



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *R. F. v. Canada Employment Insurance Commission*, 2016 SSTGDEI 99

Tribunal File Number: GE-16-644

BETWEEN:

R. F.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Katherine Wallocha

HEARD ON: July 21, 2016

DATE OF DECISION: July 25, 2016

REASONS AND DECISION

PERSONS IN ATTENDANCE

R. F., the claimant, attended the hearing via teleconference.

INTRODUCTION

[1] The claimant became unemployed on July 8, 2015. He filed for Employment Insurance (EI) benefits on September 17, 2015. An initial claim for EI benefits was established on September 13, 2015. The Canada Employment Insurance Commission (Commission) determined that the monies the claimant received upon separation from his employment were earnings and allocated them against his claim. The claimant sought reconsideration of the Commission's decision, which the Commission maintained in their letter dated January 26, 2016. 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 form of hearing respects the requirement under the *Social Security Tribunal Regulations* to proceed as informally and quickly as circumstances, fairness and natural justice permit.

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] 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."

[5] Subsection 35(2) of the Regulations provides 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;
- b) workers' compensation payments received or to be received by a claimant, other than a lump sum or pension paid in full and final settlement of a claim made for workers' compensation payments;
- c) payments a claimant has received or, on application, is entitled to receive under
 - i. a group wage-loss indemnity plan,
 - ii. a paid sick, maternity or adoption leave plan,
 - iii. a leave plan providing payment in respect of the care of a child or children referred to in subsection 23(1) or 152.05(1) of the Act,
 - iv. a leave plan providing payment in respect of the care or support of a family member referred to in subsection 23.1(2) or 152.06(1) of the Act, or
 - v. a leave plan providing payment in respect of the care or support of a critically ill child;
- d) notwithstanding paragraph (7)(b) but subject to subsections (3) and (3.1), the payments a claimant has received or, on application, is entitled to receive from a motor vehicle accident insurance plan provided under a provincial law in respect of the actual or presumed loss of income from employment due to injury, if the benefits paid or payable under the Act are not taken into account in determining the amount that the claimant receives or is entitled to receive from the plan;
- e) the moneys paid or payable to a claimant on a periodic basis or in a lump sum on account of or in lieu of a pension; and
- f) where the benefits paid or payable under the Act are not taken into account in determining the amount that a claimant receives or is entitled to receive pursuant to a provincial law in respect of an actual or presumed loss of income from employment, the indemnity payments the claimant has received or, on application, is entitled to receive pursuant to that provincial law by reason of the fact that the claimant has ceased to work for the reason that continuation of work entailed physical dangers for
 - i. the claimant,
 - ii. the claimant's unborn child, or
 - iii. the child the claimant is breast-feeding.

[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.

EVIDENCE

Information from the Docket

[9] The claimant applied for regular EI benefits stating that his last day of work was July 8, 2015 and he would not be returning to this employer (Pages GD3-3 to GD3-13).

[10] The employer submitted a Record of Employment (ROE) dated July 10, 2015 indicating that the claimant began working on November 12, 2013 and he quit on July 8, 2015 accumulating 2129 hours of insurable employment. He was paid \$13,108.36 in vacation pay (Page GD3-14).

[11] The employer submitted an amended ROE dated August 13, 2015 indicating that the claimant was further paid \$246,328.29 in severance pay (Page GD3-15).

[12] The claimant was contacted by the Commission and he stated that he did not quit his employment, the employer was doing a massive restructuring and he was given two options; to leave on July 8, 2015 and be paid 16 weeks in lieu of notice or to continue working until the 16 weeks were up but there was no guarantee that he would be doing the same job as he was told he could work in a similar role (Page GD3-16).

[13] The claimant provided the letter from the employer dated June 23, 2015 which explains the restructuring and the two options given to the claimant. Option #1 stated that the employee can resign effective July 8, 2015 and be eligible immediately for a separation payment and applicable Performance Share Unit (PSU) treatment. Option #2 stated that the employee can remain an employee during the 16 week working notice period of June 23 to October 13, 2015. During this time he will be required to complete work as assigned that will be substantially similar to the level of his current work. As of October 13, 2015, he would be eligible for separation payment which reflects consideration of the working notice provided and he would receive a pro-rated PSU payment in accordance with the terms of the plan (Pages GD3-17 to GD3-25).

