Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

Citation: *D. S. v Canada Employment Insurance Commission*, 2018 SST 1161

Tribunal File Number: GE-17-3476

BETWEEN:

D. S.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Paul Dusome

HEARD ON: April 27, 2018

DATE OF DECISION: May 15, 2018

Canada

DECISION

[1] The appeal is dismissed, as the Appellant received money from his former employer while he was receiving employment insurance (EI) benefits. That money from the employer resulted in an overpayment. There will be a variation to the Respondent's decision, reducing the overpayment to $682.00 from $701.00.

OVERVIEW

[2] The Appellant lost his job on March 1, 2013 for shortage of work. On his March 5, 2013, renewal application for employment insurance (EI) benefits he stated that he did receive vacation pay with every pay cheque, but did not or will not receive other money from his employer. He received 20 weeks of EI benefits starting on March 3, 2013. In October 2015, the Respondent assessed an overpayment of $701.00 against the Appellant, based on the Appellant having received vacation pay and severance pay of $1,326.00 from the employer in mid to late March 2013. The Appellant disputed this decision by way of reconsideration with the Respondent, appeals to the Tribunal's General and Appeal Divisions, and referral back to this Tribunal .

PRELIMINARY MATTERS

[3] The Tribunal is proceeding with the decision after the Appellant did not attend the hearing, and is refusing his request for an adjournment, received on May 3, 2018.

[4] The Appellant did not attend the teleconference hearing on April 27, 2018. The Appellant received the notice of hearing on January 19, 2018, as confirmed by the Post Office receipt, and by the Appellant's responding letter received on March 28, 2018, stating that he could not participate in a teleconference in English. The Tribunal notified the Appellant by letter dated April 3, 2018 that a Mandarin interpreter would be present at the hearing, and asked him to attend the hearing. The Post Office receipt confirms delivery of this letter to the Appellant on April 14, 2018. The Tribunal is satisfied that the Appellant did receive the notice of hearing and the follow up letter on the dates in the Post Office receipts, and will proceed in his absence, as authorized by subsection 12(1) of the *Social Security Tribunal Regulations.*

[5] On May 3, 2018, following the hearing of April 27, 2018, the Tribunal received from the Appellant a written request to adjourn, dated April 26, 2018. The text of the request is:

> Sorry for the late response regarding the interpreter for hearing on April 27, 2018. I was not able to check my mail box and send a letter back on time. If it is possible I would like to have a new hearing with a mandarin interpreter be set up sometime on Friday after May 12, 2018 (I will have no time any day except on Friday). Please let me know the contact information for attending the hearing.

[6] The letter contains no reasons for the request, or any explanation of why the Appellant could not attend the hearing on April 27th, when he acknowledged that an interpreter would be present for that hearing. The hearing date of April 27th was a Friday, which is the only day of the week the Appellant identified in his April 26th letter that he could be available. The Appellant failed to explain why he could not have telephoned or emailed the Tribunal at any time between receiving the Tribunal`s letter confirming the Mandarin interpreter and the actual hearing date. Instead, he chose to mail a letter which would not arrive until after the hearing. The Appellant's adjournment request letter was received on May 3rd, after the hearing.

[7] The Tribunal is exercising its discretion to refuse the adjournment request for the following reasons. A party may seek an adjournment by filing a request with the Tribunal with supporting reasons (subsection 11(1) of the *Social Security Tribunal Regulations*). In the normal course, a request is made before or at the hearing. The notice of hearing states in bold face type "Important: until you are advised that your adjournment request has been granted, the hearing will proceed as scheduled." The requirement for filing means that the request must be received by the Tribunal before or at the hearing. This request was filed on May 3, 2018. The Appellant's request contains no reasons. Supporting reasons are a mandatory requirement.

[8] In these circumstances, where the Appellant had advance notice of the hearing (including the statement that the hearing would go ahead as scheduled unless notified that the adjournment request had been granted), responded to that notice, had advance notice that a Mandarin interpreter would be present for the April 27th hearing, did not contact the Tribunal before the hearing to request the adjournment, did not attend the hearing, did not file his request for adjournment until May 3,2018, and did not provide any reasons in support of his request, the

Tribunal will not grant the request for adjournment. In these circumstances, the interests of justice would not be served by granting an adjournment for no discernable reason.

ISSUES

[9] 1. Did the Appellant receive vacation pay and severance pay from the employer after March 1, 2013, by reason of termination of the employment? 2. If yes, was that money earnings for EI purposes? 3. If yes, should that money be used to reduce the EI benefits the Appellant received in March 2013?

ANALYSIS

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

[11] The word "earnings" is defined as "the entire income of a claimant arising out of any employment" (subsection 35(2) of the *Employment Insurance Regulations* (Regulations). These earnings are to be taken into account for the purpose of determining earnings to be deducted from benefits. That is the applicable purpose in this case. The income must be linked to employment, either as amounts earned by labour or given for work, or there is a sufficient connection between the employment and the money received (*Canada (A.G.) v. Roch*, 2003 FCA 356). Severance pay is earnings within subsection 35(2) of the Regulations, (*Canada (A.G.) v. Boucher Dancause*, 2010 FCA 270). The onus then shifts to the appellant to show that the money was for something other than earnings (*Bourgeois v. Canada (A.G.)*, 2004 FCA 117).

