[TRANSLATION]

Citation: *O. C. v. Canada Employment Insurance Commission*, 2015 SSTGDEI 46

Appeal #: GE-14-4636

BETWEEN:

O. C.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance

SOCIAL SECURITY TRIBUNAL MEMBER:	Normand Morin
HEARING DATE:	February 19, 2015
TYPE OF HEARING:	Teleconference
DECISION:	Appeal dismissed

PERSONS IN ATTENDANCE

[1] The Appellant, O. C., was absent from the telephone hearing (teleconference) held on February 19, 2015. Since the Social Security Tribunal of Canada ("the Tribunal") was satisfied that the Appellant had received notice of the hearing on February 19, 2015 (Exhibits GD1-1 to GD1-3), it proceeded in his absence, as permitted in such a situation by section 12 of the *Social Security Tribunal Regulations*. It should be noted that the Tribunal waited more than 30 minutes after the start of the hearing on February 19, 2015 to ensure that the Appellant would be present at the hearing. However, despite that waiting period, the Appellant did not make his presence known.

DECISION

[2] The Tribunal finds that the Appellant's earnings were allocated in accordance with the provisions of sections 35 and 36 of the *Employment Insurance Regulations* ("the Regulations").

INTRODUCTION

[3] On November 29, 2013, the Appellant made an initial claim for benefits effective December 1, 2013. The Appellant stated that he had worked for Provigo Québec Inc. until March 29, 2013 and that he had stopped working for that employer after leaving voluntarily. The Appellant also stated that he had worked for the M. P. C. until November 29, 2013 (Exhibits GD3-3 to GD3-16).

[4] On January 15, 2014, the Respondent, the Canada Employment Insurance Commission ("the Commission"), informed the Appellant that it had not used the hours he had worked for Provigo Québec Inc. in calculating his benefits, since he had voluntarily left that employment without just cause within the meaning of the *Employment Insurance Act* ("the Act"). The Commission also informed the Appellant that the $81,262.00 in severance pay he had received from Provigo Québec Inc. was considered income and would be deducted from his benefits from March 31, 2013 to October 4, 2014. The Commission stated that $834.00 would be deducted from his benefits during the week of October 5, 2014 (Exhibits GD3-18 and GD3-19).

[5] On January 17, 2014, the Appellant made a Request for Reconsideration of an Employment Insurance (EI) decision (Exhibits GD3-20 and GD3-21).

[6] On February 12, 2014, the Commission informed the Appellant that the decision made on January 15, 2014 concerning the allocation of his earnings was being upheld (Exhibits GD3-24 and GD3-25).

[7] On February 25, 2014, the Appellant filed a Notice of Appeal with the Employment Insurance Section of the Tribunal's General Division (Exhibits GD2-1 to GD2-3).

[8] On December 9, 2014, the Appellant sent the Tribunal [translation] "a copy of the reconsideration decision being appealed . . ." (Exhibits GD2A-1 to GD2A-3).

[9] On December 11, 2014, the Tribunal informed the Appellant that his Notice of Appeal seemed to have been filed more than 30 days after the day on which he had received the Commission's reconsideration decision. The Tribunal told the Appellant that it could allow further time for bringing an appeal in certain circumstances but that in no case could it do so more than one year after the day on which the Appellant had received the reconsideration decision (Exhibits GD2B-1 and GD2B-2).

[10] In an interlocutory decision rendered on January 2, 2015, the Tribunal granted the Appellant an extension of the time for appealing to its General Division (Exhibits GD5-1 to GD5-16).

[11] On February 19, 2015, the Tribunal sent questions to the Commission for investigation and report by February 27, 2015. That request related to the amount shown in the space for the final pay period on the Appellant's record of employment (block 15C, insurable earnings, P.P. 1 – Exhibit GD3-17) and its impact on the allocation of the Appellant's earnings (Exhibits GD6-1 and GD6-2).

[12] On March 5, 2015, the Commission sent the Tribunal further information and explained how that information affected the allocation of the Appellant's earnings (Exhibits GD7-1 to GD7-6). Along with the additional arguments it submitted, the Commission presented the following evidence:

(a) Amended record of employment issued to the Appellant by Provigo Québec Inc. on September 24, 2014 (Exhibit GD7-3);

(b) Testimony obtained by the Commission from Provigo Québec Inc. on March 4, 2015 (Exhibit GD7-4);

(c) Testimony obtained by the Commission from the Appellant on February 11, 2014 (Exhibits GD7-5 and GD7-6).

