



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *J. S. v. Canada Employment Insurance Commission*, 2018 SST 1065

Tribunal File Number: GE-18-1144

BETWEEN:

J. S.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Eleni Palantzas

HEARD ON: July 30, 2018

DATE OF DECISION: August 22, 2018

DECISION

[1] The appeal is dismissed. The retirement allowance received by the Claimant was correctly allocated. He must therefore pay the resulting overpayment of benefits.

OVERVIEW

[2] The Claimant made an initial claim for employment insurance regular benefits. Upon separation from his employment, he received \$40,092 as a retirement allowance. The Canada Employment Insurance Commission (Commission) determined that these monies (minus legal fees) were earnings and that they had to be retroactively allocated to the weeks starting from the week of separation from his employment. This decision resulted in an overpayment of \$5,738. The Claimant requested that the Commission reconsider its decision arguing that the retirement allowance should not be allocated from the beginning of his claim. He also objected to the amount of the allocation since he only received half of the amount after taxes and legal fees were deducted. The Commission however, maintained its decision noting that the allocation was properly made according to the legislation. The Claimant disagreed and appealed to the Social Security Tribunal of Canada (Tribunal).

ISSUE

[3] Is the retirement allowance considered earnings? If so, how should it be allocated?

ANALYSIS

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

[5] In many cases, and for various reasons, a claimant may receive monies that were paid or were payable when they were also in receipt of employment insurance benefits. The Commission must decide whether these monies are considered “earnings” and, if so, to which weeks the earnings should be allocated. The *Employment Insurance Regulations* (Regulations) provide direction as to what monies are considered “earnings” (section 35) and how these earnings are to be allocated (section 36).

[6] The following facts are undisputed. On October 27, 2017, the Claimant and the employer reached a settlement agreement. As a result, the Claimant was paid a retirement allowance in the

amount of \$40,092, less applicable deductions. The Claimant incurred a total of \$8,965.25 in legal fees. The employer agreed to pay \$2,500 towards the Claimant's legal fees.

[7] The Claimant disagrees with the fact that he has to repay benefits he received from the start of his claim in October 2017 when he did not receive the retirement allowance until December 2017. He argues that he should only have to repay the \$952 which is the amount of the benefits he received after the settlement.

Issue: Is the retirement allowance considered earnings? If so, how should it be allocated?

[8] Yes, the retirement allowance is considered earnings and because it was paid to him by reason of a separation from his employment, it must be allocated beginning the week of separation.

[9] Having reached a settlement agreement, the Claimant received a gross amount of \$40,092 as a retirement allowance from his employer. He provided evidence of the \$8,965.25 in legal fees he incurred in order to come to this agreement. His employer paid \$2,500 towards those fees. The net amount of \$6,465.25 that the Claimant paid was deducted from his retirement allowance. The Member finds that the Claimant therefore received a gross amount of \$33,626.75 from his employer as a result of the separation from his employment (GD3-34).

[10] The retirement allowance that the Claimant received is considered income unless the amount falls within an exception in subsection 35(7) of the Regulations or does not arise from employment. In this case none of the exception in subsection 35(7) apply. Because this income arose from his employment, it is considered to be "earnings" (subsection 35(2) of the Regulations).

[11] The onus is on the Claimant to establish that the monies he received as result of his dismissal amount to something other than earnings within the meaning of the EI Act and its Regulations (Bourgeois 2004, FCA 117). The Claimant does not dispute that the retirement allowance is earnings.

[12] Further, because these earnings were paid to him by reason of a separation from employment, they must be allocated to his benefit period beginning the week of separation, regardless of when the earnings are purported to be paid or payable. The earnings must be

allocated in an amount equal to the Claimant's normal weekly earnings, beginning with the week of the separation (subsection 36(9) of the Regulations). The Claimant does not dispute that his normal weekly earnings are \$1,172.

[13] The Member finds therefore, that the Commission correctly allocated the gross amount of \$33,626.75 to the weeks beginning October 6, 2017 through to the week of April 8, 2017 at a rate equal to his normal weekly earnings of \$1,172. The balance of \$1,046 was allocated to the last week of April 15, 2017.

[14] At the time of the allocation, the Claimant had received benefits only during the period of October 6, 2017 to December 13, 2017. During this period he was paid an amount of \$5,738 in benefits which he must now repay to the Commission.

[15] The Member understands and is sympathetic to the Claimant's situation and the financial hardship this retroactive allocation has caused. The Commission and the Tribunal however, are obligated to apply the legislation as it is intended and written. The Member recommended that the Claimant speak with the Commission upon receipt of this decision to enquire about any further entitlement to benefits after the allocation and the continuation of the payment plan he had in place.

CONCLUSION

[16] The appeal is dismissed.

Eleni Palantzas

Member, General Division - Employment Insurance Section

HEARD ON:	July 30, 2018
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	E. S., Representative for the Appellant

ANNEX

THE LAW

Employment Insurance Regulations

35 (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;

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.

36 (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.

36 (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.

36 (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.