



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *R. P. v Canada Employment Insurance Commission*, 2019 SST 238

Tribunal File Number: GE-18-3675

BETWEEN:

R. P.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Lilian Klein

HEARD ON: December 31, 2018

DATE OF DECISION: February 3, 2019

DECISION

[1] The appeal is allowed. The holiday pay that the Appellant received for December 30, 2016, should be allocated to the week of December 25, 2016.

OVERVIEW

[2] When the Appellant's 10-month contract as a school board X ended in December 2016, he was paid for the upcoming New Year's Day statutory holiday on December 30, 2016, instead of on January 1, 2017. The Respondent found that he knowingly made a false representation about his earnings when he did not report this holiday pay on his benefit claim report for the week of January 1, 2017. It initially established an overpayment of benefits and imposed a penalty.

[3] On reconsideration, the Respondent rescinded the finding of misrepresentation and the penalty, but maintained the overpayment. The Appellant appealed this decision, submitting a letter from his employer showing that it had designated December 30, 2016, instead of January 1, 2017, as the New Year's Day statutory holiday. The issue now before me is how the Appellant's holiday pay for December 30, 2016, should be allocated.

ISSUE

[4] **How should the Appellant's statutory holiday pay for December 30, 2016, be allocated?**

ANALYSIS

[5] A claimant's income from any employment is considered earnings, including pay for a statutory holiday (section 35 of the *Employment Insurance Regulations* (EI Regulations)). To be considered earnings, there must be "sufficient connection" between the employment and the sums received (*Attorney General of Canada v. Roch*, 2003 FCA 356). Claimants have the burden of proof to show, on a balance of probabilities, that any payments they received were not earnings (*Bourgeois v. Attorney General of Canada*, 2004 FCA 117). The term "balance of probabilities" means it is more likely than not that events occurred as described.

[6] The “entire income...from any employment” is taken into account in calculating the amount to be deducted from employment insurance benefits (subsection 35(2) of the EI Regulations). Once income is deemed earnings under section 35 of the EI Regulations, it is allocated for this purpose under section 36.

ISSUE

How should the Appellant’s statutory holiday pay be allocated?

[7] I find that the holiday pay the Appellant received for December 30, 2016, should be allocated to that same week, rather than to the week of January 1, 2017, since his employer designated December 30, 2016, as the statutory holiday.

[8] The Appellant did not dispute in principle that statutory holiday pay counts as earnings that must be allocated. However, he argued that he reported these earnings when he applied for benefits on December 29, 2016, and they should be allocated to that same week rather than the week of January 1, 2017. He submitted a letter from his employer showing that it had designated December 30, 2016, as the statutory holiday for its contract employees in lieu of January 1, 2017.

[9] The Respondent submitted that pay for a statutory holiday counts as earnings that must be allocated to the week in which that holiday falls. It therefore argued that the Appellant should have declared his holiday pay for December 30, 2016, as earnings during the week of January 1, 2017, since this is when the official New Year’s Day statutory holiday falls.

[10] After considering the evidence and submissions of both parties, I find that the Appellant’s holiday pay for December 30, 2016, should be allocated to the week in which that date fell: the week of December 25, 2016. Pay for a statutory holiday can be allocated in one of two ways. The first option is for the pay to be allocated to the week in which the statutory holiday falls “by law, custom or agreement,” regardless of when the time off is taken or the payment is made (subsection 36(13) of the EI Regulations). The Respondent has based its allocation decision on that option.

[11] However, I find that the EI Regulations allow for a second allocation option as well. When a statutory holiday falls on one day but, through a written agreement, employees are given

a different day off “immediately preceding or following” the customary date of the holiday, their holiday pay can be allocated to the week of the alternative date (subsection 36(13) of the EI Regulations).

[12] I assign significant weight to the letter the Appellant submitted from his employer, which clearly states that the school board designated December 30, 2016, as its New Year’s Day statutory holiday in lieu of January 1, 2017. I note that New Year’s Day in 2017 fell on a Sunday. According to the EI Regulations, the employer could change the date of its statutory holiday to the working day either “immediately preceding or following” January 1, 2017.

[13] By designating as its statutory holiday the working day immediately preceding January 1, 2017, the employer provided a non-working day at its establishment on Friday, December 30, 2016. I find that the EI Regulations allow for allocation of the Appellant’s holiday pay for that day to the week of December 25, 2016, rather than to the week of January 1, 2017.

[14] I note that this second allocation option has been confirmed in CUB appeals in the past (CUB 18994; CUB 14671, affirmed in *Marchand v. CEIC*, A-148-88). While I am not bound by these CUB decisions, I am guided by their logic which I have now applied to the Appellant’s case.

CONCLUSION

[15] The appeal is allowed. The holiday pay that the Appellant received for December 30, 2016, should be allocated to the week of December 25, 2016.

Lilian Klein

Member, General Division - Employment Insurance Section

HEARD ON:	December 31, 2018
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	R. P., Appellant