



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *J. H. v. Canada Employment Insurance Commission*, 2016 SSTGDEI 157

Tribunal File Number: GE-16-2569

BETWEEN:

J. H.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Teresa Jaenen

HEARD ON: November 30, 2016

DATE OF DECISION: December 22, 2016

REASONS AND DECISION

PERSONS IN ATTENDANCE

Ms. J. H., the Appellant (claimant) attended the teleconference hearing.

INTRODUCTION

[1] On November 2, 2014 the Appellant established a claim for employment insurance benefits. On March 7, 2016 the Canada Employment Insurance Commission (Commission) notified the Appellant that the separation monies she received in the amount of \$15228.00 would be applied against her claim from May 17, 2015 to August 22, 2015 and the balance of \$304.00 to the week of August 23, 2015. On March 31, 2015 the Appellant made a request for reconsideration. On June 7, 2016 the Commission maintained its original decision. On June 30, 2016 the Appellant appealed that decision to the *Social Security Tribunal of Canada* (Tribunal).

[2] The hearing was held by Teleconference for the following reasons:

- a) The fact that the credibility is not anticipated to be a prevailing issue.
- b) The fact that the appellant will be the only party in attendance.
- c) The information in the file, including the need for additional information.
- d) 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 Tribunal must decide whether monies the Appellant received constitute earnings pursuant to subsection 35 of the *Employment Insurance Regulations* (Regulations) and if the monies were correctly allocated in accordance with subsection 36 of the Regulations.

EVIDENCE

[4] A record of employment indicates the Appellant was employed with Crop Production Service (Canada) Inc. from January 1, 2014 to October 31, 2014 when she left due to a shortage of work (GD3-14).

[5] A document shows the history of payments received by the Appellant from the week of November 2, 2014 to July 18, 2015 (GD3-16 to GD3-17).

[6] On February 18, 2016 the Commission contacted the employer who stated that the Appellant's position was eliminated and they were given an option to a deferred severance and take a SUB top up for 26 weeks. She stated the Appellant's last day of work was October 31, 2014 and 26 weeks of top up would be May 2, 2015. She confirmed the total severance pay was \$15228.10 (GD3-20).

[7] An amended record of employment indicates the severance amount of \$15,228.19 (GD3- 21).

[8] On March 7, 2016 the Appellant contacted the Commission stating she received an email on from her employer stating her top up would end as of May 16, 2015. She stated she received the email on June 5, 2015. The two week waiting period was not paid and then 26 payable week after that which is why it's the 16th and not the 2nd of May (GD3-23).

[9] Email correspondence between the Appellant and employer confirms the Appellant's top up of 26 weeks and her severance will be paid out on July 3 (GD3-24 to GD3-29).

[10] Worksheet indicates the Appellant's overpayment of \$3598.00 for weeks beginning May 17, 2015 to week of June 28, 2015 (GD3-30).

[11] On March 7, 2016 the Commission notified the Appellant the severance pay is considered earnings and will be allocated from the week of May 17, 2015 to August 22, 2015 and the week of August 23, 2015 (GD3-31).

[12] A notice of debt was issued in the amount of \$3598.00 (GD3-33).

[13] On March 31, 2015 the Appellant made a request for reconsideration (GD3-34 to GD3-76).

[14] On June 1, 2016 the Commission attempted to contact the Appellant regarding her request for reconsideration (GD3-7).

[15] On June 7, 2016 the Commission notified the Appellant that the original decision was maintained and advised her of her right to appeal to the Tribunal (GD3-78).

