Citation: ***W. P. v. Canada Employment Insurance Commission*****, 2015 SSTGDEI 186**

Date: November 5, 2015

File number: GE-15-1700

GENERAL DIVISION – Employment Insurance Section

Between:

W. P.

Appellant

and

Canada Employment Insurance Commission

Respondent

Decision by: Katherine Wallocha, Member, General Division – Employment Insurance Section

Heard by Teleconference on October 14, 2015

REASONS AND DECISION

PERSONS IN ATTENDANCE

W. P., the claimant, did not attend the hearing.

INTRODUCTION

[1] The claimant became unemployed on February 4, 2015. He filed for Employment Insurance (EI) benefits on February 5, 2015. An initial claim for EI benefits was established on February 8, 2015. The claimant received monies on separation from his employment and the Canada Employment Insurance Commission (Commission) determined this income was earnings and applied them against his EI claim. The claimant further disagreed that the Commission did not recognize that he was living temporarily in Alberta with his permanent residence is in New Brunswick. The claimant sought reconsideration of the Commission's decision, which the Commission maintained in their letter dated May 11, 2015. The claimant appealed to the Social Security Tribunal (SST).

[2] The hearing was held by Teleconference for the following reasons:

a) The complexity of the issues under appeal.

b) The fact that the claimant will be the only party in attendance.

c) The information in the file, including the need for additional information.

[3] The claimant did not attend the hearing scheduled for October 14, 2015. The Tribunal waited for more than a week to hear from the claimant however, the claimant did not contact the SST. Information retrieved from Canada Post indicates that the Notice of Hearing was successful delivered on August 23, 2015 and signed for by the claimant.

[4] Subsection 12(1) of the *Social Security Tribunal Regulations* states that if a party fails to appear at a hearing, the Tribunal may proceed in the party's absence if the Tribunal is satisfied that the party received notice of the hearing.

[5] Based on the information received from Canada Post, the Tribunal is satisfied that the claimant received notice of the hearing and thus proceeded with the hearing in his absence.

ISSUES

[6] The issue under appeal are:

1. whether the claimant has earnings to be allocated to a period of a claim pursuant to sections 35 and 36 of the *Employment Insurance Regulations* (Regulations).

2. whether the claimant has received the correct number of weeks of EI benefits during his benefit period in accordance with subsection 12(2) of the *Employment Insurance Act* (EI Act).

THE LAW

Earnings and Allocation of Earnings

[7] Subsection 35(1) 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."

[8] Subsection 35(2) of the Regulations provides, in part, that earnings to be taken into account for the purposes 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 EI Act, and to be taken into account for the purposes of sections 45 and 46 of the EI Act, are the entire income of a claimant arising out of any employment.

[9] Subsection 36(1) of the Regulations provides that earnings as determined under section 35 shall be allocated in the manner describe in this section.

[10] Subsection 36(9) of the Regulations states that 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.

Weeks of Entitlement

[11] Subsection 7(1) of the EI Act states that unemployment benefits are payable to an insured person who qualifies to receive them.

[12] Subsection 7(2) of the EI Act states that an insured person, other than a new entrant or a re-entrant to the labour force, qualifies if the person (*a*) has had an interruption of earnings from employment; and (*b*) has had during their qualifying period at least the number of hours of insurable employment in relation to the regional rate of unemployment that applies to the person.

[13] Subsection 10(1) of the EI Act provides that a benefit period begins on the later of

a) the Sunday of the week in which the interruption of earnings occurs, and
b) the Sunday of the week in which the initial claim for benefits is made.

[14] Subsection 12(2) of the EI Act states that the maximum number of weeks for which benefits may be paid in a benefit period because of a reason other than those mentioned in subsection (3) shall be determined in accordance with the table in Schedule I by reference to the regional rate of unemployment that applies to the claimant and the number of hours of insurable employment of the claimant in their qualifying period.

[15] Subsection 17(1) of the Regulations states that the regional rate of unemployment that applies to a claimant is

a) in the case of regions described in sections 2 to 11 of Schedule I, the average of the seasonally adjusted monthly rates of unemployment for the last three-month period for which statistics were produced by Statistics Canada that precedes the week referred to in subsection 10(1) of the Act or, if Statistics Canada does not publish the relevant rate for a region for reasons of confidentiality, the average that Statistics Canada has determined based on the minimum number of unemployed persons required to allow it to publish the rate; and

b) in the case of regions described in sections 12 to 14 of Schedule I, the greater of the average that would arise under subparagraph (i) and the average that would arise under subparagraph (ii):

i. the average of the seasonally adjusted monthly rates of unemployment for the last three-month period for which statistics were produced by Statistics Canada that precedes the week referred to in subsection 10(1) of the Act or, if Statistics Canada does not publish the relevant rate for a region for reasons of confidentiality, the average that Statistics Canada has determined based on the minimum number of unemployed persons required to allow it to publish the rate, and

ii. the average of the seasonally adjusted monthly rates of unemployment for the last 12- month period for which statistics were produced by Statistics Canada that precedes the week referred to in subsection 10(1) of the Act or, if Statistics Canada does not publish the relevant rate for a region for reasons of confidentiality, the average that Statistics Canada has determined based on the minimum number of unemployed persons required to allow it to publish the rate.

