: clothing store

[11] The Claimant does not dispute that she had earnings from this employer during the period. However, she argues that the Commission has not met its burden of proof, which she argues is the standard of “clear and convincing evidence” and “beyond a reasonable doubt”⁶, to demonstrate that its “claim” was valid based on facts and evidence. She submits that the Commission failed to provide documentation to substantiate the gross earnings this employer told the Commission, by telephone, that it paid to the Claimant. She submits that the Commission should have made more effort to require the employer to produce pay records.

[12] I do not accept the Claimant’s submission that the Commission’s burden of proof of the amount of gross wages the employer says it paid the Claimant is that of clear and convincing evidence and beyond a reasonable doubt. The Federal Court of Appeal reaffirmed that the onus of proof to dispute payroll information that the Commission receives from an employer is on the claimant, and that mere allegations are insufficient⁷. The Claimant’s burden proof is a balance of probabilities, that is, the Claimant must prove it is more likely than not that the payroll information the employer provided to the Commission is wrong.

[13] The Claimant submits that the amounts listed by the Commission under “Your Earnings” in its letter of May 4, 2018⁸, changed dramatically in its letter dated June 28, 2018⁹. I do not accept the Claimant’s submission because the “Earnings from employer” are broken out to show earnings from each of the four employers in specified weeks in the May 4, 2018 letter. In the June 28, 2018, letter “Your earnings are” listed for each week is the total earnings from all

⁶ RGD9-9.

⁷ *Déry v. Canada (Attorney General)*, 2008 FCA 291.

⁸ GD3-49 to 51.

⁹ GD3-55 to 57.

employers she worked for in that week. I note that the Commission does not include the weeks starting October 28, 2012, and November 4, 2012, in either letter, however the employer did provide the Claimant's gross weekly earnings for those weeks when it spoke to the Commission¹⁰. There is also an obvious typographical error on the second page of the May 4, 2018, letter where the Commission lists the week of March 14, 2013, instead of April 14, 2013, after the week April 7, 2013. There is no identifiable discrepancy in the amounts specified in the two letters, and the Claimant's evidence does not identify any discrepancy in the total gross weekly earnings she was paid by this employer in any of the weeks.

[14] The Commission spoke to this employer by telephone, and the employer provided the weekly gross wages it paid to the Claimant for 38 of the 41 weeks in the period¹¹. The Claimant submits that she discovered numerous discrepancies in the reported gross weekly earnings from the employer, therefore, the Commission needs to recalculate the overpayment spreadsheet¹². The Claimant provided pay statements with wage information for bi-weekly pay periods for the weeks in issue¹³. The gross wages stated in all but seven of the bi-weekly pay statements are the same as the gross wages the employer reported to the Commission. The weeks in which the bi-weekly pay statement of gross wages differ from the corresponding two weeks of gross earnings the employer reported are:

- Weeks starting September 30, 2012, and October 7, 2012: The employer told the Commission that the Claimant's gross earnings were \$76.68 and \$170.71, respectively, for a total of \$247.39. The bi-weekly pay statement specifies gross earnings for the two weeks as \$247.40. The difference is \$0.01;
- Weeks starting October 14, 2012, and October 21, 2012: The employer told the Commission that the Claimant's gross earnings were \$145.43 and \$89.00, respectively, for a total as \$235.33. The bi-weekly pay statement specifies gross earnings for the two weeks as \$247.24. The difference is \$11.91;
- Weeks starting November 25, 2012, and December 2, 2012: The employer told the Commission that the Claimant's gross earnings were \$199.64 and \$195.67, respectively,

¹⁰ GD3-45.

¹¹ GD3-45 & 46

¹² RGD9-2.

¹³ GD2-28-36.

for a total of \$395.31. The bi-weekly pay statements specifies the gross earnings for the two weeks as \$395.32. The difference is \$0.01;

- Weeks starting December 9, 2012, and December 16, 2012: The employer told the Commission that the Claimant's gross earnings were \$251.20 and \$256.49, respectively, for a total of \$507.69. The bi-weekly pay statement specifies the gross earnings for the two weeks as \$507.70. The difference is \$0.01;
- Weeks starting December 23, 2012, and ending January 5, 2013: The employer told the Commission that the Claimant's gross earnings were \$282.41 and \$197.16, respectively, for a total of \$479.57. The bi-weekly pay statement specifies the gross earnings for the two weeks as \$479.56. The difference is \$0.01;
- Weeks starting June 16, 2013, and June 23, 2013: The employer told the Commission that the Claimant's gross earnings were \$55.53 and \$0, respectively, for a total of \$55.53. The Claimant submitted two bi-weekly pay statements. Each statement includes one of the weeks stated above. The earnings in the other week in each of those statements were paid in the group of 38 weeks described above in which earnings are not an issue.

