



Citation: *RO v Canada Employment Insurance Commission*, 2024 SST 786

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

Decision

Appellant: R. O.
Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (643571) dated February 1, 2024 (issued by Service Canada)

Tribunal member: Marc St-Jules
Type of hearing: Videoconference
Hearing date: April 24, 2024
Hearing participant: Appellant
Decision date: May 13, 2024
File number: GE-24-711

Decision

[1] The appeal is dismissed with modification. I disagree with the Appellant. I also disagree with the Commission concerning the allocation amount for some of the weeks.

[2] The Appellant did declare work and earnings while receiving Employment Insurance (EI) benefits. However, he failed to properly report his earnings on his Employment Insurance claim.

[3] The Commission allocated (in other words, assigned) the Appellant's earnings to his EI claim. I find that some of the amounts are not supported by the evidence before me. This retroactive allocation (correction) of earnings results in an overpayment of EI benefits.

[4] The Commission acted judicially (properly) when reviewing the claim and establishing an overpayment.

[5] If the Appellant is wanting to negotiate repayment arrangements, he may wish to contact the Canada Revenue Agency (CRA) to discuss repayment options.

Overview

[6] On June 3, 2018, the Appellant applied to renew his employment insurance claim.¹

[7] While in receipt of benefits, the Appellant worked and received earnings from June 3, 2018, until the week starting January 12, 2019. The Appellant did declare work and earnings while in receipt of benefits.² However, he declared the gross hourly wage and not the total gross earnings.

[8] The Commission later found out that the earnings that the Appellant had declared were possibly incorrect. The Commission enquired with two employers about

¹ See GD03 pages 3 to 13.

² See GD07. This document contains the Appellant's reports. To be paid EI benefits, claimants need to complete biweekly reports. The reports ask a series of questions. Based on the answers, the Commission determines the Appellant's entitlement to benefits. The Appellant did declare earnings regularly.

the Appellant's earnings. As there were discrepancies, a letter was sent to the Appellant.³

[9] The Appellant did reply.⁴ He agreed to the earnings the employers had provided. He explained that he had declared the hourly pay instead of the total weekly earnings.

[10] The Commission decided to allocate the earnings as provided by the employers. It made this decision on December 18, 2023. The Commission informed the Appellant that because of false or misleading statements, it had 72 months in which to re-examine his claim. In this letter, there is no mention of penalties, interest or any other repercussions.⁵

[11] The Appellant requested a reconsideration. He argued that his answers were based on his interpretation of the questions. He added that there never was any mal intent. Repaying the overpayment would create undue hardship.

[12] On February 1, 2024, the Commission informed the Appellant via letter than it would be maintaining its decision. The Appellant then filed an appeal with the Tribunal on February 22, 2024.⁶

Issues

[13] I have to decide the following issues:

- a) Did the Commission have the legal right to review the Appellant's benefits? If it did, did it act fairly when it chose to review his claim?
- b) Did the Appellant receive earnings? If so, did the Commission allocate those earnings correctly?
- c) If he has an overpayment, does he have to repay it?

³ See GD03 page 20.

⁴ See Gd03 pages 23 to 25.

⁵ The Commission can establish overpayment but can impose other sanctions such as warnings, monetary penalties or violations.

⁶ See GD02.

Analysis

Did the Commission have the legal right to review his benefits?

[14] Yes. I find the Commission had the legal right to review his benefits up to six years later.

[15] The law gives the Commission broad powers to review any of its decisions about EI Benefits.⁷ If the Commission paid you EI benefits that you weren't really entitled to receive, it can ask you to repay those EI benefits.

[16] But, the Commission has to follow the time limits set out by the law. Usually, the Commission has three years to review its decisions.⁸

[17] In some cases, the Commission can go back further than three years. The Commission can review decisions it made as much as **six years** earlier if it thinks you made an incorrect statement.⁹ This doesn't mean that it has to prove that you were lying on purpose; it just means the Commission has to have a reasonable reason for thinking that something you said about your benefits was wrong. It can be an honest mistake.

