

**LICENCE APPEAL
TRIBUNAL**

**TRIBUNAL D'APPEL EN MATIÈRE
DE PERMIS**



**Safety, Licensing Appeals and
Standards Tribunals Ontario**

**Tribunaux de la sécurité, des appels en
matière de permis et des normes Ontario**

Citation: H.M. v Aviva Insurance Canada ONLAT 17-005588/AABS

**Date: October 31, 2018
File Number: 17-005588/AABS**

In the matter of an Application pursuant to subsection 280(2) of the *Insurance Act*, RSO 1990, c I.8., in relation to statutory accident benefits.

Between:

H.M.

Appellant

and

Aviva Insurance Canada

Respondent

DECISION

ADJUDICATOR: Deborah Neilson

APPEARANCES:

For the Appellant: H.M.

Mark Grossman, counsel

For the Respondent: Geoffrey Keating, counsel

Christine Mansbridge, counsel

Court Reporter: Kayla Riley

HEARD In-Person: May 2, 2018

I. OVERVIEW

- [1] The applicant, H.M., was involved in an automobile accident on August 7, 2016 and sought benefits pursuant to the *Statutory Accident Benefits Schedule - Effective September 1, 2010* (the "*Schedule*") from the respondent, Aviva Insurance Canada. The applicant and the respondent disagree on the amount of income replacement benefits ("IRBs") that the applicant is entitled to. The applicant applied to the Licence Application Tribunal - Automobile Accident Benefits Service ("Tribunal") for resolution of their dispute.
- [2] There is no issue that the applicant was employed on a part-time basis as a book-keeper for the restaurant that her husband manages. The parties agree that the applicant is entitled to IRBs. However, the parties disagree on the weekly amount of IRBs that are payable to the applicant because they cannot agree on the amount of income she earned in the four weeks before the accident. The respondent claims that the applicant can only establish that she earned \$750 gross in the four weeks before the accident. The applicant claims she earned \$1,500 in the four weeks before the accident.

II. ISSUES

- [3] The issue the parties agree that I must determine is whether the applicant earned \$750 or \$1,500 gross income in the four weeks preceding the accident.¹ My determination depends on how reliable I find the testimony of the parties and the following evidence that was filed as exhibits:
- (a) Record of Employment dated October 16, 2017;
 - (b) Payroll slips dated July 22, 2016, July 29, 2016 and August 31, 2016;
 - (c) Two cheques dated February 13, 2017 and a bank record for February 2017;
 - (d) Three Employer's Confirmation of Income forms; and
 - (e) 2015 and 2016 Notices of Assessment and a 2016 T4 form.

¹ The issue is not as stated in the case conference Adjudicator's order as the parties subsequently settled the issue of entitlement.

III. RESULT

- [4] I find that the testimony of the applicant, her husband and her employer about the applicant being paid \$1,500 in the four weeks before the accident is unreliable because it is not supported by the documentation. I find on the balance of probabilities that the applicant's gross earnings in the four weeks before the accident was \$750.

IV. ANALYSIS

- [5] Under s. 7 of the *Schedule*, the applicant's IRB is calculated as 70 percent of the person's gross weekly income. The gross weekly income is calculated by using the person's gross annual employment income divided by 52. The gross annual income for an employed person like the applicant is calculated by using the person's gross employment income for the 52 weeks before the accident, or the person's gross income for the 4 weeks before the accident multiplied by 13. Under s. 4(5) of the *Schedule*, the person's income before an accident shall be determined for the purposes of calculating the IRB without reference to any income the person has failed to report on their taxes. The onus is on the applicant to prove what her gross income was.
- [6] The evidence was fairly consistent that the applicant worked from home as a bookkeeper for the restaurant that her husband managed. The parties filed a joint brief of documents and I heard testimony from the applicant, her husband, and the owner of the restaurant, SB. The applicant's husband would bring home the paperwork once or twice per month. As the bookkeeper, the applicant was responsible for doing the accounts payable, organizing invoices and bills for the restaurant, the daily, weekly and monthly sales reports and preparing the payroll slips with the calculations and deductions for the four to six employees who worked at the restaurant. She prepared the payroll either every two weeks or once per month. The payroll slips were either emailed to the restaurant's accountant or printed out and mailed to SB, who then prepared and signed the payroll cheques. The pay cheques were issued the same day or within two days of the payroll slips.
- [7] The applicant's husband testified that the applicant also prepared weekly reports, biweekly reports and monthly reports. The payroll information was sent to the accountant by email. The husband would take print-outs of the payroll slips from the applicant along with the paycheques and distribute them to the staff.