[16] On June 30, 2016 the Appellant filed a Notice of Appeal providing the details of her separation from employment. She stated she was told by a Service Canada agent to report her severance pay when she received it and someone from EI would contact her for more details. She stated she contacted her employer in April to discuss when the six months would be up and for her to collect her severance pay. She stated she received the severance pay on July 3, 2016 and confirmed with EI the amount was \$15228.00. She stated on March 7, 2016 she received a letter from EI stating the monies would be allocated from May 17, 2015 to August 22, 2015 and the amount would total \$3598.00. She stated she believed she followed the EI rules and reported the earnings the week she received them. She stated she could not report her earnings on May 17, 2015 because she did not know what they were. The Appellant stated if she hadn't received EI in May she would not have had any source of income for herself and her three children. She stated had she known she was required to report the monies she would have spoken to the Labour Market Services Branch and talked to her about some sort of funding from her office while she was taking her classes and looking for work. She stated she is still taking classes and working; she is a single mother of three children and currently owes \$65,000.00 in credit cards, line of credits and personal loans. Having to repay the money will cause undue hardship for her family and requests a reconsideration on the repayment of this money. The Appellant provided email correspondence regarding her severance package, EI weekly benefit rate, information from Service Canada website and copy of letter to the Commission at the reconsideration process (GD2-1 to GD2A-33).

EVIDENCE AT THE HEARING

[17] The Appellant explained that she was laid off from her employer on October 31, 2014 and she was provided with an option to take a six month deferred severance package. She stated received her first EI payment in November 2014.

[18] The Appellant explained in March 2015 she met with a counsellor for training and she was accepted into accounting classes. She told her to contact EI and let them know she was taking classes and that they were paying for the classes but not receiving any living expenses.

[19] The Appellant explained that this was in April 2015 she did call EI and advised them of her situation and at that time asked the agent when she should report the severance money she was to receive and he told her to report it when she gets it and somebody will call her and get the details.

[20] The Appellant stated she waited to get the money but if she had of known that EI was not going to cover her for this period she would have asked the employment counsellor for money from her to cover her living expenses.

[21] The Appellant stated in April 2015 she contacted her employer and asked what the end date of her top up and when the severance would be paid out. She was told she had 5 weeks left of the top up but didn't know when the severance be paid out. She stated she never did get any response so in May 2015 but on June 4th she received forms to have the severance payout which she filled out and sent back. She stated she received the actual money on July 3, 2015 and she reported the money on her next report.

[22] The Appellant stated at this time she was still unemployed and taking her classes. She did finally find employment on August 31, 2015.

[23] The Appellant stated she felt she followed all the guidelines from what she found on the internet as stated in (GD2A-32) to report all monies in the week you receive it, and this is what she did. She stated in (GD2A-30) it states earnings which is what she was also told by the agent to do.

[24] The Appellant stated she did try and get her severance pay earlier because she knew it was coming due in May. She didn't get the monies until July, so there was no way she could have reported that money in May because she wouldn't have known how much she was going to get.

[25] The Appellant stated when she applied for benefits in October she provided the Commission with information regarding the bonus she had received as well as provided the Commission with the information regarding the deferral program she had selected.

[26] The Appellant stated she is struggling financially and if she has to pay the money back she will, if she doesn't have to claim bankruptcy first. She stated she believes she did as she was supposed to and that was to report the money when she got it and that is what she did. She stated her employer didn't give her the money when they were supposed to and she didn't have any other choice but to stay on EI.

[27] The Appellant stated she hasn't done anything wrong, she has paid into EI for the sole purpose that if she loses her job she has something to fall back on.

[28] The Appellant confirmed she did receive the money on July 3, 2015 and is not disputing this; but she is disputing when she got the money, she didn't get any money on May 17th so how was she supposed to report it on that day.

SUBMISSIONS

[29] The Appellant submitted that:

- a) She believes she followed the instructions from the agent when he told her to report her severance pay when she received it and that is what she did;
- b) She doesn't dispute that she received the monies but she doesn't feel it should be allocated to May 17, 2015 because she didn't receive it until July 3, 2015; and
- c) She is suffering financially and will repay the money if she has to providing she doesn't claim bankruptcy first.