FORM OF HEARING

[13] The hearing was held by teleconference for the reasons stated in the notice of hearing dated January 5, 2015. Those reasons were as follows:

(a) The cost-effectiveness and expediency of the hearing choice;

(b) The Appellant was to be the only party attending the hearing (Exhibits GD1-1 to GD1-3).

ISSUE

[14] The Tribunal must determine whether the amounts received by the Appellant constitute earnings under section 35 of the Regulations and, if so, whether those earnings were allocated in accordance with the provisions of section 36 of the Regulations.

THE LAW

[15] The provisions on "determination of earnings for benefit purposes" and "allocation of earnings for benefit purposes" are set out in sections 35 and 36 of the Regulations, respectively.

[16] For the "determination of earnings for benefit purposes", section 35 of the Regulations defines "income" as ". . . any pecuniary or non-pecuniary income that is or will be received by a claimant from an employer or any other person, including a trustee in bankruptcy." Section 35 also specifies which income is considered earnings.

[17] Subsection 35(2) of the Regulations states the following:

> Subject to the other provisions of this section, the earnings to be taken into account for the purpose of determining whether an interruption of earnings under section 14 has occurred and the amount to be deducted from benefits payable under section 19, subsection 21(3), 22(5), 152.03(3) or 152.04(4) or section 152.18 of the Act, and to be taken into account for the purposes of sections 45 and 46 of the Act, are the entire income of a claimant arising out of any employment, including. . . .

[18] Once this point is made, section 36 of the Regulations specifies the weeks to which earnings must be allocated.

[19] Amounts received from an employer are therefore considered earnings and must be allocated unless they are covered by the exceptions set out in subsection 35(7) of the Regulations or are not from employment.

[20] With regard to the "allocation of earnings for benefit purposes", subsections 36(8) to (10) of the Regulations provide as follows:

> (8)Where vacation pay is paid or payable to a claimant for a reason other than a lay-off or separation from an employment, it shall be allocated as follows: (*a*) where the vacation pay is paid or payable for a specific vacation period or periods, it shall be allocated (i) to a number of weeks that begins with the first week and ends not later than the last week of the vacation period or periods, and (ii) in such a manner that the total earnings of the claimant from that employment are, in each consecutive week, equal to the claimant's normal weekly earnings from that employment; and (*b*) in any other case, the vacation pay shall, when paid, be allocated (i) to a number of weeks that begins with the first week for which it is payable, and (ii) in such a manner that, for each week except the last, the amount allocated under this subsection is equal to the claimant's normal weekly earnings from that employment. (9) Subject to subsections (10) to (11), all earnings paid or payable to a claimant by reason of a lay-off or separation from an employment shall, regardless of the period in respect of which the earnings are purported to be paid or payable, be allocated to a number of weeks that begins with the week of the lay-off or separation in such a manner that the total earnings of the claimant from that employment are, in each consecutive week except the last, equal to the claimant's normal weekly earnings from that employment. (10) Subject to

> subsection (11), where earnings are paid or payable to a claimant by reason of a lay-off or separation from an employment subsequent to an allocation under subsection (9) in respect of that lay-off or separation, the subsequent earnings shall be added to the earnings that were allocated and, regardless of the period in respect of which the subsequent earnings are purported to be paid or payable, a revised allocation shall be made in accordance with subsection (9) on the basis of that total.

EVIDENCE

[21] The evidence in the file is as follows:

(a) A record of employment (serial number of record: W27164056) dated April 9, 2013 showing that the Appellant worked for Provigo Québec Inc. from November 29, 1976 to March 29, 2013 and stopped working for that employer because he was retiring (code G – mandatory retirement). The record indicates that $9,404.14 in vacation pay was paid to the Appellant. There are two other amounts in the "other monies" boxes showing severance pay of $13,857.76 and another similar payment in the amount of $58,000.00. The amount of $6,318.07 also appears in the space for the final pay period on the record of employment (number 15C-1) (Exhibit GD3-17);

(b) An amended or replaced record of employment (serial number of record: W35275561) dated September 24, 2014 showing that the Appellant worked for Provigo Québec Inc. from November 29, 1976 to March 29, 2013 and stopped working for that employer because he was retiring (code G – mandatory retirement). The record indicates that $9,404.14 in vacation pay was paid to the Appellant. There are two other amounts in the "other monies" boxes showing severance pay of $14,292.92 and another similar payment in the amount of $58,000.00. The amount of $10,081.57 also appears in the space for the final pay period on the record of employment (number 15C-1) (Exhibit GD7-3);

(c) On March 4, 2015, Provigo Québec Inc. stated that the $10,081.57 shown in the space for the final pay period on the Appellant's record of employment (number 15C-1) could be broken down as follows:

i. $476.71 for 19 hours of wages for the week of March 24 to 29, 2013;

ii. $200.72 for the statutory holiday on March 29, 2013;

iii. $9,404,14 in vacation pay (Exhibits GD7-3 and GD7-4).

