



Citation: *SP v Canada Employment Insurance Commission*, 2022 SST 914

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

Decision

Appellant: S. P.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission
reconsideration decision (380235) dated January 16, 2020
(issued by Service Canada)

Tribunal member: Raelene R. Thomas

Type of hearing: In person

Hearing date: June 22, 2022

Hearing participant: Appellant

Decision date: July 13, 2022

File number: GE-20-587

Decision

[1] The appeal is dismissed. The Tribunal disagrees with the Claimant.

Overview

[2] The Claimant stopped working due to illness. She applied for coverage under the Short Term Disability Plan (STDP) she was enrolled in through her work. The STDP management company rejected her claim, so she applied for employment insurance (EI) sickness benefits. She continued to appeal the STDP management company's decision and was successful getting coverage. She received a retroactive STDP payment and a Long Term Disability Plan payment.¹ The Claimant transitioned to maternity leave from her employment on July 20, 2019.

[3] The Commission decided that the money the Claimant received from the STDP and LTDP was earnings and she had no entitlement to EI benefits while receiving the STDP payments. This meant the Claimant had to repay \$6,780 in EI benefits the Commission said she was not entitled to receive.

[4] The Commission also decided that the Claimant's interruption of earnings occurred once she stopped receiving payments from the STDP and not when she initially stopped working due to her illness. This meant that it recalculated her earnings from a later date when her earnings were lower. As a result, the Commission reduced the Claimant's weekly benefit rate from \$506 to \$460.

[5] The Claimant does not agree that she should repay any EI benefits. When she applied for EI benefits she discussed her situation with a Service Canada agent. She was assured that she could receive EI benefits and money from the STDP at the same time with the only consequence being to her income taxes. The Claimant has recently received STDP payments and EI sickness benefits at the same time and was given the same information by Service Canada agents.

¹ The Claimant received STDP payments for the period March 30, 2019 to July 17, 2019 and LTDP payments for July 18 and 19, 2019.

[6] The Claimant does not agree that her benefit rate should be reduced. The Commission said that the money she received from the STDP was insurable earnings and the Commission has used that lower amount to calculate her weekly benefits. The Claimant says that she was not at work while receiving payments from the STDP and those amounts should not be used to calculate her weekly benefits.

Matters I have to consider first

The hearing was adjourned

[7] This appeal was initially scheduled to be heard in person on March 6, 2021. The Claimant's request that the hearing be held on March 25, 2021, was granted because it was made within the two-day grace period. On March 13, 2020, the COVID-19 pandemic was declared and the facilities for in person hearings were no longer available. The in person hearing was changed to a teleconference hearing. The Claimant asked that her hearing be held in person due to difficulties participating by phone and because she felt she could best present her case in person. In the interests of natural justice, the Claimant's adjournment request was granted to allow the Claimant to fully participate in the hearing. The hearing was rescheduled to June 22, 2022 and went ahead on that date.

I am accepting documents sent in after the hearing

[8] In its submissions to the Tribunal, the Commission stated the Claimant resided in a certain employment insurance (EI) economic region. But it did not provide the evidence it relied upon to make this determination. At the hearing I explained to the Claimant the evidence to establish the EI economic region she resided in was necessary to decide her appeal and that I would ask the Commission to provide it. The Claimant received a copy of my request to the Commission and its reply.

[9] At the hearing, it was agreed that if the evidence the Commission provided confirmed the Commission's submission was accurate then the Claimant would be not be provided an opportunity to respond. It is the case that the Commission's evidence did establish that it correctly determined the EI economic region for the Claimant's

residence. I am accepting the Commission's submission into evidence because it is relevant to the issue of the amount of weekly benefits the Claimant was entitled to receive.

[10] At the hearing the Claimant referenced a letter she received from the STDP management company approving her for coverage and the approval she received from LTDP coverage. She submitted the letters after the hearing. I am accepting the letters into evidence because they are relevant to the issue of when the Claimant received money from the STDP and the LTDP and the periods of time those payments covered.

Issues

[11] Is the money the Claimant received from the STDP earnings?

[12] If the STDP money is earnings, does the Claimant have to repay the EI benefits she received?

[13] Did the Commission correctly calculate the Claimant's weekly rate of EI benefits?

