



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *K. P. v. Canada Employment Insurance Commission*, 2016 SSTGDEI 145

Tribunal File Number: GE-16-1645

BETWEEN:

K. P.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Katherine Wallocha

HEARD ON: November 1, 2016

DATE OF DECISION: November 15, 2016

REASONS AND DECISION

PERSONS IN ATTENDANCE

K. P., the claimant, attended the hearing via teleconference.

INTRODUCTION

[1] The claimant became unemployed on June 3, 2014. He filed for Employment Insurance (EI) benefits on June 11, 2014. An initial claim for EI benefits was established on June 8, 2014. The employer provided the claimant with severance pay on January 27, 2015 and the Canada Employment Insurance Commission (Commission) applied these earnings against the claimant's claim from June 1 to 28, 2014 causing an overpayment. The claimant sought reconsideration of the Commission's decision, which the Commission maintained in their letter dated February 18, 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 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).

EVIDENCE

Information from the Docket

[4] The claimant applied for regular EI benefits on June 11, 2014 stating that he would not be returning to work with this employer (Page GD3-3 to GD3-11).

[5] The employer submitted a Record of Employment (ROE) dated June 9, 2014 indicating that the claimant began working as an automotive technician on April 8, 2014 and he was no

longer working due to a shortage of work on June 3, 2014 accumulating 293 hours of insurable employment. He was paid \$577.46 in vacation pay (Page GD3-12).

[6] The same employer submitted an amended ROE dated January 27, 2015 indicating that the claimant was paid \$4,534.13 in severance pay (Page GD3-14).

[7] The employer was contacted by the Commission and she explained that the claimant's severance pay was paid out in January 2015 instead of June 2014 because the employer had hoped to be able to bring the claimant back when it got busy but were unable to do so therefore the severance pay was issued (Page GD3-17).

[8] The Commission sent a letter dated October 27, 2015 informing the claimant that the Commission reviewed the new ROE and determined that he received \$5,112.00 in monies upon separation from his employer. This income, before deductions, is considered earnings and will be applied against his EI claim from June 1, 2014 to June 28, 2014 with a balance of \$936.00 allocated in the week beginning June 29, 2014. The claimant was informed that if he had already received benefits, it means that he has been overpaid and he will be notified later (Page GD3-18).

[9] The claimant was sent a notice of debt dated October 31, 2015 in the amount of \$2,056.00 (Page GD3-19).

[10] The claimant contacted the Commission on November 16, 2015 and asked that the last four weeks of his claim be applied to the overpayment (Page GD3-20).

[11] Following the claimant's Request for Reconsideration, the Commission sent a letter dated February 4, 2016 informing the claimant that they tried to contact him to obtain additional information but without success. The claimant was asked to contact the Commission within 10 days of the date of the letter otherwise, the Commission will proceed with their review and a decision will be made with the information on file (Page GD3-23).

Testimony at the Hearing

[12] The claimant testified at the hearing that when he applied for EI benefits he stated that he would not be returning to this employer but he stated that this must have been a mistake

explaining that he is not a computer person so he had his wife help him and he did not realize the error. He confirmed that he did anticipate returning to work for his employer.

[13] The claimant confirmed that he did receive the \$577.46 in vacation pay and the \$4,534.13 in severance pay. He further confirmed that he received the vacation pay when he was laid off but the severance pay came with just a little pay stub and no explanation. He stated that he had been working for this employer for six years but a new owner had taken over which would explain why the ROE on file indicates that he worked for this employer for only two months adding that there must be another ROE on file.

[14] The claimant confirmed that the employer wanted to bring him back but things were very slow and he was not brought back.

[15] The claimant confirmed that according to subsection 63(2) of the *Alberta Employment Standards Code*, he had not entered into an agreement with his employer where an employer pays the employee wages or an amount instead of wages. He further confirmed that the employer did not make payments for his health and dental benefits however he had no reason to use his benefits during this period so he is not fully aware if his benefits continued after the layoff. The claimant confirmed that he was not a part of a union.

