



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *T. K. v Canada Employment Insurance Commission*, 2020 SST 189

Tribunal File Number: GE-19-3857

BETWEEN:

**T. K.**

Appellant

and

**Canada Employment Insurance Commission**

Respondent

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**SOCIAL SECURITY TRIBUNAL DECISION**  
**General Division – Employment Insurance Section**

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DECISION BY: Katherine Wallocha

HEARD ON: December 4, 2019

DATE OF DECISION: February 4, 2019

## **DECISION**

[1] The appeal is allowed. According to a Canada Revenue Agency ruling, the Claimant has enough hours of insurable employment to qualify for employment insurance (EI) benefits.

## **OVERVIEW**

[2] The Claimant was laid off from his employment. When he applied for EI benefits, he indicated that he worked for one employer and there were no other periods of employment during his qualifying period.

[3] The Canada Employment Insurance Commission (Commission) determined that the Claimant did not have enough hours to establish a benefit period. This means he could not be paid EI benefits.

[4] The Claimant said the hours on the record of employment (ROE) did not include vacation pay and statutory holidays. The Commission investigated and determined that some hours were missing from his ROE. After applying the hours from the statutory holiday pay, the Claimant still did not have enough hours to qualify.

[5] The Claimant appealed to the Social Security Tribunal. He stated that the Commission's reconsideration decision did not include 17.64 insurable hours that he took as vacation hours, rather than being paid out. This would allow him to have enough hours to qualify for EI benefits.

## **WHAT I MUST DECIDE**

[6] Does the Claimant have enough hours of insurable employment in his qualifying period to qualify for EI benefits?

## **HOURS NEEDED TO QUALIFY**

[7] The law says that a claim for EI benefits can only be based on the total number of insured hours in the Claimant's qualifying period<sup>1</sup>. The qualifying period is the 52-week period

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<sup>1</sup> This is set out in s 7 of the *Employment Insurance Act* (EI Act).

immediately before the date of the application<sup>2</sup>. The Claimant has to prove he meets the conditions to qualify for benefits<sup>3</sup>.

## **Background**

[8] The Claimant applied for EI benefits on June 13, 2019. There is no evidence he had an earlier claim. This means his qualifying period is from June 10, 2018, to June 8, 2019.

[9] The Claimant lived in economic region zone 29, with an unemployment rate of 5.9% at the time he applied for EI benefits. This means he needed 700 hours of insurable employment to qualify for EI benefits.

[10] The ROE is dated July 31, 2019. The Claimant's first day of work was September 4, 2018. His last day for which he was paid was April 12, 2019. The ROE indicated he accumulated 656 hours of insurable employment. It also indicated he was paid \$379.45 in vacation pay, and \$951.11 in other moneys.

[11] The Claimant spoke to the Commission and said his ROE did not include any vacation pay or statutory holiday pay. The Commission investigated by contacting the employer's payroll clerk on August 21, 2018. The Commission noted the following changes to the ROE:

- The employer confirmed last day worked was April 13, 2019, and NOT May 13, 2019;
- His accumulated vacation pay that was paid out to him on separation was amended from \$370.45 to \$449.44;
- The Claimant had scheduled vacation pay/time taken in January and this counted as hours to be included;
- The "other moneys" were commissions earned up to last day work and removed from the ROE.

[12] The Claimant continued to disagree with the ROE. He stated that the pay periods with all statutory holidays and vacation pay are missing hours. He gave the example that line 8 on the

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<sup>2</sup> This is set out in s 8 and 10 of the EI Act.

<sup>3</sup> This is confirmed in Federal Court of Appeal (FCA) decision *Canada (Attorney General) v Terrion*, 2013 FCA 97.

ROE under 15 C says 0 hours but has a recorded pay of \$642.00. He said he got paid for Thanksgiving, Christmas, Boxing Day, New Year's Day, Family Day, etc.

[13] The Commission decided the Claimant was denied EI benefits because he only had 656 hours of insurable employment but he needed 700 hours.

[14] The Claimant submitted a request for the Commission to reconsider its decision. He argued that the ROE figure of 656 hours is incorrect. He says his pay statements clearly prove the ROE is incorrect.

[15] The Claimant also argued that he was employed beyond April 12, 2019. He says his pay statements clearly prove he was on paid vacation during the April 26 pay statement. He had the expectation that he would work more in late April or May. On April 29, 2019, his manager informed him that this would not be the case. On May 1, 2019, he worked part of the day and delivered the company vehicle. His final commission payment was not made until May 24, 2019. This should be his final pay period ending date.