Analysis ~ Earnings

Is the money that the Claimant received earnings?

[14] Yes, the money the Claimant received from the STDP is earnings. My reasons for this decision follow.

[15] The law says that earnings are the entire income that you get from any employment.² The law defines both "income" and "employment."

[16] **Income** can be anything that you got or will get from an employer or any other person. It doesn't have to be money, but it often is.³

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

³ See section 35(1) of the EI Regulations.

[17] **Employment** is any work that you did or will do under any kind of service or work agreement.⁴

[18] The Claimant became ill and stopped working on March 30, 2019. Her employer issued a Record of Employment (ROE) on June 6, 2019 showing the reason as issuing as Leave of Absence and her last day worked as March 26, 2019. She applied for coverage under the STDP she was enrolled in at her workplace.⁵ The case management company denied her claim and she appealed. Because she was without income, the Claimant applied for EI sickness benefits on April 26, 2019.

[19] The Claimant was successful appealing the STDP's refusal of coverage. The management company allowed the Claimant's appeal in August 2019. She was paid a retroactive lump sum for the period March 30, 2019 to July 16, 2019. The employer reported the STDP payments on Record of Employment (ROE) as two bi-weekly amounts of \$1,343.46, five bi-weekly amounts of \$1,295.94 and one amount of \$900.10.

[20] The Claimant submitted that the money from the STDP was not earnings.

[21] The Claimant testified that when she applied for EI benefits she spoke to a Service Canada agent at the Service Canada office. She asked if she was approved by the STDP insurer what happens to her EI benefits? The Claimant said the officer replied that "EI" and the insurer would communicate, if there was money owing they would work it out. It was on this understanding that the Claimant applied for EI benefits.

[22] She was told by a Service Canada officer the money from the STDP was not insurable hours. Officers would go back to her last day worked in March 2019 as reported on the first ROE issued by her employer. The Claimant argued if the STDP money is not insurable hours then it should not be considered to be earnings.

[23] The Claimant testified that when she got the phone call on November 6, 2019 that she owed \$7,000 she was in shock. She was told that she could repay the money

⁴ See section 35(1) of the EI Regulations.

⁵ The STDP was provided by the Claimant's employer with assessment and case management provided by another company. See page GD2-13. All page numbers are from the appeal file.

through the Canada Revenue Agency. She called Service Canada on November 13 or 14, 2019 and spoke to an officer named A. The officer told the Claimant that there was nothing in her file to show she owed \$7,000 and that the reduction in her benefits from \$506 to \$460 would take care of the overpayment. The officer thought that the first telephone call telling her about the \$7,000 overpayment was likely a fraudulent call.

[24] The Claimant submitted the information she initially received when she applied for EI benefits and the later information from A. is the reason she is appealing the overpayment. She was given assurances by two officers that she would not and did not owe money.

[25] The Claimant submitted that citizens rely on Service Canada employees to give the correct information. The Claimant noted she is currently in the same circumstance of having been approved for STDP payments prior to maternity leave. She has been again been told that the STDP payments are not insurable earnings.

[26] The Claimant explained that she applied for maternity and parental benefits when she applied for her sickness benefits on April 26, 2019. She initially selected extended parental benefits but asked to have that changed to standard benefits in September before she had been paid any parental benefits. The Claimant said she was told it would take 28 days to process her request. Her request had not been actioned before she received the November 6, 2019 call. She says this shows the lack of action on her file.

[27] The law says that payments from a group wage-loss indemnity plan are earnings.⁶

[28] The law also sets out when a wage-loss indemnity plan is not a group plan to ensure the money received from those plans personally funded by claimants is not deducted from any EI benefits they might receive.⁷ These are plans that are: not related to a group employed by the same employer; not financed in whole or part by the

⁶ See section 35(2)(c)(i) of the EI Regulations

⁷ See section 35(8) of the EI Regulations

employer; and, are voluntarily purchased by a person. And, these plans must also be completely portable, provide for a regular monthly income while allowing for other income to be deducted, and have premium rates that are not based on the group of employees covered by the plan. A plan must have all of these characteristics to not be considered to be a group plan.