[16] The claimant questioned the statements the Commission made that the claimant should contact them to determine his eligibility for four additional reports stating that this was basically what he had asked for and he went to Service Canada and asked for this to happen but there was no decision before his wife completed her cancer treatments and they went away. He stated that unfortunately he was away and missed the phone calls from the Commission and the letter asking for him to contact them.

SUBMISSIONS

[17] The claimant submitted that:

- a) He did not receive severance pay until December 14, 2014 therefore he did not claim it at the beginning of his claim. He requests that the money he owes be deducted from EI benefits payable at the end of his claim (Page GD3-21).

- b) There was no communication between him and the Commission before the decision was made (Page GD2-2).
- c) He was told that he was overpaid because he received separation pay while he was collecting EI benefits but this is not the case. He received severance pay after his EI was depleted. The amount he received had been taken off at the beginning of his claim and he could have continued to claim EI longer but he did not know this and would like to have the four weeks added to his claim due to the long span of time it took the Commission to make its decision (Page GD2-7).

[18] The Commission submitted that:

- a) The 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 being laid off from his job. The Commission submitted that the payment was made by reason of his separation from employment. Consequently, the severance pay was allocated pursuant to subsection 36(9) of the Regulations, according to his normal weekly earnings from his last day of work. However, this allocation start date is incorrect (Page GD4-2).
- b) The claimant's normal weekly earnings were \$1,182 (Page GD4-1).
- c) Labour legislation, when applicable, may require the payment of severance pay immediately upon separation or when, by Provincial statute, a separation is determined to have occurred. In those Provinces where such legislation is applicable, the last day of work, that is, date of lay-off, is the date used to calculate the beginning of the lay-off period (Page GD4-3).
- d) Based on the employer's statement, the reason they did not pay out his severance pay at the time of the layoff was because they were hoping to recall the claimant (Page GD4-2).
- e) When the claimant had not been recalled to work after a designated number of weeks or months, the Provincial legislation states that a separation occurs at that time, and requires the payment of severance pay. In this scenario, both a lay-off and a separation have occurred at different times. Severance pay is payable by reason of the separation, which occurred only after a certain period of time passed, and not by reason of the lay-

off. In this case the severance pay would be allocated from the week of the separation from employment (Page GD4-3).

- f) According to the Alberta *Employment Standards Code*, RSA 2000, c E-9:

Temporary layoff

62 If an employer wishes to maintain an employment relationship without terminating the employment of an employee, the employer may temporarily lay off the employee.

Termination pay after temporary layoff

63(1) On the 60th consecutive day of temporary layoff, an employee's employment terminates and the employer must pay the employee termination pay on that day.

(2) Subsection (1) does not apply if

(a) after the layoff starts, and by agreement between the employer and employee, an employer pays the employee wages or an amount instead of wages, in which case the employment terminates and termination pay is payable when the agreement ends;

(b) the employer makes payments for the benefit of the laid-off employee in accordance with a pension or employee insurance plan or the like, in which case employment terminates and termination pay is payable when the payments cease;

(c) there is a collective agreement binding the employer and employee containing recall rights for employees following layoff, in which case employment terminates and termination pay is payable when the recall rights expire (Page GD4-3).

- g) As per the *Employment Standards Code* the severance pay became payable on the 60th day after the last day of work so that is the date the severance pay should be allocated from. In this case, it would be August 3, 2014. The Commission is obligated to correct the allocation but because the claimant was still on claim during that period, the overpayment will remain the same (Page GD4-3 and GD4-4).
- h) The decision is in accordance with the EI legislation and is supported by case law. The Commission, therefore, respectfully requests the Tribunal to dismiss the claimant's appeal with modification and allow the Commission to correct the allocation and contact the claimant to determine his eligibility for four additional reports (Page GD4-4).

ANALYSIS

[19] The relevant EI legislative provisions are reproduced in the Annex to this decision.

[20] 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.

[21] 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).