[15] After the hearing, the Claimant provided a summary (Claimant's summary), which she prepared from a record she kept of the dates and hours she worked for three of the employers, other than the employer automobile dealership. The Claimant's summary lists the weeks starting September 23, 2012, up to and including the week starting June 23, 2013. She specified each employer she worked for in each week, her hourly wage, her calculation of her gross wages and vacation pay for the total she says is the "total earned", the amount the Commission states she declared in her bi-weekly claims and the amount of overpayment it calculated. Where there are differences between the pay statements and the Claimant's summary, I accept the pay statements the Claimant provided and give them weight over the Claimant's summary because the pay statements are the written record the employer prepared to provide an explanation of net pay to the Claimant in each pay period. The pay statements set out the total hours worked in the pay period, gross wages, vacation pay and statutory holiday pay, and specifies all deductions from gross wages in order to calculate net pay. There is no evidence before me that the Claimant disputed the amount of earnings in any of the pay periods when she was paid those earnings.

[16] With regard to the discrepancies in gross weekly wages, because the Commission obtained the gross weekly earnings from the employer by telephone, I give more weight to the pay statements in the first five discrepancies described in paragraph 15. For the last two discrepancies, I give more weight to the gross weekly earnings the employer reported to the Commission because the pay statements do not contain sufficient information to determine the amount of gross earnings paid for each week in the bi-weekly period.

[17] Taking into account that the Commission rounds earnings to the nearest dollar, I find that the evidence shows only one discrepancy that I must address, that is, the pay statement that shows a difference in earnings of \$11.91 from the amount that the employer reported. Therefore, I find that the employer paid the Claimant gross weekly wages in the amounts it reported to the Commission in each of the weeks in question, except for the weeks starting October 14, 2012, and October 21, 2012, in which the Claimant was paid a total of \$247.24 for the two weeks. I find that the wages the employer paid the Claimant in the 38 weeks during the period was for work she performed for the employer in each of those weeks.

[18] The Claimant submits that coupons, called starbucks, which the employer gave employees who met specific sales levels, should not be included in earnings if the Commission considered them to be earnings. The total amount of the coupons the Claimant refers to is \$120.00. The Claimant did not provide evidence to show that the Commission did include the coupon value as earnings, then, allocated that amount. Based on the evidence before me, I find that the Commission did not include the amount of \$120.00 in employer coupons for use only

Employer: Medical Clinic

[19] The employer medical clinic responded to the Commission's request for payroll information. The employer reported gross weekly wages it paid to the Claimant for each week starting with February 17, 2013, up to and including the week starting March 10, 2013. The employer states that it paid the Claimant gross weekly wages in the amount of \$175.21, \$521.11, \$157.24 and \$300.99 respectively for those weeks¹⁴, for total gross earnings of 1,154.55.

¹⁴ GD3-50.

[20] The Claimant provided copies of timesheets signed by the employer, with her handwritten notes of the hours she says she worked¹⁵. The Claimant's handwritten notes on the timesheets appear to be her calculations of her gross weekly earnings. She provided payroll information for the two monthly pay periods¹⁶, showing a total that corresponds with the information the employer reported to the Commission. The Claimant did not provide any evidence to show that the gross weekly amounts the employer reported to the Commission are not correct. On the basis of the evidence before me, I find that the employer paid the Claimant the gross weekly wages in amount that the employer reported to the Commission.

Employer: Automobile Dealership

[21] The employer automobile dealership provided information to the Commission that it paid the gross monthly wages to the Claimant for the months of April, May and June, 2013. The employer reported that it paid the Claimant gross monthly wages of: \$3,200.00 on May 15, 2013, for work she performed in April 2013; \$3,200.00 on June 15, 2013, for work she performed in May, 2013; and, \$4,012.06 on July 15, 2013, for work she performed in June, 2013.

[22] The Claimant provided paycheque inquiry information¹⁷ and pay stubs¹⁸ that show the same amount of gross wages as the information that the employer provided to the Commission, except that the date of her paycheque issued in June, for work performed in May 2013, is dated June 14, 2013, and not June 15, 2013 as the employer told the Commission. They documents show that the amount of the salary advances the Claimant received are included in deductions from gross monthly pay in calculation of the net pay.

