



Citation: *MD v Canada Employment Insurance Commission*, 2023 SST 1970

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

Decision

Appellant: M. D.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (551010) dated May 17, 2023 (issued by Service Canada)

Tribunal member: Lilian Klein

Type of hearing: Teleconference

Hearing date: August 24, 2023

Hearing participants: Appellant

Decision date: September 27, 2023

File number: GE-23-1758

Decision

[1] The law requires me to dismiss the appeal. This decision explains why.

[2] Due to some reporting mistakes, the Appellant underreported her earnings in 2019. She hasn't shown that the Commission's records of her earnings are wrong. So, her extra earnings must be allocated to the weeks she earned them, resulting in an overpayment.

[3] This means that the Appellant has to repay some of her benefits.

Overview

[4] The Appellant established a claim for EI regular benefits starting on June 30, 2019. She was paid benefits based on the earnings that she reported.

[5] The Commission later received a report from the Appellant's employer that she'd earned more than she reported in certain weeks. The Commission says this money is also earnings since the money was paid for work performed. So, it allocated those extra earnings to the weeks when she received them. This caused an overpayment.

[6] The Commission also imposed a penalty and violation but later removed them.

[7] The Appellant disputes that she earned more than she reported. She says her employer's given the Commission incorrect information while her records are accurate.

The three issues I must decide

[8] Was the Appellant paid more than she reported for eight weeks in 2019?

[9] Was the Commission within the deadline to recalculate the Appellant's claim?

[10] Did the Commission have to allocate the extra earnings against her EI benefits?

Analysis

Did the Appellant receive more earnings than she reported?

[11] Yes. The evidence set out below shows that the Appellant got more money from her employer than she reported in eight of the benefit weeks from September 15, 2019, to November 16, 2019. This money is part of her earnings from these weeks.

[12] The Appellant's employer gave the Commission information on her earnings that differed from what she'd reported. She says her pay slips support what she reported.

[13] The Commission set out the information from the employer as follows:

| Week beginning: | Earnings: | Instead of (declared): |
|------------------------|------------------|-------------------------------|
| September 15, 2019 | \$488.00 | \$242.00 |
| September 29, 2019 | \$488.00 | \$242.00 |
| October 6, 2019 | \$488.00 | \$242.00 |
| October 13, 2019 | \$732.00 | \$484.00 |
| October 20, 2019 | \$976.00 | \$726.00 |
| October 27, 2019 | \$1,016.00 | \$726.00 |
| November 3, 2019 | \$1,220.00 | \$968.00 |
| November 10, 2019 | \$732.00 | \$484.00 |

[14] The Commission listed the earnings reported by the employer according to the week. But the payslips that the Appellant submitted are marked by deposit date only, not by weeks worked.¹ She says her employer paid her two weeks in arrears for two-week periods at a time, but the dates of these periods aren't listed on the payslips.

[15] So, a direct week-by-week comparison between the amounts the employer reported and what the Appellant claims to have earned isn't possible using the payslips she provided. I gave her the opportunity to contact her employer for help matching her weekly earnings to the deposit dates on her payslips, but she declined this offer.

¹ The Appellant didn't submit payslips covering November 3-16, 2019. During the hearing for her other appeal (GE-23-1759), I gave her the chance to still provide them, but she submitted nothing further.

[16] The Appellant's the one who must prove that the information the employer gave the Commission is wrong. She must show it's more likely than not that she didn't receive the extra money. If she did receive it, she must show that it wasn't earnings.

[17] But the Appellant hasn't proved that her employer made mistakes in how it reported her earnings from September 15, 2019, to November 16, 2019. The payslips she's provided don't support her claim that her employer's payroll records are incorrect. The amounts on the payslips cover the earnings documented in those records.

[18] That's why I give more weight to the payroll records than to the payslips.

[19] The Appellant also hasn't proved that this extra money was anything other than earnings from her job. So, I agree with the Commission that **this money is earnings**.

[20] That's because the law says the **entire** income that you get from any employment counts as earnings.² The law defines both terms.

[21] **Employment** is any work you did or will do under any kind of service or work agreement.³ **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.⁴ So, any money your employer pays you for the work you do is earnings.⁵ This means the Appellant had extra earnings.

Did the Commission act by the deadline for reconsidering and recalculating the Appellant's claim?

[22] Yes. If unreported earnings are only later discovered, the law allows the Commission to go back within a specified period and recalculate a claim. This applies even after benefits have been paid. The Commission must respect this deadline.

[23] The Commission respected this deadline when recalculating the Appellant's claim. The usual deadline is 36 months. But where the initial calculation was based on false or misleading information, the deadline is extended to 72 months.

² See section 35(2) of the EI Regulations.

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

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

⁵ See *Blais v Canada (Attorney General)*, 2011 FCA 320.

[24] To reconsider a claim within this extended deadline, the Commission doesn't have to prove that the Appellant **intended** to defraud the government. Sometimes claimants make mistakes in how they report their earnings. So, the Commission only has to show that the information the Appellant provided was false or misleading.

[25] The employer's payroll information proves that the Commission originally calculated the Appellant's claim based on false or misleading information. So, the Commission was allowed 72 months to reconsider and recalculate her claim. It did this within those 72 months.

[26] I accept that this false or misleading information came from honest reporting errors. But those errors don't mean that the Appellant's additional earnings are exempt from allocation.

Did the Commission act correctly when it allocated the Appellant's extra earnings?

[27] Yes. The Commission has to all allocate all earnings.

[28] The Appellant's extra earnings were in payment for work she did during eight benefit weeks between September 15, 2019, and November 16, 2019. She doesn't dispute that she worked for her employer during this period.

[29] The law says all earnings must be allocated to the weeks when you earn them.

[30] The Commission says it allocated the Appellant's extra earnings starting the week of September 15, 2019, since this was the first week when she had additional earnings. Subsequent additional earnings were allocated to the weeks when she earned them.

[31] The Appellant hasn't disputed the allocation method, only the principle that she had unreported earnings that had to be allocated, leading to an overpayment of benefits.

[32] The allocation of her extra earnings means that the Commission overpaid benefits to the Appellant. Only the Commission has the power to calculate this overpayment. So, I'll make no findings on the amount of the overpayment.

[33] The Appellant says this have been a difficult and frustrating experience for her and I sympathize with her circumstances. But I don't have the power to change the law that says all earnings must be allocated.⁶ I also don't have the power to ignore the law that says you must repay any benefits you were overpaid.⁷

Conclusion

[34] The Appellant received more earnings than she reported in 2019. The law says the Commission had to allocate these additional earnings to the corresponding weeks of her EI claim. It did this within the 72-month period allowed under the law. The allocation means that the Appellant was overpaid some of her benefits and must now repay them.

[35] That's why I must dismiss her appeal.

Lilian Klein

Member, General Division – Employment Insurance Section

⁶ See *Canada (Attorney General) v Knee*, 2011 FCA 301.

⁷ See sections 43 and 44 of the EI Act.