[14] The claimant stated that PSUs were the annual "retention" allocation belonging to 2013 and 2014 adding that no PSUs will be allocated for 2015 until December 2015 and only if one works there at that time. He explained that the PSUs are for prior years and because option #2 cut their prior year's money in half, almost everyone chose option #1 (Page GD3-26).

[15] The claimant provided the Summary Chart of Separation Options showing that option #1 was to pay the claimant \$154,222.29 in separation payment, \$92,106.00 in PSU payment

while option #2 would pay the claimant \$63,710.87 in separation payment and \$40,963.00 in PSU payment (Page GD3-29).

[16] The claimant provided the Release and Indemnity, copies of his 2013 Personal Tax Credit Returns, information regarding his benefit package and the employer's policies and procedures (Pages GD3-35 to GD3-85).

[17] The Commission sent a letter dated October 9, 2015 informing the claimant that he received monies on separation from his employment and this income, before deductions, is considered earnings and a total of \$200,324.00 will be applied against his EI claim from September 13, 2015 to April 16, 2016 (Page GD3-87).

[18] The claimant submitted a Request for Reconsideration stating that his compensation annually was based on four categories; Base pay, Incentive Compensation (IC), PSUs and Flexible Cash Allowance. Based on option #1, the base pay of \$63,710.87 was calculated between July 8 and October 13, 2015 as a 16 week work notice [$\$154,222.29 - \$63,710.87 = \$90,511.42$] and paid in lieu of IC and Flexible Cash Allowance for the period of January 1, 2015 to the work notice date of October 13, 2015. PSUs were released from prior year's grants in the amount of \$92,106.00. He stated that it is crystal clear that all these monies were owed to him only up to October 13, 2015 and no further monies were allocated to him as a result of his separation and termination beyond October 13, 2015 (Page GD3-90).

[19] The claimant submitted his employment offer letter dated October 18, 2013 informing him that his Flexible Cash Allowance was \$3,600.00. This letter further explained the PSU program stating that "at the end of a three year vesting period, you will receive the approved payout of the units plus the equivalent of accrued dividends" (Page GD3-92).

[20] The claimant provided a document titled Total Direct Compensation Statement showing that in 2015 the claimant's annual salary was \$184,212.00. He was awarded an annual IC payment in the amount of \$48,850.00. His PSU grant for 2015 was \$46,053.00 (Page GD3-100).

[21] The claimant was contacted by the Commission and he was adamant that the monies he received on separation should be allocated to the past pay periods and that he should be immediately payable benefits from October 13, 2015. The claimant feels these monies were

owed to him only up to October 13, 2015 and no further monies were allocated to him as a result of separation beyond October 13, 2015 (Page GD3-101).

[22] The Commission sent the reconsideration decision letter dated January 26, 2016 maintaining the decision that the monies arising from separation were earnings. The Commission provided information from the Digest 5.6.2.1 Allocation of Earnings that Were Paid or Payable by Reason of a Lay-Off or Separation (Pages GD3-102 and GD103).

Testimony at the Hearing

[23] The claimant testified at the hearing that there are a couple of things that are really unusual in this case. He stated that he spoke to the Commission and he was told that the Commission decided that all of the employees who were terminated from this employer would be denied EI benefits because of quit. This information is not in the file and he feels that this is illegal and unethical and the Tribunal has the authority to retrieve this information.

[24] The claimant stated that he believes that he should have received EI benefits following the 16 week notice period. He stated that his employer provided him with payment for those 16 weeks and he believes that his EI benefits should start on October 14, 2015. Further, the Commission miscalculated his earnings and therefore, his allocation should not have lasted until April 10, 2016.

