



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *AI v Canada Employment Insurance Commission*, 2021 SST 60

Tribunal File Number: GE-20-2267

BETWEEN:

A. I.

Appellant (Claimant)

and

Canada Employment Insurance Commission

Respondent (Commission)

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Linda Bell

HEARD ON: January 28, 2021, and February 8, 2021

DATE OF DECISION: February 12, 2021

DECISION

[1] I am allowing the appeal in part. The Commission reviewed the Claimant's Employment Insurance (EI) claims within the required period. The Claimant received earnings while in receipt of EI benefits. These earnings are allocated to her EI claims, as amended and set out below.

OVERVIEW

[2] The Claimant submitted an application for sickness EI benefits. The Commission assisted the Claimant when completing her biweekly reports (claims) over the telephone. The Claimant states she told the Commission she paid someone else to do the work. She also says she told them she only kept \$240.00 to cover the income tax and payroll deductions for each pay.

[3] The Commission conducted a review of those claims several months later. They decided that the Claimant failed to report all of her earnings. They amended the allocation, increasing the amount of earnings in each week. This retroactive allocation results in a \$3,221.00 overpayment of benefits.

[4] After reconsideration, the Commission maintained the amended allocation. The Claimant appealed to the General Division of the Social Security Tribunal (Tribunal). She states that she disagrees with the allocation because she did not keep all of the wages for herself. She paid someone else to do the work for her. The Commission states they allocated the earnings in accordance with the *Employment Insurance Regulations (Regulations)*.

[5] The Claimant failed to appear at the November 6, 2019, hearing. The General Division issued their decision on November 18, 2019, dismissing the appeal. The Claimant submitted an appeal to the Tribunal's Appeal Division (the AD) stating she was not able to attend the November 6, 2019, hearing due to medical reasons. The AD allowed the appeal and returned the matter to the General Division for a new hearing.

[6] The General Division held a new hearing on July 22, 2020, and dismissed the appeal for a second time. In his July 22, 2020, decision, the General Division member states that the Commission correctly allocated the Claimant's earnings to her EI claims. The Claimant appealed this decision the AD. The AD granted leave to appeal and heard the matter on October 30, 2020. The AD issued their decision on November 10, 2020. The AD returned the matter to the General Division for reconsideration. I am the member of the General Division assigned to reconsider the appeal. The AD issued directions and specific questions to consider, relating to the retroactive allocation. I have set out those questions below.

[7] In reconsidering the issue, I requested additional submissions from both parties. The Claimant's submissions were received on January 8, 2021. The Commission's submissions were received on January 14, 2021.

[8] A teleconference hearing was held on January 28, 2021, during which the Claimant and an interpreter attended. The hearing was adjourned to February 8, 2021, because the interpreter was required to leave prior to completion of the hearing. The Claimant, her witness, and a different interpreter attended the adjourned hearing on February 8, 2021.

[9] In making this decision, I have considered all documentary evidence and submissions received on the appeal file prior to January 28, 2021. I have also considered the AD decisions, the recording from the July 22, 2020, hearing, and the affirmed testimony provided by the Claimant and her witness.

ISSUES

[10] Did the Commission review the claims within the required timeframe?

[11] Is the Claimant's income earnings for the purpose of EI?

[12] If so, what amount of the Claimant's earnings are to be allocated?

[13] How are the earnings to be allocated to her claims?

ANALYSIS

Did the Commission review the claims within the required timeframe?

[14] Yes. The law says that the Commission may reconsider a claim for benefits within 36 months after the benefits have been paid or would have been payable.¹ This period is extended to 72 months in cases where, if in the opinion of the Commission, a false or misleading statement or representation has been made in connection to a claim.² The Federal Court of Appeal has said that the Commission must be "reasonably satisfied" of its opinion that a false or misleading statement had been made.³

¹ See section 52(1) of the *Employment Insurance Act (Act)*.