[22] The evidence presented at the hearing is as follows:

(a) Both parties to the case were absent from the hearing, so no evidence was presented during the hearing.

PARTIES' ARGUMENTS

[23] The Appellant made the following submissions and arguments:

(a) He stated that, when he was employed by Provigo Québec Inc., he earned $25.00 an hour and worked 40 hours a week (Exhibit GD7-6);

(b) He explained that the severance pay he received from Provigo Québec Inc. was invested in a registered retirement saving plan (RRSP) and that he currently had no access to it (GD2-1 to GD2-3, GD3-22 and GD3-23);

(c) He explained that he disagreed with the Commission's decision to apply the earnings related to the amount he received from Provigo Québec Inc. as severance pay, which had the effect of disqualifying him from receiving employment insurance benefits (Exhibits GD2-1 to GD2-3, GD3-22 and GD3-23);

(d) He wondered why he was being penalized with respect to his employment insurance benefits even though he had no income to live on (Exhibits GD3-22 and GD3-23).

[24] The Commission (the Respondent) made the following submissions and arguments:

(a) The Commission explained that amounts received from an employer are considered earnings and must therefore be allocated unless they are covered by the exceptions set out in subsection 35(7) of the Regulations or are not from employment (Exhibit GD4-2);

(b) It noted that amounts paid by an employer by reason of a lay-off or separation from an employment must be allocated under subsection 36(9) of the Regulations. It specified that it is the reason for the payment, not its date, that determines when it must be allocated (Exhibit GD4-2);

(c) It determined that the amounts received by the Appellant as vacation pay and severance pay constituted earnings under subsection 35(2) of the Regulations (Exhibit GD4-2);

(d) It noted that the Appellant decided to invest the amounts he received in a registered retirement savings plan (RRSP). It submitted that the purchase of an RRSP did not change the nature of the earnings or the fact that they were payable immediately and that they were considered paid or payable. The Commission explained that the decisive factor is why the amounts were paid, not how the Appellant decided to use them. It noted that even though the Appellant invested his money in an RRSP, it was up to him how he used it, and the fact remains that the amount was paid (Exhibit GD4-3);

(e) It stated that there was a mistake in the record of employment issued by Provigo Québec Inc. concerning the last week's wages under number 15C in the box for insurable earnings, P.P. [pay period] 1 (Exhibit GD3-17). The Commission explained that the Appellant earned $6,318.07 during his last week of work (Exhibit GD3-17 – block 15C, insurable earnings, P.P. 1). It recommended that the Tribunal dismiss the appeal with a variation so it could check with the employer to find out what the Appellant's final pay period included, since his wages were about $1,000.00 a week (Exhibit GD4-3);

(f) It explained that the employer issued an amended record of employment dated September 24, 2014 in which $10,081.57 was shown in the space for the final pay period on the Appellant's record of employment (number 15C-1 – block 15C, insurable earnings, P.P. 1) (Exhibits GD7-1 and GD7-3);

(g) It explained that, after it contacted the employer, the employer told it that the $10,081.57 could be broken down as follows:

   i. $476.71 for 19 hours of wages for the week of March 24 to 29, 2013;

   ii. $200.72 for the statutory holiday on March 29, 2013;

   iii. $9,404,14 in vacation pay (Exhibits GD7-1 and GD7-3).

(h) It stated that the total amount to be deducted must be $81,697.06. It determined that the Appellant's normal weekly earnings were $1,000.00 and that the allocation should be as follows: $1,000.00 a week during the period of December 1, 2013 to October 18, 2014, with a balance of $374.00 during the last week, October 19 to 25, 2014 (Exhibit GD7-1);

(i) It stated that it would adjust the Appellant's file based on the additional information it had obtained (Exhibit GD7-1).

ANALYSIS

[25] The Federal Court of Appeal ("the Court") has affirmed the principle that amounts that constitute earnings under section 35 of the Regulations must be allocated under section 36 of the Regulations **(*Boone et al.*, 2002 FCA 257)**.

[26] In ***McLaughlin* (2009 FCA 365)**, the Court stated:

> Hence, when subsection 35(2) states that "the entire income of a claimant arising out of any employment" is to be taken into account in calculating the amount to be deducted from benefits and for the purposes of section 46, "employment" is not limited to insurable employment.