[25] The claimant stated that the Commission determined his income using the incorrect amount for his PSU grant; the Commission stated he received only \$6,288.47 in PSU grant but he stated that this amount of PSU grant was in 2013 when he worked for only a month and a half and the PSU grant was prorated for that particular year or perhaps it was the IC payment that was prorated for 2013. He stated that when he worked a full year he would get 25% of his annual salary; in 2015 he received \$46,053.00. He stated that if you replace \$6,088 with the \$46,053.00, this increases his weekly earnings and therefore his allocation would not last until April 10, 2016.

[26] Next, the claimant stated that every year he was supposed to get paid his base salary, his IC, PSU and his flexible cash with his flexible cash being paid monthly for him to use as he saw fit. He stated that his base salary was guaranteed but his IC was calculated each year based on

company performance and his performance. He stated that this money was a bonus for the prior calendar year but was paid in March or April of every year. He stated that his PSUs were granted as a retention tactic where the grant was held for a three year vesting period meaning the PSUs he was granted in 2013 were going to be paid in January 2016 or 2017. He stated that he was required to be an employee at the time the PSUs are paid out explaining that this is an administrative tactic because when times are good the employer does not want people to leave.

[27] The claimant stated that the Commission wants to pick and choose which Act they are reading. He directed the Tribunal to the reconsideration decision dated January 26, 2016 where the Commission provided information from the Digest 5.6.2.1 Allocation of Earnings that Were Paid or Payable by Reason of a Lay-Off or Separation. He read:

“This includes any earnings paid to compensate for loss of employment, as well as any payment of outstanding entitlement to unused benefits, such as vacation pay or accumulated sick leave credits, which are paid out under the terms of the contract of employment on separation...

Earnings paid on the occasion of a lay-off or separation are usually considered to be paid by reason of the event; however, there may be evidence that the payment simply coincides with the lay-off. The true reason for the payment may be something entirely different. For instance, a layoff may coincide with an anniversary payment of vacation pay. If the vacation pay would have been paid at that time, regardless of the lay-off, then it cannot be said that the payment was made by reason of the lay-off. Payments may be merely bookkeeping activities prompted by the layoff or separation and not truly paid to compensate for that lay-off or separation or to pay any entitlement to unused benefits that are due on lay-off or separation under the terms of the contract or collective agreement.”

[28] The claimant stated that his PSU grant payout was a bookkeeping activity or a form of bookkeeping tactic where the payment is held off for three years so you stay employed longer but that money is his and was his in 2013 and 2014; it is just that he had to wait to get it and that was the administrative system. He stated that he was not compensated for the lay-off by paying or releasing that PSU grant money; the PSU money was his from January 1 of every year that he worked for this employer and it did not change because of the lay-off. He stated that the amount did not change, the system did not change, nothing changed because of this lay-off “it’s just that money was there and because he was not there anymore, they released it.”

[29] The claimant continued reading from the Digest "...the employer may discover that certain earnings should have been paid at an earlier date but were overlooked. While payment was prompted by the lay-off, it was not the reason for the payment." He stated that his PSU payment was not overlooked it was an administrative activity and the lay-off was not the reason for the payment. He continued reading "Regulation 36(9) regarding earnings by reason of a lay-off or separation is not concerned with the type of earnings paid but only with the reason for the payment." He stated that this is clear to him. He stated that the only time you can refer to his monies upon separation as a severance package is between July 8 and October 13, 2015 because his employer was clear in the letter that they were paying him 16 weeks of income and they were not paying him PSUs for 2015 because he was not employed at the end of the year.

[30] The claimant confirmed that he received his vacation pay in the amount reported by the employer and further confirmed that he is not disputing the vacation pay. He stated that he is disputing that the Commission included all of his monies on separation into their calculations. The claimant further confirmed that he did receive the \$246,328.29 from his employer upon separation from employment. He stated that the Commission used this amount in their calculations and that is incorrect. He stated that his severance was just for the 16 week work notice or $[16 \text{ (weeks)} \times \$4,672 \text{ (weekly earnings calculated by the Commission)} = \$74,752]$ and only this amount should be allocated. The claimant stated that the employer paid him 16 weeks' salary and a 16 week bonus that he would have made if he would have remained an employee until the end of the year. And then he was given the PSUs separately. He stated that the Commission can add on the vacation pay which would amount to another two weeks of allocation but he should have been receiving EI benefits much sooner than April 10, 2016.