[23] The Claimant has not provided evidence to show that the amount of wages the employer reported to the Commission are not correct. I, therefore, find that the employer paid the Claimant the wages that it reported to the Commission for work she performed in each of the months of April, May and June, 2013.

¹⁵ GD2-10 & 11.

¹⁶ GD2-12 to 14.

¹⁷ GD2-15 & 16.

¹⁸ GD2-18 to 23.

[24] The Commission says that it pro-rated the monthly gross earnings reported by the employer to weekly earnings by dividing the monthly wages by the number of workdays in each month to obtain a daily rate. It then multiplied the daily rate by five days, which the employer reported that the Claimant worked each week, to calculate the Claimant's weekly wages.

[25] The Claimant argues that the Commission's method of calculation of a daily rate of wages is not correct because the Commission only factored in the number of days and hours each day that the employer scheduled her to work per month¹⁹. She told me that her job in auto sales requires working on leads for sales outside her work schedule, and involves her working past the scheduled hours of work during the entire month. She says that on average she worked 60 hours per week at the dealership and frequently did not get two days off each week, but says the employer would never admit that. She submits that her job was based on the efforts and productivity of the entire month, and not on the number of days she was scheduled to work. The Claimant submitted her view of how gross monthly wages should correctly be pro-rated to establish gross weekly wages²⁰. That is, to divide her gross monthly wages of \$3,200.00 for work performed in each of April, May and June 2013 by 30 days to calculate a daily wage. Then, to multiply the daily wage by 5. She told me that using gross weekly wages is hypocritical.

[26] I do not accept the Claimant's submission. I find that the Commission's calculation of the Claimant's weekly wages is reasonable. I find that the pro-rated wages the employer paid the Claimant was for work that she performed in each week from the week starting March 31, 2013, up to and including the week starting June 23, 2013. The Claimant's view of how the Commission should calculate a daily rate of wages and pro-rate gross monthly salary to a weekly salary is based on her working 30 days each month. She did not provide evidence to show that she worked 30 days each month, the number of days she worked in each week, and the hours she worked on each day. The Claimant has not provided evidence to show that the Commission made an error in its calculation of the gross daily wage and gross weekly wage. I note that the method the Claimant asserts as the correct method for pro-rating gross monthly wages to daily and weekly wages shows \$3,200.00 as the gross monthly wages she was paid in each of April,

¹⁹ RGD9-7.

²⁰ RGD9-8.

May and June, 2013, however she declared on the amount of the salary advances she received for work performed in each of the three months.

Employer: Drugstore

[27] The employer drugstore responded to the Commission's request for payroll information. The employer reported gross weekly wages it paid to the Claimant for each week starting with September 16, 2012 up to and including the week starting October 21, 2012²¹.

[28] The Claimant provided pay statements for four bi-weekly pay periods which correspond to the weeks the employer reported that she worked²². I give more weight to the gross weekly earnings that the employer reported to the Commission because the information on the pay statements is not sufficient to determine the amount of gross earnings paid for each week in the bi-weekly period. Therefore, I find that the employer paid the Claimant gross wages of \$106.81, \$88.00, \$87.99, \$86.46, \$86.46 and \$146.54 respectively in the weeks she worked for the employer²³.

[29] The Claimant does not dispute that she had earnings in the weeks during the period, but says that she had difficulty in determining the earnings she had to report in her bi-weekly claims. I acknowledge the difficulties that Claimant states she had in completing her bi-weekly claims because she worked for a total of four different employers during the period who had different pay periods, and the pay periods did not always correspond with the bi-weekly claim periods. However, I note that the Commission did not find that the Claimant made any misrepresentation

[30] The Claimant argues that the Commission did not respond to her request for copies of her written bi-weekly claims that she submitted to the Commission so that she could verify that the amounts the Commission states she declared are accurate. The Claimant's testimony and her

²¹ GD3-50.

²² GD2-24.

²³ GD3-50.

written submission²⁴ show that she only declared the amount of the salary advances the employer automobile dealership paid her for work she performed in the months of April, May and June, 2013. She did not declare the full amount of her gross monthly earnings as shown on the paycheque information in the payroll inquiry she obtained from the employer²⁵ and provided to the Tribunal. The amount of those earnings represents all but a few dollars of the amount the Commission's investigation revealed that the Claimant did not declare.