[16] Paragraph 17(1.1)(a) of the Regulations states that the regional rate of unemployment referred to in subsection (1) is for the purposes of sections 7, 7.1, 12 and 14 and Part VIII of the Act, the rate produced for the region in which the claimant was, during the week referred to in subsection 10(1) of the Act, ordinarily resident.

EVIDENCE

[17] The claimant applied for regular EI benefits using an X, Alberta address however he also provided an address in X, New Brunswick. The claimant stated that he had worked for three employers in the last 52 weeks (Pages GD3-3 to GD3-14).

[18] The claimant's last employer submitted a Record of Employment (ROE) indicating that the claimant began working on December 22, 2014 and his last day of work was February 4, 2015 due to "other" commenting "Reduction in force; severance to be paid upon receipt of release letter. The ROE further indicated that the claimant had accumulated 217 hours of insurable employment and received $254.17 in vacation pay, $1,407.69 in pay in lieu of notice and $3,237.00 in severance. The ROE identified the claimant's address as X, NB (Page GD3-15).

[19] The Commission provided the EI Economic Region for X, Alberta for the period of February 8, 2015 to March 14, 2015 indicating that the unemployment rate at that time was 4.8% requiring the claimant to have 700 hours of insurable employment and the minimum number of weeks payable was 14 with the maximum being 36 (Page GD3-17).

[20] The claimant contacted the Commission and informed that he was temporarily living in Alberta however; his permanent residence is in New Brunswick (Page GD3-19).

[21] The Commission sent a letter dated March 6, 2015 informing the claimant that he received monies on separation from his employer. This income, before deductions, is considered earnings and a total of $4,509.00 will be applied against his EI claim from February 8, 2015 to February 28, 2015. A balance of $389.00 will be applied against his claim for the week beginning March 1, 2015 (page GD3-20).

[22] The claimant submitted his Request for Reconsideration providing an address in X, Alberta. He stated that the vacation pay should not be included in the waiting time as employees could get paid for vacation pay during employment and it will be unfair to those who get paid when they get laid off. This is causing him to wait longer than normal (Page GD3-22).

[23] The claimant continued that the lump sum payment offered at the end of his employment should not be included in the waiting time for EI benefits. The claimant further stated that the special payment was not mandatory from Alberta Works and this payment has nothing to do with the regular pay and not every worker received this. He stated that it would be unfair to him if this payment was included towards his waiting period (Page GD3-24).

[24] The claimant stated that his permanent residence is in X, New Brunswick where he owns a condo. He came to Alberta for work but still has an obligation to pay for property tax and condo fees. He stated that it will be unfair to him if those facts are ignored as this decision results in getting paid for fewer weeks compared to New Brunswick. He stated that he does not own any property in Alberta but moves to where he can find a job. He added that he may not find a job and the decision will be unfair if it is based on where he submitted the claim and not from where his permanent residence is (Page GD3-24).

[25] The claimant was contacted by the Commission and he stated that it is unfair that the vacation pay is allocated because those who have vacation pay paid on each cheque do not have to wait for EI benefits. He also felt that there should be a limit to how much is allocated for severance pay as he received more than the employer was legally obligated to pay him based on how long he worked there. He felt this money should be considered bonus monies. The claimant was advised that his benefit period was extended accordingly and he replied that EI premiums should not be mandatory (Page GD3-25).

[26] The claimant disputed his ordinary place of residence and advised that even though he has been living and working in Alberta for well over a year; he owns a condo in New Brunswick and pays taxes and fees for it. He further stated that he has a roommate who lives there off and on and he stays there as well when he goes back for a couple of days. He stated that the Canada Revenue Agency (CRA) considers his New Brunswick address to be his principal residence so EI should to. He added that he does not plan on staying in Alberta permanently but has to be here because there are no jobs in New Brunswick (Page GD3-25).

SUBMISSIONS

[27] The claimant submitted that:

a) The delay of receiving EI payment is unfair to those who are waiting to receive the EI payment for a very long time and maybe after this still not receive the EI payment. The delay is unfair to those who receive generous severance pay; more than is required by law (Page GD2-5).

b) There is a cap for EI premiums; there should also be a limit of waiting period to receive EI benefits. If there is no limit to the waiting period then there should be an option to receive the premium back in a timely manner (Page GD2-5).

c) The primary residence should agree with CRA; where he owns a condo and not where he works (Page GD2-5).

