



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *E. L. v. Canada Employment Insurance Commission*, 2016 SSTGDEI 151

Tribunal File Number: GE-16-2171

BETWEEN:

**E. L.**

Appellant

and

**Canada Employment Insurance Commission**

Respondent

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**SOCIAL SECURITY TRIBUNAL DECISION**  
**General Division – Employment Insurance Section**

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DECISION BY: Katherine Wallocha

HEARD ON: November 30, 2016

DATE OF DECISION: December 1, 2016

## **REASONS AND DECISION**

### **PERSONS IN ATTENDANCE**

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

M. S., the claimant's husband, attended the hearing via teleconference to assist his wife as she does not speak English very well.

### **INTRODUCTION**

[1] The claimant became unemployed on December 10, 2015. She filed for Employment Insurance (EI) benefits on December 22, 2015. An initial claim for EI benefits was established on December 13, 2015. The Canada Employment Insurance Commission (Commission) determined that the claimant had received earnings upon separation from her employment and allocated these monies to her claim for EI benefits. The claimant sought reconsideration of the Commission's decision, which the Commission maintained in their letter dated May 4, 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 December 22, 2015 stating that she was no longer working due to a shortage of work (Page GD3-3 to GD3-10).

[5] The claimant submitted a Request for Record of Employment (ROE) form stating that her first day worked was November 10, 2014, her last day of work was December 10, 2015 and she worked 40 hours per week. She stated that she worked as a payroll specialist and her normal weekly earnings were \$772.5. She stated that she received \$772.5 pay in lieu of notice, \$1,545 in severance pay and \$1,847.40 in vacation pay upon separation from her employment (Page GD3- 11 to GD3-12).

[6] The claimant provided a letter from her employer dated December 10, 2015 informing her that the employer had decided to restructure the finance operations and her employment will terminate effective December 10, 2015. The letter informed her that she would be provided with one week's pay as pay in lieu of notice and two week's pay as severance pay; the total for the three weeks' pay is \$2,317.5. She was further informed that she would be paid all accrued vacation up to the last day worked less statutory deductions (Page GD3-13).

[7] The Commission made several attempts to contact the employer to obtain a ROE and the employer explained that they had a recent switch in how the payroll is completed so the ROE may have been missed. The employer further informed that the employer is having an issue with producing the ROE due to a payroll change to the United States (Page GD3-17).

[8] Finally a ROE was submitted dated March 2, 2016 indicating that the claimant began working on November 10, 2014 and she was no longer working due to a shortage of work on December 10, 2015 accumulating 2160 hours of insurable employment. The claimant was paid \$1,995.72 in vacation pay, \$2,317.5 severance pay and \$1,847.40 in pay of banked overtime (Pages GD3-17 and GD3-18).

[9] The employer submitted a second ROE dated March 2, 2016 indicating that the claimant was no longer working due to mandatory retirement accumulating 2120 hours of insurable employment and having been paid \$1,847.40 in vacation pay, \$772.50 pay in lieu of notice and \$2,479 in severance pay (Page GD3-20).

[10] The Commission provided the ROE Audit Trail showing that the reason for separation was verified with the employer and it was changed to shortage of work (Pages GD3-22 to GD3-25).

[11] The Commission sent a letter dated March 3, 2016 informing the claimant that she received monies on separation from employment. This income, before deductions, is considered earnings and a total of \$3,820 will be applied against her EI claim from December 13, 2015 to January 9, 2016 with the balance of \$219.00 applied in the week beginning January 10, 2016 (Page GD3-26).

[12] The claimant contacted the Commission and stated that she disagreed with the severance pay stating that she did not receive severance pay at all (Page GD3-28).

[13] The claimant submitted her Request for Reconsideration and included the cheque she received in the amount of \$1,428.95 for vacation pay accrued from November 2014 to December 2015; the cheque for pay in lieu of notice was for \$686.81; the cheque for \$735.73 was noted as pay for pay period 26 and November and December bus passes; the cheque for \$1,604.55 for overtime pay and the cheque for \$1,515.93 noted as "two weeks" (Pages GD3-29 to GD3-37).

[14] The claimant was contacted by the Commission and through her husband she stated that they agree with the pay in lieu of notice and severance pay being considered earnings but disagree with the vacation pay being included in the allocation (Page GD3-39).

[15] The claimant stated that she received \$2,317.5 pay for severance and pay in lieu of notice and \$1,502.5 in accrued vacation pay.

### **Testimony at the Hearing**

[16] The claimant's husband testified at the hearing that the claimant received severance pay, overtime pay and vacation pay and they do not believe that the overtime pay and vacation pay should be considered separation payment and used to deducted from EI benefits because this is overtime and vacation pay is income she earned during the period of her employment and not for the separation from the company.