[18] The Commission says the Appellant failed to correctly report his earnings that he received between June 2018, and January 2019.

[19] The Appellant agrees that he had not properly declared his earnings. He argues that he was consistently answering the questions the same way. This suggests that he did not want to fraud the government.

[20] He also argued that there should have been checks and balances. Had there been some kind of stop-gap measure, this could and should have been caught or

⁷ See section 52 of the *Employment Insurance Act* (EI Act). The Federal Court of Appeal sets out the Commission's broad power under this section in *Briere v Canada Employment and Immigration Commission*, A-637-86.

⁸ See section 52(1) of the EI Act and *Canada (Attorney General) v Laforest*, A-607-87.

⁹ See section 52(5) of the EI Act. The law says that the Commission has 72 months in these cases.

noticed before. He argues that this should have been caught after just a few reports to avoid this issue from continuing.

[21] The requirement is that there is false information. It does not have to be a misrepresentation. I reviewed the decision letters sent to the Appellant. There is no mention of this being a fraudulent overpayment. There is no mention of a warning or violation.

[22] The Commission does not have to prove that a claimant made a false or misleading statement. It only needs to show that it could reasonably conclude that a false or misleading statement was made in connection with the claim for benefits.¹⁰

[23] I agree with the Appellant that he did not knowingly do anything wrong. I believe the Appellant thought he was answering correctly. However, his answers were wrong.

[24] I come to this conclusion as the Appellant agreed he declared the hourly wage instead of the total gross earnings. He agreed with the earnings obtained from his employers. Those earnings were different than what he had declared.

[25] I find that the Commission could reasonably conclude that there were false statements. The fact that the Commission did not impose further sanctions such as a warning supports that even the Commission believes the Appellant made honest mistakes. Warnings require an element of knowingly making false statements.¹¹

[26] Based on the above, the Commission had the legal right to reconsider his claim. The weeks under review were all less than 72 months away. The Appellant was notified in December 2023. The oldest week under review was April 2018. This is less than 72 months.

¹⁰ See M.G. v C.E.I.C. 2018 SST 1150.

¹¹ See Section 38 of the EI Act for monetary penalties or section 41.1(1) for warnings.

Did the Commission act fairly when it chose to review his benefits?

[27] Yes. I find the Commission acted fairly (in other words, used its discretion judicially) when it decided to review the Appellant's benefits.

[28] Even though the law gives the Commission the power to review a claimant's benefits, it doesn't say that the Commission **must** use this power. The Commission has the choice to use its review power or not. In other words, the power to review is a discretionary power.

[29] When the Commission decides to use its discretion to review your entitlement to benefits, it must show that it used this power fairly. This is called using its discretion judicially.

[30] To show that it used its discretion judicially, the Commission has to show that it:

- Acted in good faith
- Didn't ignore relevant factors
- Didn't consider irrelevant factors
- Didn't act for an improper purpose
- Didn't act in a discriminatory way

[31] The evidence shows that the Commission knew about the Appellant's possible earnings issue as early as March 13, 2019. This was the date one employer was sent a request for payroll information.¹² Then, in December 2021, the Commission added another employer to the same case.¹³ The Commission sent the Appellant a letter asking him to confirm the earnings reported by the employers.

¹² See GD03 page 15.

¹³ See GD03 page 19.

[32] The Appellant's response was received on June 13, 2023.¹⁴ He agreed with the information the Commission sent him. He says his misinterpreted one of the questions that led to his answers.

[33] When I look at everything in the appeal file, I think the Commission used its discretion fairly. It considered every factor and circumstance the Appellant brought up. It didn't rely on irrelevant or unimportant factors. The Appellant hasn't shown me that the Commission acted in a way that was discriminatory or in bad faith.

[34] This means the Commission used its discretion fairly when it decided to review and reconsider the Appellant's benefits.

Is the money that the Appellant received earnings?

[35] Yes, the wages obtained from both employers are earnings. Here are my reasons for deciding that the money is earnings.