[28] The Commission submitted that:

Earnings and Allocation of Earnings

a) Earnings paid by an employer by reason of the separation from employment must be allocated pursuant to subsection 36(9) of the Regulations. It is the reason or motive for the payment, and not the date of payment that determines the date from which the allocation must begin (Page GD4-3).

b) The vacation pay, pay in lieu of notice and severance pay the claimant received constituted earnings pursuant to subsection 35(2) of the Regulations because the payment was made to compensate the claimant for the loss of employment. The Commission further submits that the payment of $4,899.00 and was paid by reason of his separation from employment. Consequently, the vacation pay, pay in lieu of notice and severance pay was allocated pursuant to subsection 36(9) of the EI Act, according to his normal weekly earnings of $1,503.00 from February 4, 2015 (Page GD4-3).

Weeks of Entitlement

c) The claimant accumulated 1820 hours of insurable employment in his qualifying period and the regional rate of unemployment was 4.8% when the benefit period was established. Accordingly, the maximum number of weeks for which benefits may be paid pursuant to Schedule I in subsection 12(2) of the EI Act is 36 (Page GD4-3).

d) The claimant has been living and working in Alberta for over a year, the claimant applied for EI benefits in Alberta based on employment accumulated in Alberta. The claimant may not consider Alberta home, but this is where he has settled. This meets the definition of "ordinarily resident" as stated in paragraph 17(1.1)(a) of the Regulations. The fact that the claimant has an intention to return one day to a Province he considers home does not prevent him from being ordinarily resident in a place where he has been making his living and appears to wish to continue making his living for the foreseeable future.

ANALYSIS

Earnings and Allocation of Earnings

[29] In order to be considered earnings, the income must be arising out of any employment or there is a "sufficient connection" between the claimant's employment and the sums received (*Canada (Attorney General) v. Roch*, 2003 FCA 356). The claimant must disclose all monies paid or payable.

[30] It is incumbent upon the claimant to establish that all or part of the sums received as a result of their dismissal amounted to something other than earnings (*Bourgeois v. Canada (Attorney General)*, 2004 FCA 117).

[31] In this case, the claimant received monies as a result of his layoff or separation from employment. The ROE shows the amounts he received as severance pay, vacation pay and pay in lieu of notice. The claimant has provided no evidence to show that the amounts indicated by the employer are incorrect therefore; the Tribunal accepts the information provided by the employer to be the correct amounts that the claimant received upon separation from his employment. Additionally, the Tribunal finds that the amounts received are considered earnings pursuant to subsection 35(2) of the Regulations because they are sums arising from employment.

[32] The claimant argued that he received more severance than what was required by law and it should therefore be considered a bonus. Although the Tribunal respects the claimant's position, the fact remains that it was not received as a bonus and was received as severance pay therefore it is considered earnings received because of his separation of employment.

[33] The Federal Court of Appeal (FCA) upheld the principle that amounts paid by reason of a layoff or separation from employment constitutes earnings within the meaning of section 35 of the Regulations and must be allocated in accordance with section 36(9) of the Regulations (*Canada (Attorney General) v. Boucher-Dancause*, 2010 FCA 270).

[34] Further, in the FCA decision *Lemay v. Canada (Attorney General)*, 2005 FCA 433, Justice Letourneau writes:

> "In *Canada (Attorney General) v. Savarie (1996)*, 205 N.R. 302, leave to appeal to the Supreme Court of Canada denied (1997), 214 N.R. 158, Marceau J.A. defined the circumstances where a payment is a payment paid by reason of a separation from employment pursuant to what is today section 36(9) of the Regulations:
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> > In my opinion, a payment is made "by reason of" the separation from employment within the meaning of this provision when it becomes due and payable at the time of termination of employment, when it is, so to speak, "triggered" by the expiration of the period of employment, when the obligation it is intended to fulfil was simply a potentiality throughout the duration of the employment, designed to crystallize, becoming liquid and payable, when, and only when, the employment ended. The idea is to cover any part of the earnings that becomes due and payable at the time of termination of the contract of employment and the commencement of unemployment."

[35] Once it is determined that the amounts received from the employer are considered earnings, then they must be allocated according to section 36 of the Regulations. The applicable allocation provision in this case is subsection 36(9) of the Regulations as these earnings were paid to the claimant by reason of a separation of employment.