- [8] The applicant testified that she usually earned about \$750 per month. Sometimes she earned nothing, but other times, in particular the month before the accident, she earned \$1,500 for the month, depending on the amount of work she performed. She testified that she earned \$1,500 in July 2016. She earned double her usual pay because it was the year end for the restaurant and the first year for filing taxes for the restaurant. The applicant also testified that there was a lot of construction for the restaurant because it just opened up in 2015. Therefore, she had a large number of invoices to process for tax purposes. Her testimony was mirrored by her husband and her employer, SB. However, I find that SB's evidence is not reliable and the documentary evidence does not support their testimony for the following reasons.

A. Record of Employment dated October 16, 2017

- [9] According to the applicant's unsigned Record of Employment ("ROE"), she started working for the restaurant in October 2015 and earned \$1,500 monthly in the seven months prior to the accident.² The applicant testified that the amount of her income and the hours worked on the ROE was estimated together with her husband and SB. She testified that the \$1500 was an estimate of her monthly earnings. The applicant's husband corroborated the applicant's testimony. He testified that he did not prepare the ROE, but he had input in estimating the applicant earned \$1500 because sometimes she earned \$1500 per month. However, he did not recall if it was discussed with SB. The ROE was not signed by SB, but SB testified that it was his handwriting. He later testified that it was prepared by his accountant, who is a chartered accountant. SB could not recall if the applicant and her husband had any input in preparing the ROE. He testified that that the number of hours on the ROE, 300, was information provided by SB's accountant, but SB really could not recall.
- [10] The applicant's husband testified that he negotiated her salary as \$750 per month, regardless of the amount of work she performed. SB testified that the applicant earned a salary of \$750 that was payable on a weekly or monthly basis, depending how much the applicant worked. She did not get paid every month. This information is contrary to SB's signed statement dated March 8, 2018.³ In his statement, SB stated that the applicant was paid a salary of \$1,500.00 gross per month in a full-time capacity. However, because he was not asked about this inconsistent statement, I am unable to draw any

² Exhibit 1, Tab 6 of the Amended Joint Evidence Brief: ROE dated October 16, 2017. The ROE only allows one to calculate 7 pay periods if a person is paid on a monthly basis.

³ Exhibit 1, Tab 2: signed statement of SB dated March 8, 2018.

conclusions about the inconsistencies other than his evidence is not reliable. SB testified that the way he knew whether to pay her bi-weekly or monthly was because the applicant's husband would advise him, which is consistent with the applicant's testimony, but not her husband's. SB also testified that the applicant kept track of her hours and told the accountant of her hours. This was how SB determined how much to pay the applicant for the month. The amount to pay her was calculated by the applicant's husband.

- [11] I find the ROE is of very little assistance in determining the applicant's gross income in the four weeks before the accident. It is unsigned and SB's evidence is contradictory as to who prepared it. I do not accept that a chartered accountant prepared the ROE because the accountant would not have stated the applicant only earned \$1500 in the eight months before she stopped work⁴ after having prepared a T4 form that states the applicant earned \$5,250.00 total over the 8 months she worked in 2016. I would expect a chartered accountant to know how to properly fill out an ROE. The \$1500 on the ROE is more in keeping with the applicant's and her husband's testimony that they estimated how much she earned in one month.