[30] The Respondent submitted that:

- a) The Commission determined that the severance pay the Appellant received constituted earnings pursuant to subsection 35(2) of the Regulations because the payment was made to compensate the Appellant for the loss of wages or other benefits or advantages related to employment;
- b) The Commission submits that the payment was reason of her separation from employment, therefore severance pay was allocated pursuant to subsection 36(9) of the Regulations, according to her weekly earnings from the date on which her employment relationship with her employer ended;
- c) In this case, although the Appellant's last day of work was October 31, 2014, she was still attached to the employer until May 16, 2015 when her entitlement to Supplementary Employment Benefits (SEB) ended and the severance became payable;
- d) The severance pay was allocated at the Appellant's normal weekly earnings of \$1066 from May 17, 2015 to August 22, 2015 with the balance of \$304.00 being allocated to the week commencing August 23, 2015. As the Appellant had been paid EI benefits of \$514.00 per week from May 17, 2015 to July 4, 2015, the benefits she had received, to which she was no longer entitled, had to be repaid;
- e) The Commission submits the information the Appellant was to report her severance in the week she received it is correct. However the information on the website states that several types of earnings may be paid or payable upon separation or during a benefits period and refers to an earnings chart (with a hyper-link) to find out if a payment constitutes earnings for benefit purposes and how those earnings are allocated. The website also explains the difference between when earnings are paid and payable and how that affects allocations; and
- f) The Commission had no discretion in the repayment of EI benefits received by a claimant, to which they are not entitled. Pursuant to sections 43 and 44 of the Act, benefits paid to a claimant that they are not entitled to receive, have to be repaid.

However, an arrangement can be reached with Canada Revenue Agency Collections department for the repayment of the overpayment in monthly instalments.

ANALYSIS

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

[32] The Tribunal must determine are the monies “earnings” for benefit purposes and if the monies were allocated to correctly.

[33] The Appellant presents the argument that she doesn’t dispute she received the monies but rather that the Commission allocated the monies to May 17, 2015 when she in fact did not receive the monies until July 3, 2015.

[34] The Tribunal finds from the facts on the file and from the Appellant’s oral evidence that she did receive the monies and the monies were paid as severance pay from her employer therefore the monies constitute earnings pursuant to subsection 35(2) of the Regulations.

[35] The Tribunal finds there is no dispute that the monies were paid because of the separation from employment and therefore must be allocated pursuant to subsection 36(9) of the Regulations, and applied according to her weekly earnings from the date on which her employment relationship with her employer ended.

[36] The Tribunal finds from the evidence on the file and from the Appellant’s oral evidence that her last day of work was October 31, 2014, however she chose to take a 26 week top up program from her employer and defer her severance package until the top up program ended, which in this case the Appellant was still attached to the employer until May 16, 2015 when her entitlement to Supplementary Employment Benefits (SEB) ended and the severance became payable.

[37] The Tribunal finds it unfortunate the employer did not respond to the Appellant’s request and provide her with the necessary documents to ensure she received the severance pay when it was due, however the monies in this case still became payable when the employment ended.

[38] The Appellant presents the argument that she was instructed by a Service Canada agent and what she read on the Service Canada web site to report the monies when she received it and that is what she did; therefore she doesn't feel it is fair to go back to May 17, 2015.

[39] The Tribunal finds it is extremely unfortunate when a claimant relies on the advice of the Commission and web site and then later discovers that advice was not accurate; however the information on the web site (which the Appellant included in her appeal (GD2-14) does clearly state that some earnings paid or payable upon separation can have an effect on a claim. As well (GD2-15) clearing states earnings paid or payable include severance monies.

[40] The Tribunal relies on CUB 27239A where Umpire J. Reed stated:

I recognize that the CEIC officials are often in a difficult position. If advice is sought from them and they do not give it, they are criticized for not being helpful. If advice is sought and they give it, is possible that they do so on the basis of one side of the story only, or without fully understanding all the ramifications of the facts they are told.

There should be some way of formalizing and documenting request for advice and the answers so given so that if misinformation is given the claimants are not disadvantaged thereby. As it stands now, however, Umpires have no jurisdiction to take such misinformation into account when they hear appeals (Granger v. C.E.I.C) A-684-85.