[27] The Court has confirmed the principle that amounts paid by reason of a lay-off or separation from an employment constitute earnings within the meaning of section 35 of the Regulations and must be allocated in accordance with subsection 36(9) of the Regulations (***Boucher Dancause*, 2010 FCA 270**, ***Cantin*, 2008 FCA 192**).

[28] In ***Pospiech* (A-49-96)**, the Court affirmed CUB 31126, in which the umpire had stated:

> The claimant appeals a unanimous decision of the Board of Referees affirming the Commission's ruling of June 22, 1994, allocating his vacation pay to the week immediately following his last day of work. The claimant worked as an engineer on a 5-month contract for Osmose Pentox Inc. from January 4 to June 3, 1994. At the conclusion of this contract, he received vacation pay in the amount of $424. He applied for unemployment insurance benefits on June 6, 1994. On June 22, 1994, the insurance officer informed the claimant that, pursuant to subsections 57(2) and 58(9) of the ***Regulations***, he was disqualified from receiving benefits for the week immediately following his termination of employment because of these earnings, but that his entitlement period would be extended by one week. . . . The claimant now appeals this decision on the grounds that he was not on vacation the week following his dismissal and that his vacation pay should be deemed to have been received the next time he takes a vacation from employment. I cannot find any merit in this submission.

[29] In ***Granger* (A-684-85)**, the Court confirmed the principle that amounts paid into a person's registered retirement saving plan (RRSP) must be considered as if they had been paid directly to the person. Therefore, even where amounts have been paid into a person's RRSP, the person is deemed to have received or cashed them.

[30] ***Murray* (2013 FC 49)** involved an application to the Federal Court by the applicant, Norman Murray, for the following purpose:

> . . . to quash a decision of the Public Service Staffing Tribunal [PSST] dismissing his request to submit post-hearing evidence and dismissing his complaint of discrimination in a staffing process undertaken by the Immigration and Refugee Board [IRB] in 2006.

[31] In that decision (***Murray*, 2013 FC 49**), the parts of the test to be used for the admission of post-hearing evidence were stated as follows by the Court:

> . . . The parties agreed that the three-part test summarized in *Whyte v Canadian National Railway*, 2010 CHRT 6 [*Whyte*], which followed that used in *Vermette v Canadian Broadcasting Corporation*, [1994]

> CHRD 14, should be used. The test is the following: 1. It must be shown the evidence could not have been obtained with reasonable diligence for use at the trial; 2. The evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive; and 3. The evidence must be such as presumably to be believed, or in other words, it must be apparently credible, although it need not be incontrovertible.

[32] On this point, the Tribunal will, in its analysis, consider the additional arguments and new evidence submitted by the Commission on March 5, 2015 following the hearing on February 19, 2015 (Exhibits GD7-1 to GD7-6), since those documents have a decisive influence in this case and contain information that would probably have an influence on the Tribunal's decision (***Murray*, 2013 FC 49**).

Amounts received from the employer

[33] First, the evidence in the file shows that, following the Appellant's separation from his employment with Provigo Québec Inc., he received a total of $81,697.06 (Exhibits GD7-1 and GD7-3). That amount was made up of the following: $72,292.92 in severance pay ($58,000.00 + $14,292.92 = $72,292.92) and $9,404.14 in vacation pay ($72,292.92 + $9,404.14 = $81,697.06) (Exhibits GD7-1 and GD7-3).

[34] The Tribunal accepts that the total amount in issue in this case is $81,697.06. The $476.71 paid to the Appellant for the hours worked during the week of March 24 to 29, 2013 and the $200.72 paid to him for the statutory holiday on March 29, 2013 are part of the Appellant's last week of work while employed by Provigo Québec Inc., not his employment insurance benefit period (Exhibit GD7-3). Indeed, the Commission stated in its additional arguments that [translation] "the total earnings to be deducted are eighty-one thousand six hundred ninety-seven dollars and six cents ($81,697.06)" (Exhibit GD7-1).

[35] The Tribunal notes that the amended record of employment issued by Provigo Québec Inc. on September 24, 2014 and the new information it gave the Commission also clarified the nature of the $10,081.57 shown in the space for the final pay period on the Appellant's record of employment (number 15C-1 – block 15C, insurable earnings, P.P. 1) (Exhibit GD7-3). That amount includes the $9,404.14 in vacation pay paid to the Appellant,

the $476.71 for his work during the week of March 24 to 29, 2013 and the $200.72 paid to him for the statutory holiday on March 29, 2013 ($9,404.14 + $476.71 + $200.72 = $10,081.57).

[36] The Tribunal finds that the total of $81,697.06 paid to the Appellant clearly constitutes earnings under section 35 of the Regulations, since it was paid to him as severance pay and vacation pay. The severance pay is made up two amounts totalling $72,292.92, namely $58,000.00 and $14,292.92 (Exhibit GD7-3). The Appellant's vacation pay is $9,404.14 (Exhibit GD7-3).