B. Payroll Slips

- [12] The applicant testified that she prepared a payroll slip on or about July 22, 2016 for the work she did at the beginning of July 2016. That payroll slip indicates that the applicant was paid on a biweekly basis.⁵ She testified that she prepared another payroll slip on or about July 29, 2016, because she did more work that month. The payroll slip dated July 29, 2016 indicates the applicant was paid on a monthly basis.⁶ The parties filed a third payroll slip for a pay date of August 31, 2016, that the applicant explained was for work she did after the accident.⁷
- [13] The bottom of the July 22 payroll slip states that it was "Saved on November 3, 2016." The bottom of the July 29 and August 31 payroll slips state that they were "Saved on October 11, 2016." The applicant testified that the payroll slips were not prepared on those dates, but that the saved dates on the payroll slips

⁴ The testimony of all the witnesses was uncontradicted that the applicant returned to work for a brief period in August 2016, after the accident.

⁵ Exhibit 1, Tab 7: Pay stub from payroll deductions on-line calculator for pay date July 22, 2016, saved on November 3, 2016.

⁶ Exhibit 1, Tab 7: Pay stub from payroll deductions on-line calculator for pay date July 29, 2016, saved on October 11, 2016.

⁷ Exhibit 1, Tab 7: Pay stub from payroll deductions on-line calculator for pay date August 31, 2016, saved on October 11, 2016.

were accurate. The saved dates imply that the applicant changed the payroll slips three or more months after the accident. Because of the saved dates on the payroll slips, I would have expected the applicant to file the emails to or from the accountant attaching those payroll slips because those emails would have corroborated the applicant's testimony of the original date the payslips were prepared.

- [14] The applicant testified that she did not keep track of her hours, but only provided estimates. She testified that she was paid based on the amount of work she performed. The amount of work she performed was determined by her husband because he knew how much work he brought home for her to do. The applicant's husband, on the other hand, testified that the applicant was paid \$750 regardless of her hours. Her husband also testified that whether she was paid more than once per month was determined by SB and the accountant.
- [15] SB testified that he was the one who decided whether to pay the applicant once or twice per month. He found out how much work the applicant had done in a month from her husband. SB also testified that the applicant provided her hours to the accountant and that is how SB determined how many times the applicant was paid. However, no record of the applicant's hours was produced to substantiate the July 22 and 29 payroll sheets.
- [16] The respondent submits that, if I accept that the July payroll slips show that the applicant was paid twice in July 2016, then on a balance of probabilities, the July 2016 payroll slips only show the applicant earned income of \$750 in the four weeks before the accident. The respondent submits, and I find, that the four week period before the accident started on July 10, 2016. The applicant asks that I reject the respondent's submission and submits that she would be paid almost at the same time as she did the work. I prefer the respondent's submission. I find that the applicant's submission is not consistent with her testimony that the first July payroll slip was for work the applicant performed in early July 2016. Nor is it consistent with her testimony that her payroll slip dated August 31, 2016 was for work that was performed in mid-August 2016. The applicant could not allocate what portion of that payroll was for work performed after July 10, 2016. However, I am not satisfied that the payroll slips are reliable evidence that the applicant was paid twice in July 2016.
- [17] At a minimum, I would have expected a record of the applicant's hours that SB stated the applicant provided to the accountant to be produced. Otherwise, the

preponderance of the evidence supports a finding of fact that the applicant was paid a monthly salary of \$750 for the reasons set out below.