² See section 52(5) of the *Act*.

³ *Canada (Attorney General) v Langelier*, 2002 FCA 157; *Canada (Attorney General) v Dussault*, 2003 FCA 372.

[15] The Claimant argues that the Commission was out of time to reconsider her claims. She states that it is unfair for the Commission to re-examine her benefits more than 3 years (36 months) after the period she received EI sickness benefits. She says she is at a disadvantage having to go back and obtain information from that long ago. The Claimant disputes the Commission's assertion that she made a false or misleading statement. She says she told the Commission's agent that she paid someone else to do the work and she only kept enough money to cover the deductions.

[16] The Commission states that the reconsideration period is extended to 72 months because they were reasonably satisfied that false statements were made. Before the AD, the Commission says that the Claimant's original statement about her earnings was false on its face. This is because the amounts the employer reported as weekly earnings paid to the Claimant are greater than, the earnings listed on her biweekly claims.

[17] The Commission submits a copy of their Request for Payroll Information form they sent to the Claimant's employer on January 19, 2016. The period of review listed on this form is March 13, 2016, to May 21, 2016.⁴ This is the same period of review listed on the request for information sent to the Claimant and the decision letter dated July 18, 2019.⁵ So, I find as fact that the period under review is from March 13, 2016, to May 21, 2016.

[18] Based on the evidence set out above, the Commission commenced their review in early January 2019. This is less than 36 months after the biweekly claim reports processed on June 8, 2016, and August 22, 2016. This said I recognize that the Commission notified the Claimant of the outcome of their review on July 18, 2019, which is 38 months after the period that benefits would have been payable for the weeks under review.

[19] The Commission states that the Claimant does not need to have knowingly made the false statements to have a 72-month reconsideration period. It is enough that the statements made were false. Incorrect or inaccurate statements are considered false. This means that if the earnings reported are incorrect, a false or misleading statement or representation is made.

[20] The Commission submits copies of the claims made for the periods of February 28, 2016, to March 19, 2016, and April 17, 2016, to May 28, 2016.⁶ The Claimant says that an agent for the Commission assisted her in completing these reports over the telephone. As per the

⁴ See GD3-22.

⁵ See documents at pages GD3-24 and GD3-26 respectively.

⁶ See GD3-16 and GD3-18 to GD3-19

Supplementary Record of Claims, the Commission processed these claim reports over the telephone on June 8, 2016, and August 22, 2016, respectively. I recognize that the Commission listed the earnings reported and the amended allocation for the period under review, in their July 18, 2019, decision letter.

[21] The Commission relies on the Record of Employment (ROE) and the employer's response to their request for payroll information. Both these documents indicate the Claimant worked during the period under review. The Request for Payroll Information lists different weekly earnings than the earnings listed on the Claimant's biweekly claim reports. Further, there are zero earnings declared in the four weeks from March 20, 2016, to April 10, 2016. However, the employer lists earnings in these weeks on the Request for Payroll Information form. The Commission asked the Claimant to explain these differences. She told them that she paid someone else to do the work and she only kept some of the earnings. She argued that the Commission's agent completed her reports for her.

[22] The Commission commenced their review in early January 2019, which is less than 36 months after the claims were processed, June 8, 2016, and August 22, 2016. This said I recognize that the Commission notified the Claimant of the outcome of their review on July 18, 2019, which is 38 months after the period that benefits would have been payable for the weeks under review.

[23] After careful consideration of the evidence, as set out above, I find as fact that the Claimant's earnings, as listed on the claims processed for the period from March 13, 2016, to May 21, 2016, are different than the weekly earnings reported by the employer on the Request for Payroll Information form. Further, based on the first and last day worked listed on the ROE, it appears that the Claimant worked during the entire period under review.

