



Citation: *MF v Canada Employment Insurance Commission*, 2021 SST 490

**Social Security Tribunal of Canada
General Division – Employment Insurance Section**

Decision

Appellant: M. F.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (418385) dated April 29, 2021 (issued by Service Canada)

Tribunal member: Mark Leonard

Type of hearing: Teleconference

Hearing date: August 18, 2021

Hearing participants: Appellant

Decision date: August 24, 2021

File number: GE-21-1141

Decision

[1] The appeal is dismissed. The Appellant's benefit rate as calculated by the Canada Employment Insurance Commission (Commission) is correct.

Overview

[2] The Appellant established a claim for regular benefits effective February 23, 2020. The Commission accepted the Record of Employment (RoE) supplied by his employer and input his biweekly pay amounts. This resulted in a benefit rate of \$455.00 per week. The Commission identified an error of the Appellant's RoE during an internal file review. It recalculated the Appellant's benefit rate to be \$343.00. This resulted in a \$3,989.00 benefit overpayment subject to recovery.

[3] The Appellant says that it was not his fault that the benefit rate was miscalculated. He says that it was the Employer's fault and that he should not be responsible to pay back the benefits because of his Employer's error. Further, he says that the recovery amounts are incorrect because he did not receive all of the EI benefits that the Commission says he did.

[4] I have to decide whether the benefit rate applied to the Appellant's claim is correct.

Matter I have to consider first

Post hearing documents

[5] The Appellant provided a "Statement of Account" for the EI benefits he received. The Appellant testified to the contents of the document during the hearing and I am satisfied that the document does not convey any facts different from his testimony. I am further satisfied that the document does not prejudice the Commission case because it is a copy of a document it sent to the Appellant. I will accept the statement of account into the record as evidence and consider it in my deliberations.

Issue

[6] What is the correct benefit rate for the Appellant?

Analysis

How is a benefit rate determined?

[7] A benefit rate is calculated by establishing a claimant's normal weekly earnings. The Commission first determines the qualifying period from which it will take the earnings of the claimant. The qualifying period is usually the preceding 52 weeks before the claim establishment date. Then the Commission must select the number of weeks of earnings that will be included in the calculation based on the unemployment rate in the region where the Appellant resides.¹ Then the Commission combines the best weeks of earnings and divides by the same number of weeks selected to find the normal weekly earnings of the claimant.

[8] Lastly, the weekly benefit rate is determined to be 55% of the calculated normal weekly earnings.²

The Appellant's qualifying period

[9] As noted above, the earnings counted are the ones that the Appellant worked during his qualifying period. In general, the qualifying period is the 52 weeks before your benefit period would start.³

[10] The Commission decided that the Appellant's qualifying period was the usual 52 weeks. It determined that the Appellant's qualifying period went from February 24, 2019, to February 22, 2020.

¹ See section 14(2) – Table, of the EI Act.

² See Section 14(1) of the EI Act.

³ See section 8 of the EI Act.

The Appellant agrees with the Commission

[11] The Appellant agrees with the Commission's decision about his qualifying period.

[12] There is no evidence that makes me doubt the Commission's decision. So, I accept as fact that the Appellant's qualifying period is from February 24, 2019, to February 22, 2020.

The Appellants region and regional rate of unemployment

[13] The Commission determined that the Appellant's region was Vancouver and that the regional rate of unemployment at the time was 4.6%.

[14] This means that the Appellant would have a total of 22 weeks of his earnings averaged to establish his normal weekly earnings.

The Appellant agrees with the Commission

[15] The Appellant agrees with the Commission's decisions about which region and regional rate of unemployment apply to him.

[16] There is no evidence that makes me doubt the Commission's decision.

What is the Appellant's normal weekly earnings?

[17] The Commission looked at the RoE supplied by the Appellant's Employer and accepted the figures provided. It selected the best 22 weeks of the Appellant's weekly earnings, combined them, and then divided by 22. It calculated 55% of that number to establish his benefit rate at \$455.00.

[18] Roughly, one year later the Commission conducted a quality assurance review on the Appellant's file and determined that the calculation was wrong.

[19] The Commission contacted the Employer and determined that the Appellant had a highly variable rate of weekly pay because he was a commissioned sales person. It examined his RoE, which was set to semimonthly pay periods that resulted in identifying the highest weeks of earnings. It then changed the RoE to weekly pay periods, which

changed the normal weekly earnings to roughly \$579.00. Fifty-five percent of \$579.00 established the Appellant's weekly benefit rate as \$343.00.

[20] The commission did not explain why it changed the RoE pay periods to weekly from biweekly. In fact, such a change would not on its surface result in the change of benefit rate.

[21] However, examination of the file reveals that it is more likely that the Commission took the Appellant's entire yearly earnings and averaged them over 52 weeks to establish his normal weekly earnings. It did this because the Appellant was paid a combination of a salary (draw) and commissions. The *Employment Insurance Regulations* (Regulations) says that if you are paid a combination of salary and commissions, the earnings will be apportioned over a 52-week period.⁴ In other words, the Commission calculated his entire earnings for the 52 weeks qualifying period then divided by 52 to find his average weekly earnings.