SUBMISSIONS

[31] The claimant submitted that:

- a) The monies allocated against his claim were retained from previous years or were performance money for the timeline between January 1, 2015 and October 13, 2015 and no further. They are not extra monies beyond October 13, 2015 (Page GD3-89).
- b) The monies he received upon separation from his employer were either owed to him from prior years and/or performance based compensation up to October 13, 2015. No

extra monies were received beyond October 13, 2015 therefore he must be eligible for EI benefits starting October 14, 2015 (Page GD3-90).

- c) He has the right to receive EI benefits after October 13, 2015 and hereby requests a reversal of the Commission's decision and immediate payment of EI benefits (Page GD3- 91).
- d) The only severance package paid out to him was in the form of 16 weeks of "work notice." The employer made it crystal clear that because of separation, they were going to release all the monies owed to him that he had to wait to get. The employer cut all relationship and compensation with him on October 13, 2015; there was no money, no severance, no bonus and no pay, no nothing paid out to him after October 13, 2015. He has a right to receive what he has been contributing to for decades at this time of hardship. Please stop this nasty game and start paying him what is his right (Page GD2-4).
- e) The employer did not want to hold on to his money now that he was no longer there but it had nothing to do with the layoff. The PSUs were an administrative tactic for retention and he needed to be an employee at the end of the year in order to get the current years PSUs.
- f) His severance pay was not \$246,328.29; his severance was just for the 16 weeks work notice and October 13, 2015 was the end of it. Further, the Commission miscalculated his weekly earnings and should have begun paying him sooner than April 10, 2016.

[32] The Commission submitted that:

- a) Based on the Variable Best Weeks identified by the system and taken from the ROE detailed pay period information, the system determined that the claimant's average weekly earnings from this employment were \$6,566.49; this money was subject to allocation until the week of April 10, 2016. In this case, the money the claimant received was allocated from July 12, 2015 until April 9, 2016 (39 weeks) based on \$6,566.49 a week with the balance of \$3,344.00 allocated into the week of April 10, 2016; in this instance, the allocation would prevent payment of EI benefits and prevent the claimant from serving his two week waiting period until April 17, 2016 (Page GD4-4).

- b) On Pages GD2-6 through page GD2-9, and on page GD3-100, the claimant provided additional facts to dispute his allocation of monies received as a result of separation; the claimant provided actual information regarding his compensation package which was compared to the evidence from his ROE. The Commission validated his normal weekly earnings as being comprised of \$184,212 base salary; \$48,850 incentive compensation (IC) award, PSU Grant of \$6,288.47 and \$3,600 Flexible Cash Allowance for 2015; the claimant's yearly salary would amount to \$242,950. In order to determine his normal weekly earnings, the yearly amount divided by 52 weeks would be validated as \$4,672.12 (Page GD4-5).
- c) Based upon the facts on file the Commission determined that the \$13,108.36 vacation pay and severance pay of \$246,328.29 the claimant received constituted earnings pursuant to subsection 35(2) of the Regulations because the payment was made to compensate the claimant for loss of his employment. The Commission submitted that the payment was made by reason of his separation from employment. The Commission further submitted that his \$259,436.65 vacation pay and severance pay paid to him as monies on separation was allocated pursuant to subsection 36(9) of the Regulations (Page GD4-5).
- d) Based on the validation of his normal weekly earnings shown above from the claimant's contention that the total monies paid to him should only be allocated up to October 13, 2015, the Commission submitted that normal weekly earnings of \$4,672.12 should be utilized in determining the allocation of the monies paid to him as a result of separation which will result in a modification to his allocation and benefit period extension. It is the Commission's contention that it is not reasonable to conclude that \$246,328.29 paid to the claimant as severance would only be allocated over a three month period as it is representative of almost 53 weeks based on the validated amount of his normal weekly earnings [$\$246,328.29 \div \$4,672.12 = 52.72$ weeks] (Page GD4-5).
- e) The Commission respectfully recommends that the claimant's allocation of monies paid to him as a result of separation [$\$13,108.36$ vacation + $\$246,328.29$ severance] be modified using the validated amount of normal weekly earnings as follows:

July 12, 2015 to July 30, 2016 – 55 weeks at normal weekly earnings of \$4,672.12

July 31, 2016 to August 16, 2016 – balance of allocation of \$2,470.05

If the modification to the allocation is maintained by the Tribunal, the claimant's extension to his benefit period will be modified to the maximum extension to the benefit period allowed of 52 weeks. The Commission submitted that it has not erred in its application of the EI Act and Regulations (Page GD4-6).

ANALYSIS

[33] 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 and must prove that the income is not earnings and should not be allocated.

[34] 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).

[35] The claimant attended the hearing and reported a conversation he had with the Commission regarding the termination of his employment explaining that it was stated to him by the Commission that an internal decision was taken to deny EI benefits to all employees who had been dismissed from this employer because it was determined that these employees voluntarily left their employment without just cause. The claimant stated that this conversation was not in the file and he feels that this is illegal and unethical and the Tribunal has the authority to request this information. While the Tribunal recognizes that this conversation was not documented in the file, the Tribunal does not consider this relevant as voluntarily leaving without just cause is not the issue under appeal and the claimant was not denied EI benefits for voluntarily leaving his employment.

[36] For the issue under appeal, the Tribunal accepts the claimant's testimony that he received \$13,108.36 in vacation pay and he does not dispute that this sum of money needs to be allocated. The claimant further confirmed that he received \$246,328.29 upon separation from employment.

[37] The Tribunal agrees with the claimant and the Commission that the claimant's vacation pay is considered earnings pursuant to subsection 35(2) of the Regulations and needs to be allocated pursuant subsection 36(9) of the Regulations because the amount was paid due to the layoff or separation from employment.

[38] The claimant stated that his employment compensation package consisted of four parts; base pay, IC, PSU grant and flexible cash allowance. He further stated that the monies he received upon separation from employment were to compensate him for the 16 week work notice, his outstanding IC, PSUs and flexible cash. From this, the Tribunal can conclude that the monies the claimant received upon separation from employment are considered earnings pursuant to subsection 35(2) of the Regulations because there is sufficient connection between the claimant's employment and the amounts he received. However, the claimant argued that the sum he received upon separation included pay for the 16 week work notice period and only that amount should be allocated; the remainder was for his IC, flexible cash allowance and PSU grant which were retained from previous years or were performance money for the timeline between January 1, 2015 and October 13, 2015 and no further.

[39] The claimant received \$92,106.00 which represented the full initial grant value of his outstanding PSU grants. The claimant argued that the PSUs were granted as an administrative retention tactic and were paid for previous years of employment but were held for a three year vesting period. He stated that this money should be allocated to the years in which they were earned and awarded but not after October 13, 2015 when his 16 week work notice expired. He further argued that this money was paid because of a bookkeeping activity prompted by the layoff or separation and not truly paid to compensate for the lay-off or separation as per the Digest 5.6.2.1. The claimant stated that the Commission wants to pick and choose which Act they use to determine his allocation when the Digest makes it clear to him that these monies need not be allocated. The Tribunal notes that the Digest is not separate legislation but is merely an internal policy providing guidance or interpretation of the EI Act to Commission representatives and the Digest does not have the power of the law nor does it replace the EI Act.

[40] The Tribunal is reminded of the Federal Court of Appeal (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.”

