Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

[TRANSLATION]

Citation: *I. D. v. Canada Employment Insurance Commission*, 2016 SSTGDEI 124

Tribunal File Number: GE-16-945

BETWEEN:

I. D.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Employment Insurance Section

DECISION BY: Charline Bourque

HEARING DATE: August 4, 2016

DATE OF DECISION: September 30, 2016

Canada

REASONS AND DECISION

PERSONS IN ATTENDANCE

I. D., the claimant, took part in the hearing by teleconference.

INTRODUCTION

[1] The Appellant filed a claim for employment insurance benefits beginning on March 31, 2013. On June 11, 2015, the Canada Employment Insurance Commission ("Commission") informed the claimant that he had not reported his income from the City of X in respect of vacation and sick leave credits. The Commission adjusted his income amounts for the weeks of April 21 and July 14, 2013, resulting in an overpayment of $1,002.00. On August 21, 2015, following the claimant's request for reconsideration, the Commission informed him that the decision communicated on June 11, 2015 had been replaced. The earnings were allocated as follows:

Week beginning on	Income is:	Instead of:
April 21, 2013	$2,895.00	$0.00
May 26, 2013	$1,327.00	$0.00
July 14, 2013	$0.00	$1,327.00

[2] This appeal was heard by teleconference for the following reasons:

(a) The complexity of the issue(s).

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

(c) This 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 claimant is appealing a decision concerning an allocation of earnings under sections 35 and 36 of the *Employment Insurance Regulations* ("Regulations").

THE LAW

[4] Subsection 35(1) of the Regulations [version from 2013-03-24 to 2013-03-31] states that the definitions in that subsection apply in section 35.

"employment" means

> (a) any employment, whether insurable, not insurable or excluded employment, under any express or implied contract of service or other contract of employment,
>
> (i) whether or not services are or will be provided by a claimant to any other person, and
>
> (ii) whether or not income received by the claimant is from a person other than the person to whom services are or will be provided;
>
> (b) any self-employment, whether on the claimant's own account or in partnership or co-adventure; and
>
> (c) the tenure of an office as defined in subsection 2(1) of the *Canada Pension Plan*. (*emploi*)

. . .

"income" means 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. (*revenu*)

. . .

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

(2) 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

(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, or

(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;

(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] Subsections 36(8) to (10) of the Regulations state the following:

(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

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

(a) Desjardins account statements for February 1 to May 31, 2013 (GD2-8 to GD2-11).

(b) Claimant's affidavit dated February 25, 2016 stating that the City uses only direct deposit (GD2-12).

(c) City of X direct deposit form. The note states that no paper notice will be issued (GD2-13).

(d) Amended record of employment issued on March 21, 2014 showing a wage adjustment. An "other" amount of $97.37, anniversary vacation pay of $2,895.20 and sick leave credits of $1,327.41 were paid (GD3-16).

(e) On May 5, 2014, the employer stated that the 2012 vacation pay of $2,895.20 had been paid on April 26, 2013 (anniversary date), the sick leave credits of $1,327.41 had been paid on July 19, 2013 and the 2013 vacation pay of $1,815.87 had been paid on March 7, 2014, since the claimant had not worked for a year (GD3-17).

(f) On May 6, 2014, the employer confirmed to the investigator that the vacation pay of $1,815.87 was the amount paid on separation from employment, which was paid on March 7, 2014 because the employee had not been recalled to work for a year. The vacation pay of $2,895.20 was that paid to all employees on the anniversary date each year. The amount was paid on April 26, 2013. The sick leave credits of $1,327.41 were those paid to all employees on the same anniversary date each year. The amount was paid on July 19, 2013 (GD3-18).

(g) On December 4, 2014, the claimant stated that the amounts had been received after his benefits ended. He explained that every employee of the City of X continues to have employment priority (right of recall) for a year. All vested rights (vacation, sick leave, etc.) are also retained for a year and the employee file is active. In his case, the amounts were paid once it had been a year since his separation from employment, so they were paid after his benefits ended (GD3-20).

(h) Excerpt from the collective agreement (GD3-21).

(i) On August 20, 2015, the employer confirmed that the claimant had been laid off indefinitely at the time the vacation pay and sick leave credits were paid to him. The anniversary date for the vacation pay was April 26, 2013, and the deposit was made on June 27, 2013 in the amount of $1616.13 net or $2,895.20 gross. The anniversary date for the sick leave credits was May 30, 2013, and the deposit was made on August 1, 2013 in the amount of $740.97 net or $1,327.41 gross (GD3-34).