[29] The Claimant testified that the STDP was part of the group insurance package that she paid into at work. Employees had “flex dollars” and could decide which group insurances to enroll in. The Claimant said the premiums for the coverages she chose were deducted in one payment from her paycheque. She thought the premiums for the insurances were shared 50/50 with her employer. She had the option to decline a particular coverage. The STDP was not portable to another employer, she had to be an employee of her employer to participate in the STDP. This evidence tells me that the STDP is a group wage loss indemnity plan that is related to group of persons employed by the one employer, is partly financed by the Claimant’s employer and is not a portable plan. This means that the STDP has not met every condition to have it excluded from the definition of earnings.

[30] The appeal file has a record of a conversation held on January 15, 2020 between a Service Canada officer and a representative of the employer.⁸ The representative told the officer that it was the employer who paid the first 16 weeks of STD to the Claimant. The employer confirmed that the payments were insurable and deductions were made. After 16 weeks the insurer would pay LTD which is not insurable.

[31] I find that the Claimant’s STDP is sufficiently connected to her employment because her participation in that plan was contingent on her employment. This means that the money she received from the STDP arose from her employment. As a result, I find that the retroactive payment the Claimant received is earnings for the purposes of the EI Act and EI Regulations.

⁸ See page GD3-54

Does the Claimant have to repay the EI benefits she received?

[32] Yes, the Claimant must repay the EI benefits she received for the period that she received payments from the STDP and LTDP. My reasons for deciding this follow.

[33] The law says that earnings have to be allocated to (deducted from) certain weeks. The weeks to which earnings are allocated depends on why you received the earnings.⁹

[34] Claimants receive EI benefits during their benefit period. The law says that a benefit period begins on the later of either the Sunday of the week in which the interruption of earnings occurs or the Sunday of the week in which the initial claim for benefits is made.¹⁰

[35] An interruption of earnings happens when a claimant stops working in a job, does not perform any work in that job for a period of seven days and in respect of which no earnings arise from that job.¹¹

[36] The ROE says the last day for which the Claimant was paid was March 26, 2019. She applied for EI sickness benefits on April 24, 2019. At the time she applied for EI sickness benefits the Claimant had experienced an interruption in earnings. However, when the insurer approved her claim for coverage under the STDP effective March 30, 2019, she no longer had an interruption of earnings. This is because, as found above, the money she received under the STDP from March 30, 2019 to July 16, 2019 is earnings. In accordance with the law, the Claimant's interruption of earnings began on July 16, 2021 which is the last day she received earnings from her job.

[37] The Claimant's claim for EI sickness benefits was established April 7, 2019. She served a one week waiting period from April 7 to 13, 2019.¹² She was also outside of

⁹ See section 36 of the EI Regulations.

¹⁰ See section 10(1) of the *Employment Insurance Act* (EI Act).

¹¹ See section 14(1) of the EI Regulations. This is one circumstance that meets the definition of an interruption of earnings in section 14 of the EI Regulations. There are more circumstances that meet the definition of an interruption of earnings, but those circumstances do not apply to this appeal.

¹² Section 13 of the EI Act says claimants serve their waiting period in the first week that they would be otherwise be able to receive EI benefits.

Canada for three days during that week and disentitled from receiving benefits for those three days. That disentitlement meant her first week of EI benefits were reduced and she received \$202 of EI benefits in that week. She was then paid 13 weeks of EI benefits at a weekly rate of \$506 to July 20, 2019.

[38] As found above, the Claimant had earnings from March 30, 2019 to July 16, 2019 and experienced an interruption in earnings on July 16, 2019. It is from this date that a benefit period can begin. She was not entitled to receive any EI benefits prior to this date. This means that the Claimant was not entitled to receive the \$6,780 in EI benefits she received from April 7, 2019 to July 20, 2019.¹³ As a result, the Claimant must repay the EI benefits she was not entitled to receive.

Analysis ~ Benefit Rate

[39] To qualify for EI benefits, you need to have worked enough hours and have earnings within a certain time frame. This time frame is called the “qualifying period.”¹⁴

[40] The dollar amount of EI benefits that a claimant receives is 55% of a claimant’s weekly insurable earnings in a calculation period.¹⁵

[41] The formula to calculate a claimant’s weekly insurable earnings involves four steps.¹⁶

- a) Determine the rate of unemployment in the economic region where the claimant resides when they apply for EI benefits.
- b) Determine the “number of weeks” used to calculate the weekly insurable earnings in the calculation period.¹⁷ The “number of weeks” is the calculation period.