[16] The Claimant provided his pay stubs. The Claimant also provided emails from the payroll clerk that show a third party payroll company takes care of the ROE and the payroll clerk did not have a copy of the ROE.

[17] On October 19, 2019, the Commission contacted the payroll clerk because the pay stubs showed earnings for statutory holidays but it did not provide hours. They needed to amend the ROE.

[18] The payroll clerk further stated that the Claimant did not take paid vacation time after April 13, 2019. He was paid out vacation pay owing to him due to the separation from employment.

[19] The Commission contacted the Claimant on October 19, 2019, and advised the following:

- Although the final commission payment was made on May 24, 2019, this money was earned at an earlier date, at the time the services were performed. This means May 24, 2019, could not be the final pay period ending date;

- The employer informed the Commission that the vacation pay on the pay period ending April 26, 2019, was not paid for time taken but as a result of the separation from employment so, there are no corresponding insurable hours;
- According to the pay stubs, he was paid \$300 in vacation pay in the pay period ending January 4, 2019. He was awarded 13 hours;
- He was also awarded 20 hours for Thanksgiving, Christmas, Boxing Day and New Year's Day, and 4 hours for Family Day for a total of 24 hours of statutory holidays;
- He had 24 hours of statutory holidays and 13 hours of vacation to be added to his ROE;
- This gives him a total of 693 ( $656 + 24 + 13 = 693$ ) hours of insurable employment;
- He still did not qualify for EI benefits because he needed 700 hours.

[20] The Claimant submitted his appeal stating that the Commission did not recognize 17.64 hours of regular insurable hours. He explained these were regular paid vacation hours taken during pay period #9 (April 26, 2019) and the employer recognized these hours as regular insurable hours. This was not severance or a separation payment. The third party payroll company incorrectly listed April 12, 2019, as his last day for which he was paid. It should be April 26, 2019. Since the employer does not receive a copy of the ROE, they were unaware of the errors.

[21] The Claimant provided information from the Commission's website. This information states that the last day of work usually coincides with the last day for which paid (Block 11) on the ROE. But in some cases, employees continue to receive insurable earnings after their last day of work. This occurs with paid leave such as vacation or sick leave, earned days off, or salary continuance.

[22] The Claimant also provided an email he sent to the payroll clerk dated April 17, 2019. The Claimant was not claiming any hours for the work period from April 14 to April 27, 2019, because he is still on vacation. He asked if he could be paid out the accumulated vacation pay balance of \$418.99.

[23] The pay stub dated April 26, 2019, shows the Claimant was paid statutory holiday pay for Easter Monday and vacation pay of \$418.99. The Claimant divided 418.99 by his hourly rate of \$23.75 and concluded that he earned 17.64 hours of insurable vacation hours.

[24] The pay stub dated May 24, 2019, shows the Claimant was paid out his final commission pay. He was also paid \$39.54 in vacation pay. The Claimant argued at the hearing that this was his final pay out of vacation pay because of separation from employment. His vacation pay of \$418.99 was paid because he took vacation time off work. These hours should be included on his ROE and not as severance pay.

[25] The Commission says the Claimant's last day of work as April 13, 2019, based on the payroll clerk's information that he was paid out his vacation pay upon separation from employment, and not due to a scheduled vacation.

[26] The Commission maintained its decision on October 24, 2019, indicating the Claimant had accumulated 693 hours of insurable employment as a result of adding hours for vacation time taken and statutory holidays.

[27] In an email to the Claimant dated October 28, 2019, the payroll clerk provided the following hours that they have on his records from the third party payroll company:

- 2018 – he earned 384 hours plus \$185 (7.8 hours) of stat pay = 391.8 total hours;
- 2019 – he earned 272 hours plus \$559.92 (23.58 hours) of stat pay and \$758.53 - \$39.54 on separation (30.27 hours) of vacation pay = 325.85 hours.

[28] The Claimant explained the following:

- The employer identified vacation pay in 2019 as \$758.53 - \$39.54;
- The employer removed the \$39.54 vacation pay as it was paid on separation on the May 24, 2019 pay stub;
- It had already been determined that his vacation pay in January was \$300 or 12.63 hours;
- The April 26, 2019 pay period, shows the Claimant received vacation pay of \$418.99 or 17.64 hours;
- $12.63 + 17.64 = 30.27$  hours. This is the same number of hours the employer included in their total of 325.85 hours in 2019. This means he was paid for 17.64 hours of vacation pay for vacation time taken and not on separation of employment.