[17] The claimant's husband stated that the employer laid off all the payroll staff and transferred the entire department to the United States and the claimant did not get her ROE until six months following her dismissal because nobody knew how to prepare it. The claimant's husband confirmed that the claimant was a payroll specialist and he confirmed that she is

confident in the amounts she listed on her request for ROE form therefore; the amounts of \$772.50 pay in lieu, severance of \$1,545 and \$1,847 for vacation pay are correct; he confirmed that these amounts are gross amounts.

[18] The claimant's husband stated that the ROE on page GD3-18 was incorrect because the ROE was late to come and she had requested the ROE at least 10 times. He further stated that the claimant did not even get a pay stub for the last paycheques she received because payroll was unable to do it. He does not believe that the information provided by the employer is correct on the ROE but without the pay stub, all they can do is look at the cheques they provided.

[19] The claimant's husband explained that the statement where the claimant stated that she did not receive any severance pay at all is incorrect stating that he explained to the Commission that the claimant received one week of pay for pay in lieu of notice and two weeks' pay as severance pay. He stated that he told the Commission that vacation pay is not severance pay.

[20] The claimant's husband confirmed that the claimant was allowed to carry forward her vacation; they had accrued vacation.

## **SUBMISSIONS**

[21] The claimant submitted that:

- a) She did not receive \$3,820 from her former employer in separation; she only received two weeks' salary for severance pay and one week of pay in lieu of notice. The other payments are for six days of overtime she had and one week regular pay for her last week of work. Further, vacation pay was accrued during her employment. These other payments should not reduce her benefits (Page GD3-27).
- b) She disagrees with the vacation pay being included in the allocation as her vacation pay was earned prior to her separation from employment and should not be included (Page GD3-39).
- c) She only received \$2,317.5 in total separation pay. The decision used \$3,820 separation pay to reduce her EI benefit claim therefore, \$1,502.5 was over applied against her EI benefit claim. The \$1,502.5 is her vacation benefit which she is entitled to withdraw

anytime she can during her employment. It was earned throughout her employment period from November 2014 to December 2015. It was paid not because of termination as it is her income that had been saved in her account of vacation accrual. It should not be considered as separation pay to reduce her EI benefits (Page GD2-2).

- d) The vacation pay and the overtime pay should not be considered separation pay.

[22] The Commission submitted that:

- a) The facts on file confirm that the claimant received, vacation pay, severance pay and pay in lieu of notice, however the claimant argued the amounts she received are incorrect. Although the claimant states she only received \$2,317.50 in severance as per the termination letter dated December 10, 2015, this amount was confirmed later as \$2,479.25 when the employer submitted the ROE electronically on March 3, 2016 after a conversation with the Commission (Page GD4-3).
- b) The Commission acknowledges that there may be a discrepancy in the amount of severance pay the claimant states she received and what is presented on the ROE, however without further information from the employer there is insufficient evidence to change the amount of severance pay as it is indicated on the ROE therefore the gross amount of \$2,479.25 will remain as part of the total allocation amount of \$5099.15 (Page GD4-4).
- c) The claimant also argued that the accrued vacation pay she received in the gross amount of \$1,847.40 should not be deducted from her benefits as earnings as it was earned while she was working, she could request it from the employer at any time and was not paid on separation. However, the reason for why the claimant was paid this money (vacation pay) was because her employment ended. There was a restructuring in the company and she was laid-off and therefore she is considered to have separated from her employment. The accrued vacation was not paid for a specific vacation period, paid on an anniversary date, on each cheque or at the claimant's request with no leave taken, it was paid by reason of lay off or separation. This vacation pay is considered earnings and therefore must be allocated from the week of the lay-off or separation at the claimant's normal weekly earnings from that employment (Page GD4-4).
- d) 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 GD4-4).

- e) Based upon the facts on file the Commission determined that the vacation pay in the amount of \$1,847.40, severance pay in the amount of \$2,479.25 and pay in lieu of notice in the amount of \$772.50 received constituted earnings pursuant to subsection 35(2)(a) of the Regulations because the payment was made to compensate the claimant for wages lost for the period she would have worked or for vacation time she did not take and the payment was made by reason of her separation from employment. Consequently, the severance pay was allocated pursuant to subsections 36(9) and 36(10) of the Regulations (Pages GD4-4 and GD4-5).

## **ANALYSIS**

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

[24] 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.

[25] 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).