[41] The Tribunal deeply regrets the situation has caused the Appellant grief and hardship; however it must address the issue before it, which being whether the monies the Appellant received are earnings and if the Commission correctly allocated in accordance to the Regulations.

[42] The Tribunal finds that the determination of the allocation of separation money is a matter of law and that the Commission has correctly allocated it in accordance to subsection 36(9) of the Regulations to the Appellant's normal weekly earnings of \$1066 from May 17, 2015 to August 22, 2015 with the balance of \$304.00 being allocated to the week commencing August 23, 2015.

[43] The Tribunal finds as the Appellant had been paid EI benefits of \$514.00 per week from May 17, 2015 to July 4, 2015, the benefits she had received, to which she was no longer entitled, had to be repaid.

[44] The Tribunal does not have the authority to re-write the legislation. The law is clear that neither the Commission nor the Tribunal or Court has authority to exempt a claimant from the qualifying provisions of the Act no matter how sympathetic or unusual the circumstances. (*Levesque* 2001 FCA 304 (CanLII)).

[45] The Appellant presents the argument that she believes it to be unfair and having to repay the money will be difficult.

[46] The Tribunal sympathies with the Appellant's situation however the Tribunal finds the Commission correctly allocated the monies.

[47] The Respondent presents the argument that Commission has no discretion in the repayment of EI benefits received by a claimant, to which they are not entitled. Pursuant to sections 43 and 44 of the Act, benefits paid to a claimant that they are not entitled to receive, have to be repaid. However, an arrangement can be reached with Canada Revenue Agency Collections department for the repayment of the overpayment in monthly instalments.

[48] The Tribunal suggests that the Appellant contact the necessary authority to determine if a suitable repayment plan can be made.

CONCLUSION

[49] The appeal is dismissed.

Teresa Jaenen

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;

(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

(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

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.

(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.

(10.1) The allocation of the earnings paid or payable to a claimant by reason of a lay-off or separation from an employment made in accordance with subsection (9) does not apply if

(a) the claimant's benefit period begins in the period beginning on January 25, 2009 and ending on May 29, 2010;

(b) the claimant contributed at least 30% of the maximum annual employee's premium in at least seven of the 10 years before the beginning of the claimant's benefit period;

(c) the Commission paid the claimant less than 36 weeks of regular benefits in the 260 weeks before the beginning of the claimant's benefit period; and

(d) during the period in which the earnings paid or payable by reason of the claimant's lay-off or separation from an employment are allocated in accordance with subsection (9) or, if the earnings are allocated to five weeks or less, during that period of allocation or within six weeks following the notification of the allocation, the claimant is referred by the Commission, or an authority that the Commission designates, under paragraph 25(1)(a) of the Act, to a course or program of instruction or training

(i) that is full-time,

(ii) that has a duration of at least 10 weeks or that costs at least \$5,000 or 80% of the earnings paid or payable by reason of the claimant's lay-off or separation from employment,

(iii) for which the claimant assumes the entire cost, and

(iv) that begins during one of the 52 weeks following the beginning of the claimant's benefit period.

(10.2) If any of the conditions under which the Commission may terminate the claimant's referral under paragraph 27(1.1)(b) of the Act exists, the earnings paid or payable to the claimant by reason of a lay-off or separation from an employment shall be re-allocated under subsection (9).

(11) Where earnings are paid or payable in respect of an employment pursuant to a labour arbitration award or the judgment of a tribunal, or as a settlement of an issue that might otherwise have been determined by a labour arbitration award or the judgment of a tribunal, and the earnings are awarded in respect of specific weeks as a result of a finding or admission that disciplinary action was warranted, the earnings shall be allocated to a number of consecutive weeks, beginning with the first week in respect of which the earnings are awarded, in such a manner that the total earnings of the claimant from that employment are, in each week except the last week, equal to the claimant's normal weekly earnings from that employment.