(j) Internet Reporting Service (GD9).

(k) Claimant’s 2014 notice of assessment (GD8).

[8] The evidence adduced at the hearing through the Appellant's testimony reveals the following:

(a) The claimant questioned the reliability of the information received by the Commission. He said that that information came from telephone conversations and that the employer had not issued any document showing the information. As well, the information received from the employer changed following the request for reconsideration.

(b) No calculations were done and no money was paid during his benefit period.

(c) He lost his employment on February 1, 2013 because his position was abolished, and he was no longer an employee of the City, contrary to the Commission's assertions. He had the status of an auxiliary employee. The Commission assumed that he was still an employee of the City.

(d) He has the impression that the Commission acted in bad faith to take his money back from him.

(e) The amounts in issue were paid to him in March 2014.

(f) The right of recall did not mean that he was an employee of the City, but rather that he could be rehired in the same borough with the same employment. His position was abolished.

(g) He explained that the right of recall enables the City not to pay the amounts immediately. If employees are rehired, they will use the leave and the City will not have to spend anything.

(h) He asked the Tribunal to give his words the same weight as those of the Commission's officers.

(i) The payment date is the end of the City's fiscal year, which is the date when entitlements are calculated.

(j) He did not receive any notification, he could not say that the City owed him amounts and he did not have an opportunity to report the amounts.

(k) He said that he was harassed by the Commission, which tried to explain to him that the calculation date is what matters. He said that certain points were not correctly recorded in the Commission's reports.

(l) The amounts were paid because 12 months had passed and he had not been recalled to work.

(m) The amount was not given to him in 2013 but rather in 2014. The moneys were payable on April 30, 2013, but they were withheld because of the right of recall. They were therefore paid in October in March 2014. They are outside the Commission's jurisdiction, since they were received after his benefit period.

PARTIES' ARGUMENTS

[9] The Appellant made the following arguments:

(a) According to the claimant, the decision is incorrect because of the Commission's refusal to conduct thorough and important checks: despite his insistence, the claimant received no verification of the payment of pay entitlements exclusively by direct deposit by his employer. This argument was systematically ignored because it cast serious doubt on the information on which the decision under appeal was based.

(b) The claimant submitted that the information is wrong: both the integrity services officer and J. L., who contacted him about the request for reconsideration, said during the telephone conversations that they had requested information orally during telephone calls. The claimant seriously questions the accuracy of the information obtained because of the fact that more than two years passed between the events and the checks and, above all, because of the fact that the alleged dates when the amounts were sent changed between the two checks. In other words, the integrity services officer received information and Ms. J. L. received different information. He countered that verbal

information with indisputable written evidence, which was completely ignored at the time of the request for reconsideration.

(c) The claimant stated that he was adding, as evidence, the account statement for February 2013, which corresponds to the payment of his last month of wages (January) and shows that his wages were paid by direct deposit into the account mentioned. The fact that, a month later, I received $48 from his employer in the same account clearly shows that direct deposit was also used when he was off work. The fact that that amount is not among the amounts referred to in the impugned decision also shows that the information obtained by the Commission is false.

(d) The claimant submitted that errors were made in processing his file: the fact that, after his request for reconsideration was denied, he was asked for two different amounts ($501 and $1,002) in two successive months clearly shows that errors were made in processing the file.

(e) The claimant argued that the file was misunderstood: the Commission ignored all his explanations about the single date for calculating vacation. During a telephone conversation, the integrity services officer even used the expression "*votre anniversaire*" [your birthday]. In fact, the anniversary date mentioned in the record of employment is the vacation calculation date, the time of the year when the vacation of all employees (auxiliary and white-collar) is calculated under the collective agreement, and that time has nothing to do with the employee's birthday.

(f) According to the collective agreement, auxiliary employees who are laid off have a year to be recalled to work. During that period, they retain their entitlements and seniority. The right of recall explains why the vacation money was not paid immediately after the calculation, which the Commission mistakenly assumed. All this information was presented to the Commission's two officers.

(g) It is technically impossible, even for a financial genius, to hide an amount paid into an account by direct deposit or to carry it over to another period. This is therefore indisputable and sufficient evidence that the money was not paid as the Commission's

information indicates but rather outside the employment insurance benefit period. As a result, the amount requested as a repayment is not justified and the amount already paid must be reimbursed.