[41] While the Tribunal agrees that the PSU grant is a bookkeeping or administrative retention tactic, this money was provided to the claimant at the time of termination of the contract of employment 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. The claimant submitted that “the employer made it crystal clear that because of separation, they were going to release all the monies owed to him that he had to wait to get.” He testified that “...it’s just that money was there and because he was not there anymore, they released it.” These two statements made by the claimant are correct; the employer released his PSU grants early because the claimant was no longer working for the employer and therefore, the payment of this money, which was not due for some time yet, was paid because of the layoff otherwise he would not have received this money until after the three year vesting period. In other words, the PSU grant payment was “triggered” by the expiration of the period of employment. The Digest provides examples of “a payment at the time of separation that simply coincides with the layoff such as the anniversary payment of vacation pay or the discovery of certain earnings that should have been paid at an earlier date” however, the claimant’s PSU grant, given to the claimant on January 1 of every year, was not payable at an earlier date or at the time of separation; according to the claimant, his 2013 PSU grant (awarded on January 1, 2014) was

due to him in January 2016 or 2017 and his 2014 PSU grant (awarded on January 1, 2015) would have been payable in the following year; these grants were awarded to the claimant earlier but were not owed to him until sometime in the future and were “outstanding entitlements” similar to vacation pay. Thus, the Tribunal finds that the claimant’s PSU grants totalling \$92,106.00 are to be allocated pursuant subsection 36(9) of the Regulations.

[42] Further, the claimant stated that the IC payment was an incentive payment based on his performance and the performance of the company from the previous year and this bonus was normally paid in March or April of every year. From this, the Tribunal can conclude that the only reason why the employer paid this money to the claimant in July 2015 was because of the separation from employment otherwise he would have waited until March or April 2016 to receive this money. Therefore, the Tribunal finds that the claimant’s entire severance package totalling 259,436.65 must be allocated in accordance with subsection 36(9) of the Regulations because the claimant received this money because of a separation from employment. While the claimant objected to the allocation of his severance pay beyond October 13, 2015, Parliament has decided that a claimant for EI benefits, who receives a severance package upon separation of employment, should be expected to use that income for their living expenses according to their normal weekly earnings.

[43] However, the Commission provided the calculations used to determine the claimant’s normal weekly earnings; $\$184,212$ (base salary) + $\$48,850$ (IC payment) + $\$3,600$ (flexible cash allowance) + $\$6,288.47$ (PSU grant) $\div 52 = \$4,672.12$. The claimant stated that the amounts used by the Commission for his base salary, IC payment and flexible cash allowance are correct however the PSU grant amount is incorrect. The Tribunal agrees. On pages GD3-99 and GD3- 100, the Total Direct Compensation Statements show that in 2014 and 2015, the claimant received $\$46,053$ in PSU grant value and not $\$6,288.47$ as used by the Commission. Therefore, the Tribunal finds that the claimant’s normal weekly earnings were not $\$4,672.12$ as calculated by the Commission; the actual amount is $\$184,212 + \$48,850 + \$3,600 + \$46,053 = \$282,715$ (the claimant’s yearly salary) $\div 52 = \$5,437.00$.

[44] The Tribunal notes that the Commission, upon reconsideration, had determined that the original allocation of earnings was done using the amount of separation monies totaling

\$200,324.00 and it was this amount that was applied against his EI claim. The Tribunal recognizes that this amount is incorrect and the total amounts to be allocated are the claimant's vacation pay of \$13,108.36 + his severance pay of \$246,328.29 for a total of 259,436.65 and therefore, the Tribunal agrees with the Commission's modification to the allocation. The Tribunal further recognizes that the Commission has provided an extension to the benefit period to the maximum 52 weeks. However, the Tribunal requests that the Commission recalculate the allocation using the correct amount of weekly earnings based on the revised amount of PSU grant.

[45] For these reasons, the Tribunal concludes that the claimant had received earnings pursuant to subsection 35(2) of the Regulations however these earnings were not properly allocated pursuant to subsection 36(9) of the Regulations.

CONCLUSION

[46] The appeal is dismissed with modifications.

K. Wallocha

Member, General Division - Employment Insurance Section