[26] In this case, there is some discrepancy between what the claimant received as separation monies and what the employer reported. The claimant was a payroll specialist and therefore, the Tribunal is more likely to believe that the claimant’s reported information regarding her pay is accurate. Further, the letter the claimant received from the employer dated December 10, 2015 confirms the claimant’s information that she would receive two weeks of regular wages in severance pay and one week regular wages as pay in lieu of notice. The Tribunal finds that the claimant was given three weeks’ pay totalling \$2,317.50 which accounts for pay in lieu of notice and her severance pay. While the employer’s ROE indicates that the claimant received \$2,479 in severance and \$772.50 as pay in lieu of notice, the Tribunal is not convinced that the

ROE is correct. First, the ROE with this amount of severance pay also records the reason for separation as mandatory retirement. The amended ROE which indicates the corrected reason for separation also indicates the severance pay as \$2,317.50 but then identified banked overtime and vacation pay but did not account for pay in lieu of notice. Secondly, the employer admitted that they had a change in their payroll system and were initially unable to provide a ROE and the claimant reported that the new payroll system was unable to provide pay stubs. From this, the Tribunal considers it reasonable that the ROEs provided by the employer contain errors and therefore, the Tribunal is satisfied that the claimant received a total of \$2,317.50 in severance pay and pay in lieu of notice as per the termination letter dated December 10, 2015 and the claimant's reported information.

[27] The termination letter further stated that the claimant would be given her vacation pay however; the employer did not identify the amount that the claimant would receive as vacation pay. The claimant reported that she received \$1,847.40 and the employer reported in one ROE the vacation earnings as \$1,847.40 therefore, the Tribunal finds that the claimant received \$1,847.40 in vacation pay.

[28] The Tribunal accepts the claimant's statement that she received \$2,317.50 in severance and pay in lieu of notice and \$1,847.40 in vacation pay for a total of \$4,164.90 in separation moneys. The Tribunal further accepts the claimant's evidence that she received these monies when her employment ended. 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).

[29] The Tribunal finds that the pay in lieu of notice, the severance pay and the vacation pay the claimant received in the amount of \$4,164.90 is considered earnings pursuant to subsection 35(2) of the Regulations because there was a sufficient connection between claimant's employment and the amounts she 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. The claimant received this money because of her separation from employment



therefore; the Tribunal finds that the claimant's pay in lieu of notice, severance pay and vacation pay must be allocated in accordance with subsections 36(9) of the Regulations. The Tribunal notes that the letter the Commission sent dated March 3, 2016 identifying the claimant's separation monies as \$3,820.00 is incorrect and the correct amount to be allocated is \$4,164.90.

[30] The claimant stated that she does not dispute the allocation of her severance pay but argued that her vacation pay was earned while she was working and should not be allocated. The allocation of vacation pay falls under one of the three different provisions in the Regulations;

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.

[31] In this case, the claimant received her vacation pay because of her lay-off or separation from employment therefore; the Tribunal finds that the claimant's vacation pay must be allocated to a number of weeks that begins with the week of layoff according to the claimant's normal weekly earnings pursuant to subsection 36(9) of the Regulations.

[32] The Tribunal agrees with the claimant that her banked overtime and her regular pay for pay period 26 are not to be included in the allocation because these monies need to be allocated to the time when the services were rendered pursuant to subsection 36(4) of the Regulations. However, the claimant's vacation pay was paid to her to compensate her for benefits or earnings that will become owed to her in the future but because her employment ended, the employer paid the claimant immediately.

[33] The claimant argued that the allocation of her vacation pay will reduce her EI benefit entitlement however; the Tribunal would like to reassure the claimant that she will receive her full entitlement to EI benefits. 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 first use that income for their living expenses according to their normal weekly earnings before they begin to receive EI benefits. The Tribunal accepts the evidence that the claimant's normal weekly earnings were \$772.50.

[34] For these reasons, the Tribunal concludes that the claimant received \$4,164.90 in earnings arising out of employment pursuant to subsection 35(2) of the Regulations and while these earnings were allocated correctly pursuant to subsection 36(9) of the EI Regulations, the Tribunal finds that the Commission erred in determining the amount to be allocated and that the amount to be allocated is to be modified to \$4,164.90.

### **CONCLUSION**

[35] The appeal is dismissed with modifications.

*K. Wallocha*

Member, General Division - Employment Insurance Section

## ANNEX

### THE LAW

**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*)

*pension* means a retirement pension

(a) arising out of employment or out of service in any armed forces or in a police force;

(b) under the *Canada Pension Plan*; or

(c) under a provincial pension plan. (*pension*)

*self-employed person* has the same meaning as in subsection 30(5). (*travailleur indépendant*)

(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;

**(7)** That 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*.

**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.

**(2)** For the purposes of this section, the earnings of a claimant shall not be allocated to weeks during which they did not constitute earnings or were not taken into account as earnings under section 35.

**(3)** Where the period for which earnings of a claimant are payable does not coincide with a week, the earnings shall be allocated to any week that is wholly or partly in the period in the proportion that the number of days worked in the week bears to the number of days worked in the period.

**(4)** Earnings that are payable to a claimant under a contract of employment for the performance of services shall be allocated to the period in which the services were performed.

**(5)** Earnings that are payable to a claimant under a contract of employment without the performance of services or payable by an employer to a claimant in consideration of the claimant returning to or beginning work shall be allocated to the period for which they are payable.

**(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.