[22] In this case, the claimant confirmed that he received \$577.46 in vacation pay and \$4,534.13 in severance pay and while the claimant did expect to return to work for this employer, the Tribunal accepts the claimant’s testimony that he was not called back to work and received these monies due to a separation in employment.

[23] 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 subsection 36(9) of the Regulations (*Canada (Attorney General) v. Boucher Dancause*, 2010 FCA 270).

[24] The claimant received his vacation pay when he was laid off and subsequently, he received the severance pay when the employer was unable to recall the claimant to work therefore, the Tribunal finds that the claimant received this money as a result of his separation from employment. The Tribunal further finds that the vacation pay and the severance pay the claimant received is considered earnings pursuant to subsection 35(2) of the Regulations because there was a sufficient connection between the claimant’s employment and the amounts he received.

[25] 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. The claimant received this money because of his separation from employment therefore; the Tribunal finds that the

claimant's vacation pay and the severance pay must be allocated in accordance with subsection 36(9) of the Regulations.

[26] The claimant argued that he did not receive his severance pay until after his EI benefits had been depleted. While the Tribunal recognizes that the claimant did not receive his severance pay until January 2015, and only after the employer determined that they would not be able to bring him back to work, subsection 36(9) states that regardless of the period in respect of which the earnings are purported to be paid or payable, the earnings shall be allocated to the number of weeks that begins with the week of the layoff or separation. Initially the Commission allocated these earnings from June 1 to June 28, 2014 but upon appeal, the Commission submitted that the claimant's severance pay needed to be allocated to the period when the claimant's employment was deemed to be terminated according to the *Employment Standards Code*.

[27] According to the employer's statement that they were hoping to bring the claimant back, the Tribunal is satisfied that the claimant was temporarily laid off in accordance with section 62 of the *Employment Standards Code* as the employer wanted to maintain an employment relationship with the claimant without terminating the claimant's employment. However, according to subsection 63(1) of the *Employment Standards Code*; the claimant's employment was deemed to have been terminated and the employer was required to pay the claimant his termination pay after the 60th day of the temporary layoff. Subsection 63(2) of the *Employment Standards Code* provides exceptions that would allow the employment relationship to continue beyond the 60th day however, the Tribunal finds that the claimant did not meet any of these exceptions. From this, the Tribunal accepts the Commission's submissions that the allocation of the severance pay should begin in the week of August 3, 2014 as this is the 60th day following the claimant's temporary layoff.

[28] The claimant further argued that there was no communication between him and the Commission prior to the decision being made. While the Tribunal recognizes that this is unfortunately the case, the fact remains that the claimant received earnings as a result of his separation from employment and these earnings need to be allocated according to the applicable legislation.

[29] The Tribunal concludes that the monies the claimant received upon separation of employment are considered earnings pursuant to section 35 of the Regulations and these earnings need to be allocated in accordance with subsection 36(9) of the Regulations according to the claimant's normal weekly earnings until exhausted. The Commission determined the claimant's normal weekly earnings to be \$1,182 and no evidence has been presented to the contrary. However, the Tribunal finds that the Commission erred in determining the date from which the amounts are to be allocated and that the allocation is to be modified to begin the week of August 3, 2014.

[30] The claimant requested that he would like to have the four week overpayment added to the end of his claim and the Commission indicated in their representations that they would contact the claimant to determine his eligibility for four additional weeks. The Tribunal requests that the Commission contact the claimant to determine his eligibility for benefits during additional weeks of unemployment at the end of his claim.

CONCLUSION

[31] The appeal is dismissed with modifications.

K. Wallocha

Member, General Division - Employment Insurance Section

ANNEX

THE LAW

Employment Insurance Regulations

35 (1) The definitions in this subsection apply in this section.

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*)

(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,
- (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;

36 (1) Subject to subsection (2), the earnings of a claimant as determined under section 35 shall be allocated to weeks in the manner described in this section and, for the purposes referred to in subsection 35(2), shall be the earnings of the claimant for those weeks.

(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.