[10] The Respondent made the following arguments:

(a) 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”. It also specifies what income is considered earnings. Once this point is established, section 36 of the Regulations indicates how such income is allocated, in other words, the week in which the earnings are considered to have been earned by the claimant.

(b) Sums received from an employer are considered to be earnings and must therefore be allocated unless they fall within the exceptions in subsection 35(7) of the Regulations or do not arise from employment.

(c) When vacation pay or sick leave credits are paid because of an anniversary date, the first week for which they are payable is the week in which the anniversary date falls, even if, from an administrative standpoint, it may be that the employer did not pay them until a later date. They are therefore allocated beginning with the week of the anniversary date. An employee is entitled, by contract, to payment at a particular time.

(d) The agreement between the employer and the employee may be written or oral. The terms of the agreement determine when the employee becomes entitled to vacation pay or sick leave credits (EIR 36(8)(b)(i)).

(e) Also, the following three conditions must be met for vacation pay or sick leave credits to be allocated to past periods:

- the vacation period or eligibility period for sick leave credits must be provided for in an agreement between the employer and the employee (collective agreement);

- there must be a connection between the payment of vacation pay or sick leave credits and entitlement to a vacation period or compensation period, which is to say that the claimant is entitled to a vacation period or compensation period for which the claimant has a right to be paid; it is not necessary that the claimant be paid at the time of taking leave or that the claimant request sick leave compensation; and

- the claimant must be an employee while receiving the credits; the Federal Court has held that the unemployed are not supposed to go on vacation (A-678-87); that decision concerned the payment of vacation pay on an anniversary date, but instead of being allocated beginning on that date, the pay was allocated according to the specified leave periods.

(f) In this case, the claimant was employed during a recall period and received money from the City of X. That money was paid to him in the form of vacation pay on an anniversary date and sick leave credits on an anniversary date.

(g) The Commission argued that that money constituted earnings under subsection 35(1) of the Regulations, since it was given to the claimant as payment for vacation pay and sick leave credits paid on an anniversary date. Accordingly, under subparagraph 36(8)(b)(i), the Commission allocated those earnings correctly (see pages GD3-36 to 37).

(h) With regard to the claimant's allegations concerning the Commission's processing of his file, the Commission conducted the usual checks with the employer (page GD3-34). The information provided by the claimant (account statements) does not show the reason for payment. The employer's use of direct deposit does not demonstrate the inaccuracy of the information provided by the employer. In the case of the overpayment, the first overpayment of $1,002 was reduced to $501 on September 14, 2015, and a new overpayment of $501 was created when the decision was amended on administrative review, for a total of $1,002. Of that amount, $201 was repaid on October 7, 2015, reducing the overpayment to be repaid to $801.

(i) As well, it is possible that the expression "*date anniversaire*" [anniversary date] was used with a different meaning during the conversations between the claimant and the Commission, creating some ambiguity about its use. That expression used in processing the claimant's file was consistent with the principle of an amount paid under a written agreement between an employee and an employer. During the period to which the payments were allocated, the claimant was still an employee of the City of X and still had a right of recall, as he himself said. Even if the sums were paid outside the benefit period, they must be applied to the week of the anniversary date.

(j) The Commission submitted that the case law supports its decision. Bordeleau J. upheld the principle that sums received from an employer are considered to be earnings and must be allocated unless they fall within the exceptions in subsection 35(7) of the Regulations or do not arise from employment (CUB 79974).

(k) The Federal Court of Appeal has affirmed the principle 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 (*McLaughlin v. Canada (AG)*, 2009 FCA 365).

(l) The Federal Court of Appeal has also confirmed the principle that amounts that constitute earnings under section 35 of the Regulations must be allocated pursuant to section 36 of the Regulations (*Boone et al. v. Canada (AG)*, 2002 FCA 257).

ANALYSIS

[11] According to the claimant, he received moneys in the amount of $1,815.87 as vacation pay, $2,895.20 as anniversary vacation pay and $1,327.41 as sick leave credits (GD3-16). He stated that those amounts were paid to him in March 2014, outside his claim for employment insurance benefits. As well, they were withheld because of his right of recall.

[12] Subsection 35(2) of the Regulations states that income arising out of any employment, whether in respect of wages, benefits or other remuneration, must be taken into account unless it falls within an exception as provided for in subsection 35(7) of the Regulations.

