



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *N. I. v. Canada Employment Insurance Commission*, 2017 SSTGDEI 190

Tribunal File Number: GE-17-1488

BETWEEN:

N. I.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Katherine Wallocha

HEARD ON: December 14, 2017

DATE OF DECISION: December 15, 2017

REASONS AND DECISION

OVERVIEW

[1] The claimant made an initial claim for Employment Insurance (EI) benefits on January 21, 2017, establishing a claim for EI benefits on January 1, 2017. On January 24, 2017, the Canada Employment Insurance Commission (Commission) informed the claimant that her vacation pay would be allocated to a period of her claim after finding that this income was considered earnings. The claimant requested a reconsideration of this decision, and on April 6, 2017, the Commission maintained its decision. The claimant appealed the reconsideration decision to the Social Security Tribunal (Tribunal) on April 24, 2017.

[2] The Tribunal must decide 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).

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

- a) The fact that the claimant will be the only party in attendance.
- b) The information in the file, including the need for additional information.
- c) The fact that the claimant or other parties are represented.

[4] N. I., the claimant, attended the hearing via teleconference with her husband, S. I., who provided testimony for his wife as her English is not very good.

[5] The Tribunal finds that the claimant had earnings pursuant to subsection 35(2) of the Regulations and these earnings were correctly allocated in accordance with subsection 36(9) of the Regulations.

[6] The reasons for this decision follow.

EVIDENCE

Information from the Docket

[7] The employer submitted a Record of Employment (ROE) dated January 9, 2017, indicating that the claimant began working as a sorter on June 11, 2010, and she quit on

December 30, 2016, accumulating 1760 hours of insurable employment. The claimant was paid \$4,907.85 in vacation pay.

[8] The Commission sent a letter dated January 24, 2017, informing the claimant that she received vacation pay from her employer and this income is considered earnings; a total of \$4,675.00 will be applied against her EI claim from January 1 to March 18, 2017, with a balance of \$154.00 applied in the week beginning March 19, 2017.

[9] By letter dated February 8, 2017, the claimant informed the Commission that she only earned vacation pay of \$1,234.48 during 2016. She stated that she cannot earn the vacation pay of \$4,675.00 at her hourly rate of pay and hours worked. She stated that the vacation pay that she earned in the previous years were carried forward and paid to her on separation but it is not earnings for the year 2016.

[10] The claimant provided her pay stub dated December 23, 2016, which indicates that her year to date vacation pay in the amount of \$1,234.48 with a balance of \$4,867.88.

[11] The employer was contacted by the Commission and payroll advised that the claimant was paid out her vacation pay on her final cheque in the amount of \$4,907.85.

[12] The Commission sent a letter dated March 24, 2017, informing the claimant that they had tried to reach her but were unable and requested that she contact the Commission within 10 days.

[13] The claimant responded by letter dated March 31, 2017, explaining that she understands English but can speak minimally; therefore, she is receiving assistance from her husband. She reiterated that her year to date vacation pay was only \$1,234.48 and not \$4,675.00 in 2016. She believes that \$1,234.48 should be applied against her EI claim which would result in her EI benefits starting effective January 2017 and not March 2017.

Testimony at the Hearing

[14] The claimant's husband testified at the hearing that the claimant earned this vacation pay during her entire employment and she was eligible to cash it in every year but they decided to keep it with the employer. He stated that the only vacation pay she earned in 2016 was around \$1200; the Commission should not have used the vacation pay she earned in the previous year.

[15] The claimant's husband stated that EI gives benefits according to how much she earned and how many hours she worked but that is limited to the previous 52 weeks and it does not consider how much she earned or how many hours she worked before the 52-week period; likewise, EI should take into account only the vacation pay earned for that 52-week period and not beyond it.

[16] The claimant's husband confirmed that the claimant received \$4,633.40 in vacation pay and he further confirmed that the claimant's weekly rate of pay was \$425.00. He stated that if you look at the claimant's hourly rate of pay and the amount she worked; you will see that the claimant did not earn \$4,633.40 in vacation pay in one year.

SUBMISSIONS

[17] The claimant submitted the following:

- a) The Commission should not consider the vacation pay accrued from previous years to apply as earnings against her current EI claim. In addition to paying the income tax on the accumulated vacation pay, she will also be partly losing her EI benefits. She believes she should be spared from this double whammy when she so much needed EI support after almost seven years of continuous, dedicated service to her employer.
- b) The Commission should consider \$1,234.48 as vacation pay for 2016 and not \$4,675.00. Her EI benefits should start in January 2017 and not March 2017.
- c) She does not dispute that vacation pay is earned income and she should have to exhaust that first; they dispute that the Commission is using all of her vacation pay and not just the vacation pay from 2016. If she had drawn her vacation pay and put it in the bank, it would not have been allocated. They did not know that they would be penalized like this.
- d) The Commission only considered the last 52 weeks' earnings to determine one's eligibility for EI benefits; likewise, the Commission should only consider the vacation pay earned in the last 52 weeks and not the accumulated vacation pay earnings from previous years.
- e) Everything is so time bound for her insurable hours and her earnings; the vacation pay should be bound by the same 52- week time frame.