[24] Based on the evidence set out above, I accept that the Commission was reasonably satisfied that false statements were made in relation to the claim reports for the period from March 13, 2016, to May 21, 2016. Therefore, I find that the period of review is extended to 72 months.⁷ The Commission reviewed the claims and issued their decision 38 months after the period that benefits would have been payable for the weeks under review. This means they conducted their review within the allowable 72-month period.

⁷ See section 52(5) of the *Act*.

Is the Claimant’s income earnings for the purpose of EI?

[25] Yes. The law says that earnings are the entire income of a claimant arising out of any employment.⁸ 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.⁹ “Employment” includes any employment under any kind of contract of service or employment.¹⁰

[26] The Claimant does not dispute that her income is earnings. Rather, she is disputing the amount of income that is considered earnings. I see no evidence to dispute that her income is earnings as defined above. So I find as fact that the Claimant’s income is earnings for the purpose of EI benefits. I will now determine the amount of her earnings for the period from March 13, 2016, to May 21, 2016.

What amount of the Claimant’s income is earnings?

[27] The law provides that in cases of a claimant who is not self-employed, the amount of the claimant’s income that is earnings is the amount remaining after deducting expenses incurred by the claimant for the direct purpose of earning that income.¹¹

[28] During their review, the Commission determined the Claimant’s earnings were as reported by the employer on the Payroll Information form. The Commission rounded off her weekly earnings to the nearest dollar and allocated those amounts as follows:

March 13 to 19, 2016	\$470.00
March 20 to 26, 2016	\$470.00
March 27 to April 2, 2016	\$470.00
April 3 to 9, 2016	\$470.00
April 10 to 16, 2016	\$470.00
April 17 to 23, 2016	\$520.21 (rounded down to \$520.00)
April 24 to 30, 2016	\$520.21 (rounded down to \$520.00)
May 1 to 7, 2016	\$707.71 (rounded up to \$708.00)
May 8, to 14, 2016	\$707.71 (rounded up to \$708.00)
May 15 to 21, 2016	\$707.71 (rounded up to \$708.00)

⁸ Subsection 35(2) of the *Regulations*.

⁹ Subsection 35(1) of the *Regulations*.

¹⁰ Subsection 35(1) of the *Regulations*.

¹¹ See section 35(10(a) of the *Regulations*.

[29] In their supplementary submissions,¹² the Commission states that the law that allows for deductions of expenses¹³ does not apply to the Claimant because any earnings received by the Claimant are subject to allocation. The Commission asserts that this is the case even if the Claimant paid another person all or some of those earnings to do her work. I disagree, because the law clearly states that the “earnings amount” is that which is “remaining” after deducting expenses incurred for the direct purpose of earning that income.

[30] I find as fact that the employer paid the Claimant the wages listed on the Employee Detail, but these are not her earnings for the purpose of her EI benefits.¹⁴ I make this finding, in part, because the net pay amounts listed on the Employee Detail match the deposit amounts listed on the Claimant’s bank record.¹⁵ The Claimant does not dispute that these are the wages paid to her by her employer. Rather, she says she paid most of these earnings to her witness to perform the work. She argues that these wages are not all her earnings for the purpose of allocation for her EI claims. I agree because the Claimant has shown that it is more likely than not, that she incurred expenses for the direct purpose of earning her income.

[31] The Claimant consistently states that she paid her witness to do the work during her period of injury, which was during the period under review from March 13, 2016, to May 21, 2016. She says her earnings were only \$240.00 for each pay during this period. The Claimant states that she explained this to the Commission’s agent when they completed her claim reports over the telephone. I recognize that \$240.00 is the weekly earnings amount listed for the reports completed for the period from April 17, 2016, to May 15, 2016.

[32] In making my findings, I considered the fact that English is a second language for the Claimant and witness. During the hearing, the Claimant and her witness presented testimony through the assistance of an interpreter. Although the Claimant and witness primarily spoke in English, it is clear to me that both required interpretation services in order to present their evidence clearly. This was evident when trying to clarify the amount of money kept by the Claimant each week. Initially she said she kept \$240.00 per week. However, upon further clarification with the assistance of the interpreter, I am satisfied that, for the period under review, the Claimant kept only \$240.00 from each semi-monthly pay cheque, regardless of the amount of payroll deductions. She then paid her witness cash for the balance of the net pay amount.