[36] The claimant argued that it is unfair that the vacation pay is allocated because those who have vacation pay paid on each cheque do not have to wait for EI benefits. While the Tribunal does not disagree with the claimant, the fact is that he received his vacation pay because his employment ended. The claimant's dispute appears to be with respect to the law itself rather than the manner in which the Commission applied the law. The Tribunal has not been granted the powers to change the current law and this complaint is best delivered to Parliament through the claimant's local Member of Parliament.

[37] The claimant also stated that there should be a limit on the waiting period. The Tribunal sought guidance from CUB 80192A where Justice Goulard states:

> "[Subsection 36(9)] provides that the earnings received by reason of loss of employment shall be allocated to the weeks following the loss of employment… In CUB 16195, it was decided that there is no maximum period of time over which earnings may be allocated.

> There is a consistent line of authority to the effect that all earnings from employment must be allocated until the sum is completely exhausted before a claimant is entitled to receive benefits (*Giroux* (A-527-87), *Walford* (A-263-78), and CUBs 45218, 47415, 60262 and 65675)."

[38] The claimant stated that if there is no limit to the waiting period then there should be an option to receive the premium back in a timely manner. Parliament has decided that those who receive a severance package upon separation of employment are expected to use that money to pay their living expenses according to their normal weekly earnings until it is exhausted. There is no provision within the law to allow for a repayment of premiums.

[39] For these reasons, the Tribunal concludes that the claimant did have earnings arising out of employment pursuant to subsection 35(2) of the Regulations and the Commission correctly allocated these earnings in accordance with subsection 36(9) of the EI Regulations.

Weeks of Entitlement

[40] The number of weeks of EI benefits that may be paid to a claimant shall be based on the number of insurable employment hours accumulated in the qualifying period and the applicable regional rate of unemployment. The number of weeks payable is defined in the EI Act and its Schedule 1.

[41] In this case, the claimant does not agree with the region used by the Commission in determining the rate of unemployment. Paragraph 17(1.1)(a) of the Regulations states that the regional rate of unemployment for the purposes of section 7 of the EI Act is the rate produced for the region in which the claimant was, during the week referred to in subsection 10(1) of the EI Act, ordinarily resident. Subsection 10(1) states that a benefit period begins on the Sunday of the week in which the interruption of earnings occurred and the Sunday of the week in which the initial claim for benefits is made.

[42] The claimant argued that his primary residence is in New Brunswick where he owns a condo. He explained that there are no jobs in New Brunswick so he relocated to Alberta for work but his entitlement to EI benefits should be based on where his primary residence is according to CRA and not where he works. The claimant has not disputed the unemployment rate used.

[43] CUB 64683 established that the test of where one is "ordinarily resident" involves a consideration of both subjective and objective facts. This term means the residence that is the most important for the appellant because he habitually, regularly and consistently chooses it.

[44] In CUB 77846, the Umpire explains:

> "In a similar matter, Riche J. stated as follows in CUB 69529:
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> > There is no doubt that he lived in Salmon Creek for a considerable time working during the year, but at the end of the season, he returned home to Norton. That, in my view, was sufficient to show that that is where he was ordinarily resident. By going away to work did not change his residence. The words used in Regulation 17(1)(a)(b) refers to where the claimant was ordinarily resident in the week before he applied for benefits.
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> In CUB 21968, Justice Strayer stated in the conclusion of his decision:
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> > I would only add that it is obvious that strict attention must be paid to the circumstances of a claimant at the time when he became entitled to apply for benefits in determining where he is "ordinarily resident." Otherwise it would open to claimants newly in receipt of benefits, living in an area of relatively low unemployment, to move deliberately to some area of high unemployment where their entitlement to benefits would be greater. This surely is not contemplated by the Act or Regulations."

[45] In this case, the Tribunal finds that the claimant's "ordinary residence" is in Alberta because he lived and worked in Alberta for well over a year and did not return to New Brunswick when he was laid off. He stated that he moved to Alberta because there was no work in New Brunswick and he only stays in his condo in New Brunswick when he goes back for a couple of days. This can hardly be considered his normal place of residence. While the claimant's ROE stated his New Brunswick address, he applied for EI benefits showing an address in X, Alberta and although the claimant moved during the period of his claim, this move was to another city in Alberta. Therefore, the Tribunal is satisfied that the claimant habitually, regularly and consistently chooses to live Alberta.

[46] For these reasons, the Tribunal concluded that while the claimant may own property in New Brunswick, he has settled in Alberta and this is considered the region where he was ordinarily resident. The number of weeks of EI benefits that may be paid to the claimant shall be

based on the regional rate of unemployment for X, Alberta, where the claimant resided when he applied for regular EI benefits on February 5, 2015.

CONCLUSION

[47] The appeal is dismissed.

K. Wallocha
Member, General Division - Employment Insurance Section