C. Cheques

- [18] The applicant produced two cheques that she testified were prepared in 2017 for the work she did in 2016. The first cheque was for \$657.93 and the applicant submitted that it was for the July 22, 2016 payroll. The other cheque was for \$713.21 and the applicant submitted that it was for the July 29, 2016 payroll (the “2017 paycheques”). Both are dated February 13, 2017. The applicant submitted that the 2017 paycheques were issued in 2017 because the original paycheques that were issued in 2016 became stale dated. The applicant testified that she did not cash the original paycheques that were issued in 2016 because her husband was supposed to deposit them, but he forgot about them until they were stale dated. She was unable to provide the dates of the original cheques that became stale dated. The applicant’s husband provided the same explanation. He testified that he usually deposited the applicant’s cheques because the applicant does not drive a car.
- [19] The husband’s testimony was different from the applicant’s in that he testified that he tried to cash the 2017 paycheques and the bank refused because the 2017 paycheques were stale dated. He had the dates on the 2017 paycheques changed and initialled by SB so that he could cash them. The husband could not recall the original date on the 2017 paycheques. Copies of the 2017 paycheques were filed, but the original dates on them were illegible.⁸ The dates appeared to be scratched out and new dates of February 13, 2017 were written on the cheques and were initialled by SB. SB testified that he prepared the two 2017 paycheques and they were initially dated for July 2016, but usually his accountant prepares them. He changed the dates on the 2017 paycheques because the bank would not cash them.
- [20] I accept the applicant’s evidence that the cheques were issued in 2017 and not in 2016 for the following reasons. The bank record for the restaurant for February 2017 was filed. According to the bank record, the applicant’s 2017 paycheques were cashed on February 13, 2017. I find that although SB may have dated the 2017 paycheques for July 2016, the cheques must have been prepared by SB in January or February 2017. The reason for my finding is based on the cheque numbers. The first 2017 paycheque for \$657.93 that the applicant submitted was for the July 22, 2016 payroll, is numbered 00375 and

⁸ Exhibit 1, Tab 5, Cheques to applicant from her employer for February 2017

the second 207 paycheque for \$713.21 that the applicant submitted was for the July 29, 2016 payroll, is numbered 00376. Other cheques that were cashed to the restaurant's account in February 2017 are numbered from 00368 to 00381. The applicant's 2017 paycheque numbers are right in the middle of those other cheques. If the applicant's 2017 paycheques were initially prepared in July 2016, then the cheque numbers should be something other than in the sequence of 00368 to 00381. Otherwise, it is too incredulous to find that the twelve other cheques cashed in February 2017, numbered from 00366 to 00368, 00371 to 00374 and 00377 to 00381, were also issued in July 2016. I find that it is too much of a coincidence and highly unlikely that the entire series of cheques (save for cheque 00370) would have been stale dated. For these reasons, I find that the paycheques were not prepared until or around January or February 2017.

- [21] My finding that the 2017 paycheques were issued in 2017 raises questions about why the initial dates on them were scratched out. I do not find that the explanation provided by either SB or the applicant's husband is logically consistent, unless the 2017 paycheques were initially dated to July 2016 as testified to by SB. If that is the case, it makes no sense to issue the 2017 paycheques as new replacement cheques that were backdated to July 2016 if the original cheques issued in 2016 could not be cashed because they were stale dated for July 2016. Accordingly, I find that the applicant's submission that the 2017 paycheques were issued because the original cheques issued in 2016 became stale dated is logically inconsistent. Further, given that neither the applicant nor her husband could confirm when in 2016 the work was supposedly done for those 2017 paycheques, I do not find that they support the applicant's submission that she earned \$1,500.00 in the four weeks before the accident. In fact, the cheques, together with the restaurant's bank statement indicate that the testimony of SB and the applicant's husband is unreliable.

D. Employer's Confirmation of Income Forms

- [22] The applicant submits that if her motive was to cheat, then she would have gone for more money. The applicant's employer signed an OCF-2 Employer's Confirmation of Income form dated December 6, 2016 ("first OCF-2").⁹ The first OCF-2 states the applicant earned \$750 in the second week before the accident and \$1500 in the fourth week before the accident. No total for the four week period was filled out on the form, despite there being a space to calculate the total. However, according to the first OCF-2, the applicant earned \$2,250 in

⁹ Exhibit 2: OCF-2 Employer's Confirmation of Income form of SB dated December 6, 2016

the four weeks before the accident. This would translate to an IRB of \$393.75, or just \$6.25 shy of the maximum allowable of \$400.00 per week. Accordingly, the first OCF-2 does not support the applicant's submissions on her motive to cheat.