¹² See RGD6-1.

¹³ Subsection 35(1) of the *Regulations*.

¹⁴ See RGD2-2.

¹⁵ See RGD2-3.

[33] The Claimant's witness provided affirmed testimony on February 8, 2021. He says that he did the work replacing the Claimant from March 2016, to May 2016, because she was unable to perform the duties. He says that she supervised his work. He states that after each payday on the 8th and 23rd of the month, the Claimant would show him her pay stub to prove the amount she was paid. Then she would keep \$240.00 to cover her costs for deductions, and pay him the balance of the net pay in cash. He says that she always kept \$240.00 from each pay cheque, regardless of the amount of the net pay or the deductions.

[34] The Claimant disputes the payroll information provided by the employer. She says the employer told her they pulled that information from the archives as best they could. As explained during the hearing, EI benefits are weekly benefits. Each week starts on Sunday and ends on Saturday.¹⁶ I recognize that the amounts reported by the employer on the Request for Payroll Information form are "weekly" earnings, so they will not match the semi-monthly earnings listed on the Employee Detail document submitted by the Claimant. I explained that when completing EI claim reports, a claimant is required to report their "weekly earnings" not the amount of their earnings listed on each semi-monthly pay cheque.

[35] Based on the foregoing, I accept as fact that the Claimant kept only \$240.00 from each pay cheque, after the expense of paying her witness to perform the work. So her earnings are \$240.00 for the semi-monthly pay periods, as listed below.

[36] The Claimant agrees that she was paid semimonthly, as listed on the ROE and the Employee Detail. Her pay periods went from the 1st to the 15th and then the 16th to the last day of each month (30th or 31st). Her paydays were on the 8th and 23rd or 24th of each month. There was no pay cheque issued to the Claimant on April 23, 2016, for the pay period from April 1, 2016, to April 15, 2016. This is supported by the dates listed on the Employee Detail and the deposits listed on the bank record.

[37] Based on the evidence, as set out above, I find as fact that the amounts of the Claimant's "semi-monthly" earnings, for the period from March 13, 2016, to May 21, 2016, are as follows:

Pay Period Dates	Date Paid	Claimant's Semi-monthly Earnings
March 1 – 15, 2016	March 23, 2016	\$240.00
March 16 – 31, 2016	April 8, 2016	\$240.00
April 1 – 15, 2016	April 23, 2016	NIL

¹⁶ Section 2 of the *Act* defines a week to be seven consecutive days beginning on Sunday.

April 16 – 30, 2016	May 8, 2016	\$240.00
May 1 – 15, 2016	May 24, 2016	\$240.00
May 16 – 31, 2016	June 8, 2016	\$240.00

[38] I now turn my mind to determine the “weekly” amount of the Claimant’s earnings. In making my determination below, I considered the number of days in each week (Sunday to Saturday) that fall within each pay period, along with the fact that the Claimant’s earnings are \$240.00 semimonthly.

