



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *R. T. v. Canada Employment Insurance Commission*, 2018 SST 350

Tribunal File Number: GE-17-3290

BETWEEN:

R. T.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Teresa Jaenen

TELECONFERENCE HEARD ON: April 4, 2018

DATE OF DECISION: April 24, 2018

REASONS AND DECISION

DECISION

[1] The appeal is dismissed. I find the vacation pay the Appellant received is earnings and it was correctly allocated to the period following the separation from employment.

OVERVIEW

[2] The Appellant was laid off by her employer after an evacuation notice was issued due to the wildfires in the area. On the advice of her employer she was told to apply for employment insurance benefits (EI). Her employer informed her they were told to pay out the vacation pay before laying them off work and she received vacation pay at the time of the layoff. The Canada Employment Insurance Commission (Respondent) considered vacation pay earnings and \$886.00 was allocated to the week beginning July 16, 2017 and balance of \$854.00 the week of July 23 to July 29, 2017.

[3] The Appellant argues that she doesn't know why the holidays had to be paid out in the first place as there were extenuating circumstances and she had no choice but to leave work. She stated she had planned holidays for August when she expected to use her vacation pay. She argues that she has been paying into EI since 16 and has been at her current job for 27 years. She has never asked for benefits. She believed EI was there to help people who were out of a job and support them until they could find work. She could only assume this definition is wrong.

ISSUE

[4] Did the money the Appellant receive from her employer for vacation pay constitute earnings? If so, how should the earnings be allocated?

ANALYSIS

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

Did the money the Appellant receive from her employer for vacation pay constitute earnings?

[6] For income to be considered earnings pursuant to subsection 35(2) of the *Employment Insurance Regulations* (Regulations) there must be a sufficient connection between Appellant's employment and the sum she received (*Canada (A.G.) v. Roch* 2003 FCA 356).

[7] The Appellant has the onus of proof to show that the vacation pay was not earnings and should not be subject to allocation.

[8] I find that the vacation pay the Appellant received in the amount of \$1,838.55 is considered earnings because the money was paid or payable by reason of a lay-off or a separation of employment.

[9] The Appellant conceded that the money she received was vacation pay and paid out upon separation.

How the earnings should be allocated?

[10] Vacation pay is allocated pursuant to subsection 36(9) of the Regulations when it is paid or payable "by reason of a lay-off or separation from employment. This means that a payment made under subsection 36(9) of the Regulations covers "any part of the earnings that becomes due and payable at the time of the termination of the contract of employment and the commencement of unemployment" (*Lemay v. Canada*, 2005 FCA 433).

[11] I find that the Appellant's vacation pay must be allocated to a number of weeks that begins with the week of layoff according to the Appellant's normal weekly earnings pursuant to subsection 36(9) of the Regulations. (*Canada (Attorney General) v. Boucher Dancause*, 2010 FCA 270).

[12] I acknowledge the Appellant's frustration and that had it not been for the wildfires and forced evacuation that led to the unexpected separation of employment her vacation pay would have been available when she took her holidays in August. The employer's decision to pay out the Appellant's accumulated vacation pay when they ceased operations because of a wildfire evacuation order does not change the nature of the income paid out to the Appellant.

[13] I understand the Appellant's frustrations and that she has paid into the employment insurance program and has never accessed it and that there should be consideration to the extenuating circumstances. However, I sympathize with the Appellant but I must consider the facts and apply the statutory requirements and cannot ignore, refashion, circumvent or rewrite the Act, even in the interest of compassion (*Canada (Attorney General) v. Knee*, 2011 FCA 301).

CONCLUSION

[14] The appeal is dismissed.

Teresa Jaenen
Member, General Division - Employment Insurance Section

APPEARANCE:	R. T., Appellant
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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*)

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

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.