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

[37] **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.¹⁶ **Employment** is any work that you did or will do under any kind of service or work agreement.¹⁷

[38] The Appellant must prove, on a balance of probabilities, that the money he received was not earnings.¹⁸ So, he must show it's more likely than not that it was something else.

[39] The Commission says this money is earnings since the Appellant got it for work that he performed for his employer.

¹⁴ See GD03 page 23.

¹⁵ See section 35(2) of the EI Regulations.

¹⁶ See section 35(1) of the EI Regulations.

¹⁷ See section 35(1) of the EI Regulations.

¹⁸ See *Braga v General of Canada et al*, 2009 FCA 167.

[40] The Appellant agreed during the hearing with all the earning amounts from each of the two employers. He has nothing to refute these numbers and accepts them as obtained by the Commission.

[41] That's why I find that the money the Appellant's employers paid him while he was on EI is earnings.

Did the Commission allocate the earnings correctly?

[42] No. I am making a few changes. I do not know where the Commission obtained some of the amounts it allocated.

[43] I will call the first employer, Employer A. It is the employer with earnings from June 3, 2018, to the week ending December 29, 2018. I will call the other employer, Employer B. There are earnings in two weeks from this employer. They are the week of December 30, 2018, and January 6, 2019.

[44] The law says that earnings have to be allocated to certain weeks. What weeks earnings are allocated to depend on why you received the earnings.¹⁹

[45] The allocation of earnings is important. When earnings are allocated to weeks in your benefit period, this can reduce, or even cancel, the benefits payable for that week.²⁰

[46] Since the Appellant's earnings were paid to him for work that he did for his employers, these earnings had to be allocated to the weeks when he did that work. So, the Commission allocated them using the employer's records of the weeks he was employed from June 3, 2018, until the week ending January 12, 2019.

[47] The allocation of vacation pay is dependent on the reason why this vacation pay was paid. The law says that the earnings you get for being separated from your job have to be allocated starting the week you were separated from your job. It doesn't matter when you actually receive those earnings. The earnings have to be allocated

¹⁹ See section 36 of the EI Regulations.

²⁰ See section 35(2) of the EI Regulations and *McLaughlin v Attorney General of Canada*, 2009 FCA 365.

starting the week your separation starts, even if you didn't get those earnings at that time.²¹ For this reason, the vacation pay of \$34.30 paid on separation from employer B was correctly allocated to the week of January 6, 2019. This is the week the Appellant resigned from his job.²²

[48] For some reason, the Commission did not provide all the letters or records of conversations with the Appellant or employers. I believe the Commission should have. As a Tribunal member, I do not have access to the Appellant's file. I only have access to what the Commission and Appellant provided.

[49] There are a few examples to support the fact that I do not have all the documents. The Appellant references a letter dated May 17, 2022.²³ The Commission did not provide this letter. The Appellant could also have provided this letter. I do not have this letter. I cannot rely on it.

[50] There is another indication I was not given all the information. Employer A signed a form providing earnings. The signed form from the employer makes no reference to the \$120 statutory pay paid for January 1, 2019.²⁴ However, the letter from the Commission, dated February 23, 2022, asks the Appellant to provide comment or evidence to refute this \$120. Was this \$120 taken from the record of employment issued by Employer A? Was it taken from a verbal conversation with Employer A?

[51] There are issues with the earnings allocation for Employer A. The signed form received from this employer has different earnings than what was allocated.²⁵ My decision addresses these discrepancies.

[52] In my analysis below, I will explain why I am using the earnings that favour the Appellant.

²¹ See section 36(9) of the EI Regulations.

²² See GD03 page 19.

²³ See GD03 page 25.

²⁴ See GD03 pages 15 to 17.

²⁵ See GD03 pages 15-17.

[53] I will use the following table in the upcoming paragraphs to explain my decision.

Employer A Earning Allocation				
Date	Signed form	Letter	Allocated	My decision
September 2 2018	\$265.86	\$369.86	\$370.00	\$266.00
September 9 2018	\$472.22	\$384.38	\$384.00	\$384.00
September 16 2018	\$385.23	\$428.07	\$428.00	\$385.00
September 30 2018	\$277.20	\$307.89	\$308.00	\$277.00
December 30 2018	\$0.00	\$120.00	\$120.00	\$0.00
Total	\$1,400.51	\$1,610.20	\$1,610.00	\$1,312.00

[54] I am deciding that the amount to be allocated is the highlighted numbers above.