Pay Period Dates	Full Weeks (Sunday to Saturday) in each Pay Period	Claimant’s Earnings For Period Under Review
March 1-15, 2016	Feb. 28 to March 5, 2016	\$80.00 Not under review
	March 6 – 12, 2016	\$112.00 Not under review
	March 13 – 19, 2016	<u>\$48.00 *****</u>
	Pay Period Earnings: \$240.00	
March 16-31, 2016	March 13 – 19, 2016	\$56.00 *****
	March 20 – 26, 2016	\$112.00
	March 27 – April 2, 2016	<u>\$72.00</u>
	Pay Period Earnings: \$240.00	
April 1 – April 15, 2016	No Work Performed	Nil Earnings
April 16-30, 2016	April 10 – April 16, 2016	\$16.00
	April 17 – April 23, 2016	\$112.00
	April 24 – April 30, 2016	<u>\$112.00</u>
	Pay Period Earnings: \$240.00	
May 1 – 15, 2016	May 1 – May 7, 2016	\$112.00
	May 8 – May 14, 2016	\$112.00
	May 15 – May 21, 2016	<u>\$16.00 *****</u>
	Pay Period Earnings: \$240.00	
May 16 – 31, 2016	May 15 – May 21, 2016	\$96.00 *****
	May 22 – May 28, 2016	\$112.00
	May 29 – June 4, 2016	<u>\$32.00 up to May 31st</u>
	Pay Period Earnings: \$240.00	

[39] I find as fact that the Claimant’s weekly earnings, for the period under review from March 13, 2016, to May 21, 2016, are the amounts listed in the table below. I recognize that the earnings for the weeks of March 13-19, 2016***** and May 15-21, 2019***** as listed above, fall within two pay periods so they were added together when determining her weekly earnings.

Full Weeks (Sunday to Saturday)	Claimant's Weekly Earnings
March 13 – 19, 2016 (\$48.00 + \$56.00 *****)	\$104.00
March 20 – 26, 2016	\$112.00
March 27 – April 2, 2016	\$72.00
April 3 – April 9, 2016	Nil
April 10 – April 16, 2016	\$16.00
April 17 – April 23, 2016	\$112.00
April 24 – April 30, 2016	\$112.00
May 1 – May 7, 2016	\$112.00
May 8 – May 14, 2016	\$112.00
May 15 – May 21, 2016 (\$16.00 + \$96.00 *****)	\$112.00

[40] Now I will turn my mind to determine how these earnings are to be allocated.

How are the Claimant's earnings to be allocated?

[41] The law says that earnings have to be allocated.¹⁷ Earnings are allocated depending on the nature of the earnings: why were the earnings paid? There are sections in the law on allocation that applies to earnings that are paid or payable to a Claimant as wages for worked performed.¹⁸

[42] The law says that earnings paid or payable under a contract of employment for the performance of services are to be allocated to the period in which the services were performed.¹⁹

[43] The Claimant does not dispute that her earnings are to be allocated to the weeks in which the work was performed. Rather, she disputes the amounts of the earnings allocated by the Commission. The Commission maintains that the earnings listed in their July 18, 2019, decision letter are the correct amounts to be allocated. I disagree, as set out below.

[44] I find as fact that the earnings listed by week, in paragraph [35] above, are the Claimant's weekly earnings to be allocated to the period from March 13, 2016, to May 21, 2016, as listed above. This is because these are the Claimant's gross earnings in each week the work was performed. To clarify, these are the amounts of her weekly earnings after deducting the expenses

¹⁷ Section 36 of the *Regulations*.

¹⁸ Subsection 36(4) of the *Regulations*.

¹⁹ Subsection 36(4) of the *Regulations*.

directly incurred to earn the \$240.00 semi-monthly income.²⁰ Primarily, the expense the Claimant incurred was paying the witness to perform the work.

CONCLUSION

[45] The appeal is allowed in part. The Commission reviewed the claims within the allowable period. The Claimant's income is earnings to be allocated to the weeks the work was performed. The amount of her weekly earnings for the period from March 13, 2016, to May 21, 2016, are as set out in paragraph [35] above.

Linda Bell

Member, General Division - Employment Insurance Section

HEARD ON:	January 28, 2021 and February 8, 2021
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	
January 28, 2021	A. I., Appellant (Claimant) Mr. D. Braganza, Interpreter
February 8, 2021	A. I., Appellant (Claimant) R. M., witness for the Appellant Ms. S. Thompson, Interpreter

²⁰ See section 35(10(a) of the *Regulations*.