- f) She was actively looking for work and has been employed since March 16, 2017. She deserves EI benefits after paying the premium for seven years; she will only receive EI benefits from January 1 to March 15, 2017.
- g) She is only trying to get what she believes she is entitled to and nothing more.
- h) The payment of her EI benefits should not be delayed because of the earnings that occurred in the previous years as it would amount to penalizing her for saving her vacation pay from the previous years. Using common sense, they are right and it should be properly recognized under the legal system.

[18] The Commission submitted the following:

- a) The employer had accumulated the claimant's vacation pay over several years including 2016; however, the claimant's employment had ended and the separation was final and this money became payable to the claimant at this time. The only reason she received this money was due to the separation of employment which occurred on December 30, 2016.
- b) Once this vacation pay became payable to the claimant, the allocation of this money begins from the week of the separation. In the claimant's case as her date of separation occurred on a Friday, December 30, 2016, the allocation began the following week, the week her benefit period began, which was January 1, 2017. The Commission is required to allocate this vacation pay at the claimant's normal weekly earnings of \$425.00 per week. The end date of this allocation therefore falls in the week ending March 25, 2017.
- c) Although the claimant believes that only the amount of vacation pay she received in 2016 should be allocated, this is not the case. The Commission must abide by the legislation and the specific method in which earnings are to be allocated.
- d) The vacation pay the claimant received constituted earnings pursuant to subsection 35(2) of the Regulations because the payment was made to compensate the claimant for vacation leave regardless if the vacation time was taken or not.
- e) The payment was made by reason of the claimant's separation from employment; consequently, the vacation pay was allocated pursuant to subsection 36(9) of the Regulations, according to her normal weekly earnings from January 1, 2017, ending on March 25, 2017.

ANALYSIS

[19] The relevant 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).

[21] The claimant must disclose all monies paid or payable and it is incumbent upon the claimant to establish that all or part of the sums received amounted to something other than earnings (*Bourgeois v. Canada (Attorney General)*, 2004 FCA 117).

[22] The Tribunal recognizes that the claimant had worked and accumulated her vacation pay for almost seven years and when she was required to leave her job, she was paid the accumulated vacation pay. The Tribunal accepts that the claimant received \$4,675.00 in vacation pay because she left her employment.

[23] The Tribunal finds that the vacation pay the claimant received in the amount of \$4,675.00 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.

[24] The allocation of vacation pay falls under one of the three different provisions;

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.

[25] In this case, the claimant received her vacation pay because of her separation from employment; therefore, the Tribunal finds that the claimant’s vacation pay must be allocated in accordance with subsection 36(9) of the Regulations.

[26] The claimant argued that the Commission should not allocate her entire vacation pay payout because this was accumulated over many years of employment; the Commission should only allocate \$1,234.48, which is the vacation pay she accumulated in the 52-week period prior to her benefit period. The Tribunal acknowledges the claimant's argument that the Commission's interpretation of the law is not fair because if she had taken her vacation pay prior to leaving her job, it would not have impacted her claim for EI benefits; however, the fact remains that she did not take her vacation pay prior to leaving. Parliament has decided that a claimant for EI benefits, who receives vacation pay earnings upon separation of employment, should be expected to use that income for their living expenses according to their normal weekly earnings.

[27] The claimant further argued that the Commission uses the earnings and insurable hours in the 52-week period prior to the beginning of the separation of employment to calculate her eligibility to EI benefits and it makes common sense to treat the vacation pay in a similar way. The Tribunal recognizes that the claimant's frustrations reside in the law and not in the application of the law by the Commission. The claimant has made valid arguments; however, she is making these arguments in the wrong forum. Only Parliament can change the law.

CONCLUSION

[28] For these reasons, the Tribunal concludes that the claimant had earnings pursuant to subsection 35(2) of the Regulations and these earnings were correctly allocated pursuant to subsection 36(9) of the Regulations because the earnings were paid by reason of a separation from an employment.

[29] The appeal is dismissed.

K. Wallocha

Member, General Division - Employment Insurance Section

ANNEX

THE LAW

Employment Insurance Act

7 (1) Unemployment benefits are payable as provided in this Part to an insured person who qualifies to receive them.

(2) An insured person qualifies if the person

(a) has had an interruption of earnings from employment; and

(b) has had during their qualifying period at least the number of hours of insurable employment set out in the following table in relation to the regional rate of unemployment that applies to the person.

TABLE

Regional Rate of Unemployment	Required Number of Hours of Insurable Employment in Qualifying Period
6% and under	700
more than 6% but not more than 7%	665
more than 7% but not more than 8%	630
more than 8% but not more than 9%	595
more than 9% but not more than 10%	560
more than 10% but not more than 11%	525
more than 11% but not more than 12%	490
more than 12% but not more than 13%	455
more than 13%	420

8 (1) Subject to subsections (2) to (7), the qualifying period of an insured person is the shorter of

(a) the 52-week period immediately before the beginning of a benefit period under subsection 10(1), and

(b) the period that begins on the first day of an immediately preceding benefit period and ends with the end of the week before the beginning of a benefit period under subsection 10(1).

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;

(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.

(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.

(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.