[13] In *McLaughlin*, the Federal Court of Appeal affirmed the principle 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 (*McLaughlin v. Canada (Attorney General)*, 2009 FCA 365).

[14] The Federal Court of Appeal has also confirmed the principle that amounts that constitute earnings under section 35 of the Regulations must be allocated pursuant to section 36 of the Regulations (*Boone et al. v. Canada (Attorney General)*, 2002 FCA 257).

[15] The claimant is disputing the allocation made by the Commission. He has confirmed that he received the amounts in question in March 2014. The Tribunal notes that he is not disputing the nature of the amounts received. The Tribunal is therefore of the opinion that the $2,895.20 was in fact received for vacation pay and the $1,327.41 for sick leave credits. As a result, the Tribunal is satisfied that those amounts were indeed earnings within the meaning of section 35 of the Regulations. Accordingly, the Tribunal must determine whether and when those earnings must be allocated.

[16] Subsection 36(8) of the Regulations provides as follows:

> 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.

[17] The claimant submitted that, under the collective agreement, auxiliary employees who are laid off have a period of one year to be recalled to work. During that period, they retain their entitlements and seniority. The right of recall explains why the vacation money was not paid immediately after the calculation, which the Commission mistakenly assumed.

[18] He stated that it is technically impossible, even for a financial genius, to hide an amount paid into an account by direct deposit or to carry it over to another period. This is therefore indisputable and sufficient evidence that the payment of money did not occur as the Commission's information indicates but instead occurred outside the employment insurance benefit period. As a result, the amount requested as a repayment is not justified and the amount already paid must be reimbursed.

[19] The Commission argued that the claimant was employed during a recall period and received money from the City of X. That money was paid to him in the form of vacation pay on an anniversary date and sick leave credits on an anniversary date.

[20] The Tribunal notes that the claimant stated that the payment date is the end of the City's fiscal year, which is the date when entitlements are calculated.

[21] According to the employer, the claimant had been laid off indefinitely at the time the vacation pay and sick leave credits were paid to him. The anniversary date for the vacation pay was April 26, 2013, and the deposit was made on June 27, 2013 in the amount of $1616.13 net or $2,895.20 gross. The anniversary date for the sick leave credits was May 30, 2013, and the deposit was made on August 1, 2013 in the amount of $740.97 net or $1,327.41 gross (GD3-34).

[22] The Tribunal notes that there was a date error in the information initially sent by the employer with respect to the amount of $1,327.41, since the employer initially stated that the anniversary date was July 19, 2013 rather than May 30, 2013 (GD3-18).

[23] The amount of $1,815.87 was paid on separation from employment on March 7, 2014 because the employee had not been recalled for a year (GD3-18).

[24] The claimant questions the validity of the information obtained by the Commission from the City. Nonetheless, although he stated that he had received verbal confirmation that the amounts were paid because of the end of the City's fiscal year and not on an anniversary date, he did not provide any details about the payment dates for the sick leave credits or the anniversary date for vacation pay. The Tribunal is therefore giving more weight to the employer's version. According to both the City's payroll department and the record of employment, the anniversary date for the vacation pay of $2,895.20 was April 26, 2013.

[25] The Tribunal notes that it is up to the claimant to establish that the amounts received do not constitute earnings. In the Tribunal's view, it is up to the claimant to establish the date on which the amounts received were payable because of the anniversary date. The claimant could have referred to his collective agreement, of which he provided only a single page, or obtained an explanation from his payroll department.

[26] Although the Tribunal is considering the bank statements submitted by the claimant, it is of the opinion that the question is not when the claimant received the payment, but when the amounts were payable to him.

[27] The Tribunal is satisfied that the amounts received must be allocated to a number of weeks that begins with the first week for which they were payable.

[28] The Tribunal therefore considers that the $1,815.87 paid as vacation pay is not in issue, since it was paid after the claimant's benefit period. That amount would have been allocated to the week of March 7, 2014 if the claimant had received benefits during that time.

[29] Finally, on the basis of the parties' evidence and submissions, the Tribunal is of the view that the amounts received must be allocated under subparagraph 36(8)(b)(i) of the Regulations. Accordingly, the $2,895.20 must be allocated to the week of April 26, 2013 and the $1,327.41 must be allocated to the week of May 30, 2013.

CONCLUSION

[30] The appeal is dismissed.

Charline Bourque
Member, General Division - Employment Insurance Section