[55] **Weeks of September 2, 16 and 30 2018.** The allocation must be reduced to the lower amounts from the form. I do not have any evidence to support why the allocations were increased. If the Commission asks the Tribunal to dismiss an appeal, it has to provide all supporting evidence.

[56] As explained above, the Appellant has the burden to prove that money received is not earnings. The Commission has the burden to prove that money was paid to the Appellant. I find the Commission has not met its burden for some weeks.

[57] **Week of September 9, 2018.** The signed form has a higher number. I am not changing the allocation to a higher amount. The Appellant has the burden to prove these amounts are not earnings. I find that it is not fair to allocate a higher amount than what he was asked to refute.

[58] **Week of December 30, 2018.** The signed form from Employer A does not have \$120 in statutory pay. I do not have any evidence to support why the Appellant was paid this or that he was actually paid this amount. Even if the Appellant agreed in testimony with all the amounts allocated, I find that the Commission has not proven this amount as earnings.

[59] Please note that my decision to change the allocation for the week of December 30, 2018, is for Employer A only. Employer B earnings remain for this week. For this reason, my decision is that the allocation is reduced by \$120. I explained in this way to simplify the table above.

The Appellant's arguments

[60] The Appellant argues the following:

- The Commission should have a way of flagging these to prevent such errors.
- The answers were given in a consistent manner.
- There are errors with his name and Social Insurance Number (SIN).

[61] Unfortunately for the Appellant, this does not change the outcome. The law must still be applied.

[62] Regarding errors from the Commission. The Federal Court of Appeal has addressed the issue of the Commission's clerical errors and has said that they are not fatal to a Commission's decision.²⁶

Overpayment

[63] I have no discretion to alter the overpayment in any way.

[64] I can understand why the Appellant is concerned with the overpayment. But I cannot address how the Commission handled his file or make a decision about writing off the debt.

[65] Unfortunately, the fact that the Commission initially paid him benefits does not remove his rights and responsibilities under the EI Act. This includes the obligation to answer questions accurately when declaring earnings.

²⁶ See *Desrosiers v. Canada* (AG) A-128-89.

[66] I sympathize with the Appellant about the overpayment, but I do not have any discretion to waive it. The law simply does not empower the Tribunal to relieve him from liability for the overpayment.²⁷ I also cannot ignore the law, even if the outcome may seem unfair to the Appellant. So even though the Appellant tried to answer correctly, I cannot reduce or remove the overpayment on his claim.

[67] While I cannot alter the overpayment in any way over the lack of jurisdiction, the Appellant is left with two options.

- a) He can ask the Commission to consider writing off the debt because of undue hardship.²⁸ If he doesn't like the Commission's response, he can file a Notice of Application for judicial review with the Federal Court of Canada, but there is a 30-day timeframe for appealing to the Federal Court; or
- b) He can telephone the Debt Management Call Centre at Canada Revenue Agency (CRA) at 1-866-864-5823 and ask about debt relief due to financial hardship.²⁹ The debtor will need to present information about his financial circumstances for consideration.

Conclusion

[68] The appeal is dismissed, but I am changing the allocation for some weeks.

[69] The Appellant allocation needs to be changed to reflect the table above.

Marc St-Jules

Member, General Division – Employment Insurance Section

²⁷ Section 112.1 of the EI Act

²⁸ Section 56(1)(f)(ii) of the *Employment Insurance Regulations* gives the Commission the power to write off an overpayment when it would cause undue hardship for a claimant to repay it. The Appellant must contact the Commission and specifically refer to section 56 of the *Employment Insurance Regulations* in his request for a write-off.

²⁹ CRA collects overpayments on behalf of the Commission. The telephone number is also found on the Notice of Debt and account statements sent to the debtor.