



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *C. L. v. Canada Employment Insurance Commission*, 2015 SSTGDEI 218

Date: December 16, 2015

File number: GE-15-2483

GENERAL DIVISION - Employment Insurance Section

Between:

C. L.

Appellant

and

Canada Employment Insurance Commission

Respondent

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

Heard by Teleconference on December 14, 2015

REASONS AND DECISION

PERSONS IN ATTENDANCE

C. L., the claimant, attended the hearing via teleconference.

INTRODUCTION

[1] The claimant became unemployed on May 1, 2015. He filed for Employment Insurance (EI) benefits on April 28, 2015. An initial claim for EI benefits was established on May 3, 2015. The Canada Employment Insurance Commission (Commission) determined that the claimant's vacation pay was considered earnings and allocated these earnings to his EI claim from May 3, 2015 to June 20, 2015. The claimant sought reconsideration of the Commission's decision, which the Commission maintained in their letter dated July 3, 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 issue 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.

ISSUE

[3] The issue under appeal is 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).

THE LAW

[4] 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."

[5] 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.

[6] Subsection 35(7) provides that the portion of the income of a claimant that is derived from any of the following sources does not constitute earnings for the purposes referred to in subsection (2):

- a) disability pension or a lump sum or pension paid in full and final settlement of a claim made for workers' compensation payments;
- b) payments under a sickness or disability wage-loss indemnity plan that is not a group plan;
- c) relief grants in cash or in kind;
- d) retroactive increases in wages or salary;
- e) the moneys referred to in paragraph (2)(e) if
 - i) in the case of a self-employed person, the moneys became payable before the beginning of the period referred to in section 152.08 of the Act, and
 - ii) in the case of other claimants, the number of hours of insurable employment required by section 7 or 7.1 of the Act for the establishment of their benefit period was accumulated after the date on which those moneys became payable and during the period in respect of which they received those moneys; and
- f) employment income excluded as income pursuant to subsection 6(16) of the *Income Tax Act*.

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

[8] 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.

[9] Section 13 of the *Employment Insurance Act* stated that a claimant is not entitled to be paid benefits in a benefit period until, after the beginning of the benefit period, the claimant has served a two week waiting period that begins with a week of unemployment for which benefits would otherwise be payable.

EVIDENCE

[10] The claimant applied for regular EI benefits stating that he earned \$80,000 per year (Page GD3-3 to GD3-10).

[11] The employer submitted a Record of Employment (ROE) indicating that the claimant began working as an instructor on August 25, 2014 and his last day of work was May 1, 2015 due to a shortage of work. He accumulated 1440 hours of insurable employment and was paid \$12,276.29 in vacation pay (Page GD3-11).

[12] The Commission sent a letter dated May 15, 2015 informing the claimant that he received vacation pay from his employer and this income is considered earnings and a total of \$11,957.00 will be applied against his EI claim from May 3 to June 20, 2015 (Page GD3-13).

[13] The claimant submitted a Request for Reconsideration stating that his vacation pay was legally earned as part of his valid employment year during which he made full EI contributions. He further stated that he has no earnings for the May 2015 period and he cannot see how vacation money earned legally under the employment year together with valid EI contributions can result in such a penalty (Page GD3-15).

[14] The claimant contacted the Commission and left a message stating that he does not agree that the vacation pay which he received as a lump sum payment of at the end of April 2015 should be delaying him from receiving his EI benefits. He stated that if he had used up that vacation pay then he would have been paid EI for the month of May 2015. The claimant

informed the Commission that he was out of Canada from May 30 to July 27, 2015 (Page GD3-19).

[15] The claimant testified at the hearing that he is in contract employment within higher education and his contract ends at the end of April and his vacation pay is paid at the end of the contract. The claimant stated that if he were to use his vacation during the year then it would not apply against his EI claim. He thinks that it is unfair that it is held against him that he did not use his vacation time during the year.

[16] The claimant stated that he should be entitled to EI as of May 2, 2015. His vacation pay is paid on a weekly basis and therefore he earned this money during his employment per week. He stated that he still made EI contributions against those earnings. Now the Commission is saying that this money needs to be used against him but where is the EI he paid against those earnings.

[17] The claimant stated that another thing that must be considered is that the claimant had a two week waiting period which means the only money he actually received from EI is \$471.00 for the 3.5 months he was unemployed; he stated that he took vacation for June and July in which he was outside of Canada. He stated that the law is extremely biased and does not benefit the individual that has made contributions. He further stated that there were EI contributions made against the \$12,000.00 that is being used against his EI claim and he is not seeing a dime of that money.

[18] The claimant agreed with the amounts reported by the employer and the amount of weekly earnings used by the Commission and he confirmed that he is unable to take time off during the school year. He further confirmed that he is a temporary full-time teacher for a post-secondary institution and he is completely unemployed between contracts without health and dental benefits. He added that he is typically unemployed from May to mid-August.

[19] The claimant stated that the net amount he was paid was \$8,350.00 and not the \$12,000 that is being used against his claim.