[12] Vacation pay does constitute earnings under subsection 35(2) of the Regulations. Vacation pay is part of the compensation package the employee receives from the employer for the work done by the employee for the employer. It is calculated as a percentage of the wages paid to the employee. There is a clear and direct connection between the employment and the money received. The vacation pay is income arising out of the employment, within the meaning of subsection 35(2), and the *Roch* decision.

[13] The rule for applying those earnings to a time period (referred to as allocation) is set out in section 36(9) of the *Regulations.* The rule states that the earnings paid are to be applied to the weeks starting with the week of termination of the employment, at the person's normal weekly

earnings, until the money has been used up. This will eliminate or reduce the EI benefits for those weeks.

Issue 1: Did the Appellant receive vacation pay and severance pay from the employer after March 1, 2013, by reason of termination of the employment?

[14] The Appellant did receive the gross amount of $1,289.16 from the employer for vacation pay and severance pay in March 2013.

[15] The Appellant has consistently denied that he received the amount of $1,326.52. The Respondent used that amount initially, based on an error made by the employer in the Record of Employment (ROE). The Appellant's denial, and the dispute to the overpayment, are the only submissions he made. The Tribunal wrote to the Appellant on March 9, 2017, asking him to provide "paystubs and in particular for the period ending March 2, 2013 and any supporting bank statements to support position that you did not receive the $1,326.52…" He replied that "…I did not receive this total amount of money ($1,326.52)." He provided two pay stubs for the periods ending March 2 and 9, 2013. Both show payment of a gross amount identified as "Rea Non Elig", and a net amount after deductions. The employer identified these amounts as for severance pay. The gross amounts on the two paystubs total $909.60, the same amount as the severance pay on the ROE. The two pay stubs also bear the notation "Deposited to the account of X", with the last four digits of a bank account number, and the net amount of the pay. Based on that evidence, and the absence of bank records from the Appellant to show that he did not receive any money in March 2013 from the employer shown on those stubs, the Tribunal finds that the Appellant did receive severance pay in the gross amount of $909.60.

[16] The employer provided the above two paystubs, as well as the paystub for the period ending March 16, 2013, which shows current vacation pay in the amount of $379.56, with a notation of the deposit of the net amount to the Appellant's bank account. All the other pay stubs are consistent with this one in showing a prior vacation pay amount of $1,520.11. That confirms that the amount of $379.56 is for the period following termination of the employment. The employer, and the Respondent, conceded that this is the correct amount of vacation pay, rather than the figure of $416.62 shown on the ROE. On the basis of this evidence, the Appellant did receive vacation pay in the gross amount of $379.56.

[17] The gross amount received by the Appellant for vacation and severance pay is $1,289.16.

Issue 2: Was that money earnings for EI purposes?

[18] Earnings are the total income the employee receives from his employment.

[19] The full amount of $1,289.16 was earnings under subsection 35(2) of the Regulations. The Appellant made no submissions on whether the amount was earnings. The Respondent relied on the Regulations, court decisions, and the facts relating to the payment of the severance and vacation pay to the Appellant to support its position that the $1,289.16 was earnings.

[20] Severance pay is earnings under the law (*Boucher Dancause*). Vacation pay is also earnings, based on the law (*Roch*). The Tribunal does not have authority to vary the law.

[21] The Appellant has not shown that this amount of $1,289.16 was for something other than earnings.

[22] The Appellant may be disputing that he did not receive the gross amount of the severance and vacation pay, while conceding that he did receive the net amount. The pay stubs provided by the Appellant and the employer show that the net amounts of severance pay and vacation pay were deposited to the Appellant's bank account. Payment of the net amount does not change the conclusion about earnings. The earnings that the Respondent must apply in these cases is the gross amount of the earnings, based on paragraph 35(2)(a) of the Regulations, which refers to the earnings to be taken into account as "the entire income of a claimant arising out of any employment…".

Issue 3: Should that money be used to reduce the EI benefits the Appellant received in March 2013?

[23] Yes, the severance pay and vacation pay must be used to reduce the EI benefits.

[24] The rule states that the earnings are to be applied to the weeks starting with the week of termination of the employment, at the person's normal weekly earnings, until the money has been used up. This will eliminate or reduce the EI benefits for those weeks.

[25] The earnings must be applied to the weeks beginning on March 3, 2013. The Appellant's normal weekly earnings were $869.00, based on the average earnings for the weeks shown on the ROE. The Respondent has correctly allocated the $1,289.16 to the two weeks from March 3, 2013, as shown on its chart at RGD2-12. The calculation results in an overpayment of $682.00. The Respondent conceded that the correct amount of the overpayment was $682.00, rather than $701.00.

CONCLUSION

[26] The appeal is dismissed, as the money received by the Appellant was properly applied to create an overpayment. There will be a variation to the Respondent's decision, reducing the overpayment to $682.00 from $701.00.

Paul Dusome

Member, General Division - Employment Insurance Section

HEARD ON:	April 27, 2018
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	No parties or representatives attended.

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 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.

……..

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.

……

(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.

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