- The employer shows his total hours are  $391.8 (2018) + 325.85 (2019) = 717.65$  hours. Enough to qualify for EI benefits.

### **Separation from employment**

[29] Given the above background information, the question I have to answer is when the Claimant separate from his employment. As the Commission's website information shows, the "last day for which paid" box on the ROE is not always when the Claimant separated from his employment.

[30] The Claimant says he was on vacation and receiving his vacation pay. These hours should count towards his claim. His last day of work should be either April 26, 2019, or May 24, 2019, the dates of his last two pay stubs.

[31] The law says that a week or part of a week during a period of leave from employment is not a week of unemployment if the employee<sup>4</sup>

- takes the period of leave under an agreement with their employer;
- continues to be an employee of the employer during this period; and
- receives remuneration that was set aside during a period of work, regardless of when paid.

[32] This section of the law means that if these three factors are met, a claimant cannot be paid EI benefits during a period of leave from employment because he is not unemployed. So it stands to reason that if the Claimant can meet the test to show he is not unemployed, the only conclusion is that he was employed.

[33] The Claimant provided an email dated April 17, 2019, where he provided his hours worked to the payroll clerk. He said he did not have any hours worked since he was on vacation and requested his vacation pay. I accept this as evidence that he was on an agreed period of leave.

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<sup>4</sup> This is set out in s 11(2) of the EI Act.

[34] The pay stub dated April 12, 2019, shows that he had vacation pay of \$418.99 set aside during a period of work. The only question left is whether he remained an employee.

[35] At the hearing, I asked the Claimant if he received a termination letter or any other documentation to show when his employment ended. Following the hearing, the Claimant submitted a series of text messages dated April 29, and April 30, 2019. I accepted this post-hearing document because these text messages are directly related to the question under appeal.

[36] The employer texted the Claimant on April 29, 2019, and asked to make arrangements to transfer the vehicle on Wednesday. The Claimant responded, "Sounds good. So is that it for work? I am available if needed to help with the transition." The employer responded, "Yes it is for work." The Claimant texted the employer on April 30, 2019, informing him that he would be dropping off the car tomorrow.

[37] From the Claimant's text messages, it is clear that the Claimant had not separated from his employment. While the Claimant knew he was being laid off, he was expecting to help with the transition and was still in possession of the company vehicle. The Claimant remained an employee on vacation leave until he returned the company vehicle on May 1, 2019.

[38] I recognize the payroll clerk says that the Claimant's last day of work was April 13, 2019, and his vacation pay was paid because of the separation of employment. However, I also recognize that the ROE had numerous errors, the payroll clerk did not have a copy of the ROE, and she was unable to do a proper assessment until the October 28, 2019 email, after the reconsideration decision was made.

[39] Even though I have decided that the Claimant's last day of work was May 1, 2019, it is only CRA who can make a ruling on insurable employment<sup>5</sup>. I asked the Commission to request an insurability ruling for the period of April 14, to April 26, 2019. On January 23, 2020, CRA ruled that the Claimant was an employee and his employment was insurable. The insurable hours are 18 for the period under review.

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<sup>5</sup> This is set out in s 90 of the EI Act.



[40] The Commission was given an opportunity to respond to the information provided by CRA. It agreed that the Claimant would now have enough hours of insurable employment to qualify for EI benefits. But the Commission still requested that the Tribunal dismiss the appeal and send the case back to perform new calculations. The CRA ruling prevents me from dismissing the appeal because I must render a decision based on the evidence before me.

[41] From this, I find the Claimant required 700 hours of insurable employment to qualify for EI benefits. It had been determined earlier that he had 693 hours of insurable employment. CRA determined he had another 18 hours. This means he had accumulated 711 ( $693 + 18 = 711$ ) hours of insurable employment. As a result, the Claimant qualified to establish a benefit period and is entitled to receive EI benefits.

## CONCLUSION

[42] The appeal is allowed.

*K. Wallocha*

Member, General Division - Employment Insurance Section

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| HEARD ON:             | December 4, 2019 |
| METHOD OF PROCEEDING: | Teleconference   |
| APPEARANCES:          | T. K., Appellant |