[22] The average weekly earnings were \$579.00 for each week of the year. Even using the best 22 weeks still would result in a normal weekly earnings of \$579.00. In fact, the Commission used 21 weeks at \$579.00, and the very last weekly pay of \$1,546.30, to arrive at a total of \$13,707.00, in the 22-week period. Then, it divided \$13,707.00, by 22 weeks to arrive at \$623.00 as his normal weekly earnings. Fifty-five percent was applied resulting in a benefit rate of \$343.00.

[23] I find that the Commission correctly applied the provisions of the Act to arrive at the benefit rate of \$343.00 per week.

[24] The Commission claims that the Appellant was paid at the higher rate of \$455.00 and therefore an overpayment of benefits occurred subject to recovery.

⁴ See Section 23(3) of the EI Regulations.

Benefits not received?

[25] The Appellant claims he did not receive the benefits as stated by the Commission. He says that he worked some weeks and that his benefits were reduced in those weeks.

[26] The Commission submitted a recap of the benefits paid to the Appellant and its recovery calculation. The Commission noted the benefit rate of \$455.00. This was the amount, minus any deductions, that the Appellant received unless he worked. Weeks in which the Appellant worked, the Appellant's benefits were reduced by 50% of his total earnings. The Appellant claims that since he was paid less than \$455.00, then the recovery amount cannot be correct.

[27] Examination of the calculations reveals that the Commission correctly reduced the Appellant's benefits paid by an amount equal to 50% of his earnings as required by the *Regulations (Working While on Claim)*.

[28] As an example, the Appellant did not work the week of March 15, 2020. In that week, the Commission paid the Appellant \$455.00 benefits. Applying the corrected \$343.00 benefit rate, then the difference is \$112.00 of overpayment subject to recovery.

[29] In the week beginning May 31, 2020, the Appellant earned \$150.00. The Commission reduced the Appellant's normal benefits of \$455.00 by \$75.00 (50% of \$150.00) and paid him \$380.00. The Appellant claims that if his benefit rate should only be \$343.00, the difference must be less, and not \$112 as shown by the Commission.

[30] The Appellant has missed an element in how the calculation done. In this instance, the Commission must *start* with the benefit rate it should have paid the Appellant of \$343.00. Then it reduces this amount by 50% of the week's earnings (\$75.00). This resulted in benefits owed the Appellant of \$268.00. Since he was actually paid \$380.00, the difference remains \$112.00.

[31] The Appellant submitted a benefits statement that details the benefits paid to him. The biweekly amounts paid to him correspond with the Commission's calculations

of his weekly benefit amounts. I am satisfied that the Appellant was paid benefits based on the higher rate throughout the benefit period. Likewise, I find that those calculations should have been based on the lower benefit rate of \$343.00.

[32] I examined all weeks of benefits and I find that the Commission correctly calculated both the benefits payable and the amount of the overpayment.

Not responsible for Employer's error.

[33] The Appellant submitted that even if there is an overpayment owing, he should have to repay the benefits because it was his Employer's fault that it did not correctly complete his RoE. He says that it was a year after the fact when the Commission found this and it is unfair to request the benefits back now.

[34] The Appellant detailed how the Employer paid him. He testified that he was paid salary or draw every two weeks. In addition, all commissions earned in one month would be paid on roughly the 15th of the next month. Clearly, this was the reason for the widely varying pay amounts the Appellant received.

[35] I am not satisfied that the Employer is at fault for the RoE. It appears that the Employer followed the instructions and correctly recorded the Appellant's pay and attributed it to the weeks in which he earned it. It is highly unlikely that the Employer would have known that they needed to apportion the Appellant's pay over 52 weeks because he was a commissioned sales person.

[36] In fact, I am surprised that the Commission agent that processed his initial claim did not note the highly varying pay amounts and question it at the time the claim was approved. Regardless, even where an error is made by either the Employer or the Commission, the law is clear. If benefits are not legally payable to a claimant then they must be recovered.⁵

⁵ See Section 44 of the EI Act.

So, what is the Appellant's weekly benefit rate?

[37] I find that the Appellant's weekly benefit rate was correctly calculated at \$343.00 per week. The Appellant would not have been entitled to benefits paid in excess of this amount.

[38] However, I empathize with the Appellant's circumstances. Through no fault of his own, he finds himself with a large overpayment recovery demand. I observe that had the Commission recognized the wildly varying biweekly pay amounts when his RoE was provided, it could have enquired with the Employer and identified up front what took over a year to find by file audit.

[39] I note that the Commission has already exercised its discretion and reduced the Appellant's overpayment by \$975.00 based on the error it claims the Employer made. While I do not have the authority to impose a reduction of an overpayment, I would suggest the Commission consider how its own actions contributed to the circumstances of the Appellant when considering any final overpayment decisions.

Conclusion

[40] The Appellant's benefit rate is correctly calculated as \$343.00. This means that the appeal is dismissed.

Mark Leonard
Member, General Division – Employment Insurance Section