- [23] The applicant also prepared an undated OCF-2 Employer's Confirmation of Income form that states she earned \$750 in the second week before the accident and \$750 in the fourth week before the accident. No total is provided on the form and it is not signed by her employer ("second OCF-2"). The initial start date for the applicant's employment is scratched out and listed at October 1, 2015.¹⁰ A third OCF-2 Employer's Confirmation of Income form ("third OCF-2") appears to be an incomplete version of the second OCF-2, but has a start date of August 1, 2016.¹¹
- [24] I find the Employer's confirmation of Income Forms do not assist either the applicant or the respondent. None of the witnesses were asked about the forms and I cannot place any weight on the second and third OCF-2s because they were not signed by the applicant's employer. Although the first OCF-2 is signed by SB, I place no weight on it because SB was not asked about it and the amount listed in it is inconsistent with the evidence and testimony of the witnesses as to the applicant's earnings.

E. Notices of Assessment and T4

- [25] The applicant's Notices of Assessment from Canada Revenue Agency for both 2015 and 2016 were filed.¹² The applicant's 2016 Notice of Assessment states she earned \$6,930.0 in 2016. The applicant's T4 for 2016 from the restaurant states she earned \$5,250.00 gross. I accept SB's testimony that the 2016 T4 form was prepared by his accountant as it is consistent with the applicant's evidence. Because the form was prepared by a chartered accountant and was filed with the Canada Revenue Agency, I give it a great deal of weight.
- [26] According to the applicant's testimony, \$750 of those gross 2016 T4 earnings was for work performed after the accident. That means she earned \$4,500 total in the seven months prior to the accident. If each paycheque was for \$750.00 gross, then the applicant received six paycheques for the seven months she worked before the accident.

¹⁰ Exhibit 3 OCF-2: Employer's Confirmation of Income form signed by the applicant and undated

¹¹ Exhibit 4:incomplete OCF-2 Employer's Confirmation of Income form signed by the applicant and undated

¹² Exhibit 1, Tab 3(a): 2015 Notice of Assessment dated March 21, 2016, Exhibit 1, Tab3(b) 2016 Notice of Assessment dated April 13, 2017

- [27] The applicant's statement was filed as an exhibit.¹³ The applicant's evidence from her statement was that she took a month off, either May or June 2016, because her children were ill. If the applicant worked for six out of the seven months before the accident, her 2016 T4 earnings, after deduction for the August 31, 2016 payroll, is consistent with the applicant earning \$750 per month for the months the applicant worked in 2016 prior to the accident. While I accept that the applicant did not work for one month out of the seven months preceding the accident because the children were ill, there was no evidence to support her not working any other months from January to July 2016. Because she was responsible for the payroll and the daily, weekly and monthly reports, she would have been required to work every month. For these reasons, I find that on a balance of probabilities, the applicant earned \$750 per month in 2016 for the months she worked and earned \$750 gross earnings in the four weeks prior to the accident.
- [28] If I am wrong and the applicant earned more than what she reported on her taxes, that still would not assist the applicant. That is because under s. 4(5) of the *Schedule*, the applicant's IRB calculation is required to be made without reference to any income the applicant might have failed to report on her taxes. I therefore give the most weight to the applicant's 2016 Notice of Assessment and her 2016 T4 form.
- [29] Given the discrepancies in the evidence and the testimony, I find that the applicant has not satisfied her onus to show that she earned \$1,500 gross income in the four weeks before the accident. I find on a balance of probabilities that she earned \$750 gross income in the four weeks before the accident.

V. ORDER

- [30] I find that the applicant's gross income in the four weeks before the accident was \$750.
- [31] The applicant's appeal is dismissed.

Released: October 31, 2018

Deborah Neilson, Adjudicator

¹³ Exhibit 1, Tab 1: applicant's signed statement dated February 23, 2017.