SUBMISSIONS

[20] The claimant submitted that:

- a) His claim for EI is delayed until June 20, 2015 because he received vacation pay. He is not employed for May 2015 and the first two weeks of August 2015 and he seeks his benefits to start on May 2, 2015 as his employment was terminated on May 1, 2015 (Page GD2-3).
- b) He finds the Commission's decision to apply his vacation pay against his claim to be grossly unfair as his vacation money has no bearing on his EI claim (Page GD3-15).
- c) He feels that it is slightly unfair that it is held against him that he did not use up the vacation pay ahead of April (Page GD3-19).
- d) For the month of May he was actually in Canada and was not employed. The legislation provides for that and he should be able to receive EI benefits for that time; it is as simple as that. If you calculate the amount of money for the time he is eligible, it is less than \$2,500.00. He was out of the country on vacation for June and July and he used his vacation pay for this vacation. To have only received \$471.00 for his period of unemployment is extremely preposterous.
- e) It is not his intention to abuse the system or to receive benefits he was not entitled to but he does consider that the Commission is using his \$12,000 as legally earned vacation pay to say he is not able to receive \$2,500.00. He stated that his final net income on this amount was \$8,350.00 and using the gross total does not make sense.
- f) He is asking for a re-interpretation of the law because he was not employed and he needs the money.

[21] The Commission submitted that:

- a) Based on information obtained from the ROE and his application the claimant's normal weekly earnings were determined to be \$1,779.00. There was \$318.00 allocated to the week of layoff (April 26, 2015) to top up the earnings in the claimant's last week of work. The remaining amount (\$11,957.00) is allocated at his average weekly earnings as indicated above until it runs out in the week of June 14 to June 20, 2015 pursuant to sections 35 and 36 of the Regulations (Page GD4-1).

- b) 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 GD4-2).
- c) The vacation pay the claimant received constituted earnings pursuant to subsection 35(2) of the Regulations because the payment was made to compensate the claimant for accumulated vacation leave that the claimant did not use prior to his lay-off or separation.
- d) The payment of \$12,276.29 was paid by reason of his separation from employment. Consequently, the vacation pay was allocated pursuant to subsection 36(9) of the EI Act, according to his normal weekly earnings from May 3 to June 20, 2015 (Page GD4-2).

ANALYSIS

[22] In order to be considered earnings, the income must be arising out of any employment. The claimant must disclose all monies paid or payable and must prove that the income is not earnings and should not be allocated.

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

[24] In this case, the claimant was laid off from his employment and he received \$12,276.29 in vacation pay. The Tribunal accepts the claimant's testimony that he does not dispute the sum he received from his employer as vacation pay nor does he dispute that he received his vacation pay because he was laid off from his employment.

[25] 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).

[26] The Tribunal finds that the vacation pay the claimant received in the amount of \$12,276.29 is considered earnings pursuant to subsection 35(2) of the Regulations because there

was a sufficient connection between claimant's employment and the amounts he received. Once a sum has been found to be earnings under section 35 of the Regulations, it is necessary to allocate that sum under section 36 of the Regulations.

[27] The allocation of vacation pay falls under one of the three different provisions;

1. If paid due to the lay-off or separation from employment; it is allocated under subsection 36(9) of the Regulations;
2. If paid for a specific vacation period; it is allocated under paragraph 36(8)(a) of the Regulations;
3. In all other cases, it is allocated under paragraph 36(8)(b) of the Regulations.

[28] In this case, the claimant received his vacation pay because of his separation from employment therefore; the Tribunal finds that the claimant's vacation pay must be allocated in accordance with subsection 36(9) of the Regulations.

[29] The claimant argued that applying his vacation pay to his EI claim is grossly unfair as his vacation money has no bearing on his EI claim. He feels that it is unfair that it is held against him that he did not use up the vacation pay ahead of his lay off.

[30] The Tribunal is reminded of 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:

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.”

[31] The claimant became unemployed and he received monies as a result of his layoff or separation from employment. This money was provided to the claimant to compensate him for benefits or earnings that will become owed to him in the future but because his employment ended, the employer paid him immediately. While the Tribunal recognizes the claimant’s argument that the Commission’s interpretation of the law is not fair and that had he taken vacation prior to being laid off it would not have impacted his claim for EI benefits, the fact remains that he did not take vacation prior to being laid off. Parliament has decided that a claimant for EI benefits, who receives a severance package upon separation of employment including vacation pay, should be expected to use that income for their living expenses according to their normal weekly earnings. The Tribunal accepts the claimant’s testimony that he does not dispute the amount the Commission used as his normal weekly earnings.

[32] The claimant further argued that he made EI contributions on the money that he was paid in vacation pay. The Tribunal is mindful that the premiums paid are not a guarantee that EI benefits will be received. A claimant is still expected to meet the requirements of the law.

[33] The claimant questioned the Commission’s use of the gross amount of his vacation pay instead of the net amount or the amount that he actually received. The Tribunal is reminded of *Canada (Attorney General) v. Boone*, A-866-87 which determined that earnings can include amounts not actually received by the claimant. Thus, the whole amount of earnings, the gross amount, is allocated even though some of it goes to pay income tax. Amounts deducted from wages for the employee portion of EI premiums are deemed to have been received by the employee. Considering this case law, the Tribunal is satisfied that the Commission’s use of gross amounts was the appropriate method as the Courts have interpreted the law and have defined earnings to be gross income.

[34] The claimant stated that he was unemployed for the month of May and a few weeks in August and the legislation provides for that and he should be able to receive EI benefits for that time; he is requesting a re-interpretation of the law. While the Tribunal does not dispute that the claimant was unemployed, he was also in receipt of vacation pay and the sections of the

legislation addressing vacation pay cannot be ignored; the Commission and the Tribunal are bound to apply the law. It appears to the Tribunal that the claimant's frustrations reside in the law and not in the application of the law by the Commission. The claimant makes valid arguments however he is making these arguments in the wrong forum. Only Parliament can change the law.

[35] For these reasons, the Tribunal concludes that the claimant did have earnings arising out of employment and these earnings were allocated correctly pursuant to sections 35 and 36 of the EI Regulations.

CONCLUSION

[36] The appeal is dismissed.

K. Wallocha

Member, General Division - Employment Insurance Section