[31] I find that the wages arose out the Claimant's employment with the four employers. I, therefore, find that the wages she was paid by the four employers constitute earnings within the meaning of the EI Regulations.

Did the Commission allocate the Claimant's earnings correctly?

[32] The law says that earnings have to be allocated. Earnings payable to a claimant under a contract of employment for the performance of services shall be allocated to the weeks in which the services were performed.²⁶

[33] The Commission submits that it correctly allocated the Claimant's earnings to the weeks when she performed the work. The Commission adjusted her earnings in each week in accordance with the EI regulations from the amount she had reported in her bi-weekly claims. The Commission allocated the Claimant's earnings to the week starting September 16, 2012, up to and including the week starting June 23, 2013. The Claimant submits that she had difficulty in determining how to report wages from the four employers, however, the evidence before me shows that the earnings were paid for services she performed for the employers in the weeks during the period. Therefore, I find that the earnings must be allocated.

[34] The Claimant suggested to me that the Commission's allocating earnings before it calculated the amount of overpayment of benefits is not correct. I do not accept the Claimant's position in this regard because the law requires the Commission to allocate earnings. It is only then that the Commission can determine if there has been an overpayment of benefits.

²⁴ RGD9-5 & 6.

²⁵ GD2-15 & 16.

²⁶ Subsection 36(4) of the EI Regulations.

Employer: Clothing Store

[35] The Claimant submits that the Commission did not obtain sufficient documentation to establish the way earnings from this employer “were truly allocated over a bi-weekly period”.²⁷ However, the Commission’s evidence shows that the employer reported the gross earnings paid to the Claimant in each week. The pay statements the Claimant provided specify the total number of hours worked in each week of the two-week periods. The Claimant argues that the Commission proceeded to allocate the gross earnings the employer reported without verifying how many of the total hours specified she worked in each of the two weeks. However, there is no evidence before me to establish that the Commission made an error in its allocation of the Claimant’s gross earnings from this employer. Therefore, I find that the Commission has allocated her gross earning from this employer in the correct amount and to the correct weeks.

Employer: Automobile Dealership

[36] The Claimant submits that the Commission did not correctly allocate salary advances she received. The fact that the employer paid salary advances to the Claimant does not affect the requirement that the Commission must allocate earnings to the weeks in which the Claimant performed the work she is paid for.

[37] The Claimant has not provided any evidence to show that the Commission incorrectly allocated her gross earnings received from the employer drug store or the employer medical centre.

[38] Regardless of how difficult the Claimant may have found it to be to declare earnings from her employers in her bi-weekly claims, the Commission must adjust the gross earnings she was paid to reflect what she worked and earned in each week. The Claimant has not provided evidence to show that the law fails to capture any aspect of the four employers’ pay periods or dates on which she was paid in the rules the Commission is required to follow in the allocation of her earnings.

²⁷ RGD9-9.

[39] I find that the evidence shows that the Commission allocated the Claimant's earnings in the correct amount and to the correct weeks during the period, except for the weeks starting October 14, 2012, and October 21, 2012, with respect to her earnings from the employer clothing store. Based on information in the pay statement the employer issued, the employer paid the Claimant \$247.24, and not \$235.33 which the employer reported to the Commission. Therefore, I direct the commission to contact the employer clothing store to obtain the correct breakdown of weekly earnings in each of the two weeks, and to correct the allocation of the earnings for each of the two weeks on the basis of the services the Claimant performed in each week.

[40] The Claimant told me that she is confused about the amount of overpayment the Commission says she owes. She provides a copy of two notices of debt issued in 2018 and 2019, and three statements of account issued in 2019²⁸. The Claimant should contact the Commission to obtain an explanation of the notices and statements she has received, because only the issues of earnings and allocation are before the Tribunal in this appeal.

CONCLUSION

[41] The appeal is dismissed with modification. The Commission correctly allocated the claimant's gross earnings in each week, except for the employer clothing store for the weeks starting October 14, 2012, and October 21, 2012. The Commission is to correct the allocation of earnings for those weeks once it obtains the correct breakdown of weekly earnings from that employer.

Bonnie Ozirny

Member, General Division - Employment Insurance Section

HEARD ON:	February 12, 2020
METHOD OF PROCEEDING:	Teleconference

²⁸ RGD10.

APPEARANCES:	S. R., Appellant
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