[37] Although the Appellant argued that he did not receive the amount paid to him as severance pay because that amount, or part of it, was invested in a registered retirement saving plan (RRSP), this does not change the nature of the amount paid to him.

[38] That amount, whether cashed or transferred in whole or in part into an RRSP account, constitutes earnings for the purpose of calculating benefits. What the Appellant chose to do with the amount he received does not change the fact that it constitutes earnings within the meaning of section 35 of the Regulations (***Granger*, A-684-85**).

[39] Paragraph 35(2)(a) of the Regulations clearly specifies that:

> . . . the earnings to be taken into account for the purpose of determining whether an interruption of earnings under section 14 has occurred and the amount to be deducted from benefits payable under section 19, subsection 21(3), 22(5), 152.03(3) or 152.04(4) or section 152.18 of the Act, and to be taken into account for the purposes of sections 45 and 46 of the Act, are the entire income of a claimant arising out of any employment, including (a) amounts payable to a claimant in respect of wages, benefits or other remuneration from the proceeds realized from the property of a bankrupt employer. . . .

[40] Indeed, the Commission made the following submission:

> [Translation]
>
> The claimant decided to invest the amounts he received in a registered retirement saving plan (RRSP). The purchase of an RRSP does not change the nature of the earnings or the fact that they were payable

> immediately. The earnings are considered paid or payable. The decisive factor is why the amounts are paid, not how the claimant decides to use them. Even though the claimant invested his money in an RRSP, it is up to him how he uses it, and the fact remains that the amount was paid. (Exhibit GD4-3)

[41] In this case, the total of $81,697.06 paid to the Appellant is related to his employment with Provigo Québec Inc.

[42] It is an amount that is from employment and is not covered by the exceptions set out in subsection 35(7) of the Regulations.

Allocation of earnings

[43] The Tribunal finds that the $81,697.06 paid to the Appellant as severance pay and vacation pay must be allocated in accordance with the provisions of section 36 of the Regulations.

[44] The Tribunal cannot override the principle that amounts that constitute earnings under section 35 of the Regulations must be allocated under section 36 of the Regulations (***Boone et al.*, 2002 FCA 257**).

[45] The fact that part of the amount received by the Appellant was paid into a registered retirements savings plan (RRSP) or used for other purposes cannot mean that it is excluded from the allocation (***Granger*, A-684-85**).

[46] The Tribunal is of the opinion that the Commission has shown that the earnings received by the Appellant had to be allocated for benefit purposes (***Boucher Dancause*, 2010 FCA 270**, ***Cantin*, 2008 FCA 192**, ***Boone et al.*, 2002 FCA 257**, ***Pospiech*, A-49-96**, ***Granger*, A-684-85**).

[47] Subsection 36(9) of the Regulations clearly states that:

> (9)Subject to subsections (10) to (11), all earnings paid or payable to a claimant by reason of a lay-off or separation from an employment shall, regardless of the period in respect of which the earnings are purported to be paid or payable, be allocated to a number of weeks that begins with the week of the lay-off or separation in such a manner that the

> total earnings of the claimant from that employment are, in each consecutive week except the last, equal to the claimant's normal weekly earnings from that employment.

[48] In the additional arguments it submitted, the Commission explained that the total earnings to be deducted are $81,697.06 (Exhibit GD7-1). That amount is essentially made up of the total of $72,292.92 in severance pay paid to the Appellant and the $9,404.14 in vacation pay paid to him ($72,292.92 + $9,404.14 = $81,697.06) (Exhibits GD7-1 and GD7-3).

[49] The Commission determined that, based on the Appellant's normal weekly earnings, which it established were $1,000.00, the allocation should be as follows: $1,000.00 a week during the period of December 1, 2013 to October 18, 2014, with a balance of $374.00 during the last week, October 19 to 25, 2014 (Exhibits GD7-1 to GD7-6).

[50] The Appellant did not present any new facts or grounds that could have led the Tribunal to conclude that the allocation of the earnings he received from his employer should be different than the allocation determined by the Commission.

[51] In reliance on the above-mentioned case law, the Tribunal finds that, in light of the calculations the Commission intends to make based on the new information it now has, the earnings paid to the Appellant were allocated in accordance with the provisions of sections 35 and 36 of the Regulations.

[52] The appeal is without merit on this issue.

CONCLUSION

[53] The appeal is dismissed.

Normand Morin
Member, General Division

DATE OF REASONS: March 12, 2015