¹³ $\$202 + (\$506 \times 13) = \$6,780$

¹⁴ See section 7 of the EI Act and section 93 of the EI Regulations.

¹⁵ See section 15 of the EI Act.

¹⁶ See section 14 of the EI Act.

¹⁷ See section 14(2) of the EI Act.

- c) Review each week of the claimant's insurable earnings in the qualifying period to find the highest weekly insurable earnings for the "number of weeks."
- d) Add together the highest weekly amounts and any money paid to the claimant by reason of lay-off or separation from employment and then divide by the "number of weeks" to get the claimant's insurable weekly earnings.¹⁸

[42] The Claimant experienced an interruption in her earnings on July 16, 2019. At that time she lived in EI economic region 01. The Commission submitted that on July 16, 2019, the unemployment rate for EI economic region 01 was 8%. The Claimant does not dispute this figure, so I accept it as fact.

[43] Because the Claimant lived in an economic region with an unemployment rate of 8%, the "number of weeks" in the calculation period was 20.¹⁹ The Claimant does not dispute this.

[44] The change to the date of the Claimant's interruption of earnings meant that the dates of her qualifying period also changed. The Claimant's qualifying period had been April 8, 2018 to April 6, 2019. It was changed to July 15, 2018 to July 13, 2019. This meant that the higher earnings she had in April 2018 would no longer count towards her insurable earnings because these weeks no longer fell within the Claimant's qualifying period.²⁰

[45] The Commission says the change to the qualifying period resulted in the Claimant's 20 weeks of highest earnings totaling \$16,721.²¹ The Claimant does not

¹⁸ See section 14(3) of the EI Act.

¹⁹ See section 14(2) of the EI Act

²⁰ The Claimant had earnings of \$1,591.66 in the week of April 15, 2018, \$1,485.90 in the week of April 22, 2018 and \$944.96 in the week of April 8, 2018. The remaining weeks of earnings ranged from \$832 to \$852

²¹ None of the weeks the Claimant received earnings from the STDP are included in the 20 weeks of highest earnings

dispute this amount. The Commission says that \$16,721 divided by 20 meant that the Claimant's weekly EI benefits were reduced to \$460.²²

[46] I calculate the 20 highest weeks of the Claimant's weekly earnings to be \$16,715.33.²³ This amount when divided by 20 equals results in a weekly benefit rate of \$460 per week.²⁴ This tells me the Commission correctly calculated the Claimant's EI weekly benefit rate.

[47] I find that the Commission correctly recalculated the Claimant's rate of weekly benefits to be \$460. It used the correct number of weeks (20) and chose the 20 highest paid weeks from the new qualifying period. This means that the re-calculation was in accordance with the EI Act and the EI Regulations.

Other matters

[48] I am sympathetic to the Claimant's financial circumstances the request to repay benefits has created. As tempting as it may be in such cases (and this may well be one), I am not permitted to re-write legislation or to interpret it in a manner that is contrary to its plain meaning.²⁵ I must follow the law and render decisions based on the relevant legislation and precedents set by the courts.

[49] I do not have the jurisdiction to write off the debt.²⁶

[50] Nothing in my decision prevents the Claimant from writing directly to the Commission to ask it to write-off the debt created by the overpayment. If the Claimant is not satisfied with the Commission's response, she may appeal to the Federal Court.

²² \$16,721, when divided by 20 results in average weekly earnings of \$836.05. $\$836.05 \times 55\% = \459.83 . Amounts less than 50¢ are rounded down to the nearest whole dollar amounts above 50¢ are rounded up to the next whole dollar.

²³ This calculation is based on the amounts for the qualifying period of July 15, 2018 to July 13, 2019 listed on pages GD4-9 and GD4-10

²⁴ $\$835.77 \times 55\% = \459.67 .

²⁵ *Canada (Attorney General) v. Knee*, 2011 FCA 301. This how I refer to court cases that apply to the circumstances of this appeal

²⁶ *Arksey v. Canada (Attorney General)*, 2019 FC 1250

Conclusion

[51] The appeal is dismissed.

Raelene R. Thomas
Member, General Division – Employment Insurance Section