



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *K. N. v Canada Employment Insurance Commission*, 2019 SST 258

Tribunal File Number: GE-19-434

BETWEEN:

**K. N.**

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: Amanda Pezzutto

HEARD ON: February 19, 2019

DATE OF DECISION: February 26, 2019

## **DECISION**

[1] The appeal is allowed in part.

## **OVERVIEW**

[2] The Appellant went on maternity leave in 2014 and collected employment insurance benefits. Two years later, the Canada Employment Insurance Commission (Commission) learned that the employer had paid the Appellant a sum of money during her maternity leave. The Commission determined that this sum of money was earnings and allocated it, creating an overpayment. The Appellant requested a reconsideration, arguing that the money was a maternity top-up and should not be considered earnings. The Commission maintained its decisions and the Appellant appealed to the Social Security Tribunal (Tribunal).

[3] I find that the money was paid to supplement the Appellant's employment insurance benefits during her first six weeks of maternity leave and so I find that the money is not earnings. However, a small portion of the maternity payment, combined with the Appellant's rate of weekly benefits, exceeds the Appellant's normal weekly earnings. I find that this portion of the maternity payment is earnings and should be allocated to the four weeks for which the money was payable.

## **ISSUES**

- Issue 1 – Is the maternity payment earnings?
- Issue 2 – If the money is earnings, how should it be allocated?

## **ANALYSIS**

[4] A benefit period is the window of time in which an employment insurance claimant may receive benefits. If a claimant receives earnings during the benefit period, those earnings must be deducted from any benefits payable (section 19 of the *Employment Insurance Act* (EI Act)). This is because the purpose of the employment insurance program is to protect individuals from a loss of income due to unemployment; if a claimant receives earnings from an employer, then there is no loss of income (*Canada (Attorney General) v. Walford*, A-263-78).

[5] For the purposes of determining the amount to be deducted from the benefits payable, earnings are the entire income arising from employment (subsection 35(2) of the *Employment Insurance Regulations* (EI Regulations)). Once a sum is determined to be earnings, it must be allocated, or applied, to a given week. When earnings are allocated to a given week, that sum of money is considered earnings during that week. The reason for the payment determines how the earnings will be allocated (subsection 36(1) of the EI Regulations).

[6] Employers may pay employees on maternity or parental leave extra money to supplement their employment insurance benefits. Any money an employer pays to an employee for maternity or parental leave during the waiting period is excluded from the calculation of earnings (paragraph 39(3)(b) of the EI Regulations). Outside of the waiting period, any money an employer pays to an employee because of maternity or parental leave is not considered earnings if the payment does not reduce the employee's leave entitlement credits, and if the payment, when combined with the rate of weekly benefits, does not exceed the employee's normal weekly earnings (section 38 of the EI Regulations).

**Issue 1: Is the maternity payment earnings?**

[7] I find that the bulk of the maternity payment is not earnings; however, a small portion of the payment exceeded the Appellant's normal weekly earnings, and so I find that only this portion is earnings.

[8] The Appellant and her employer have consistently stated that the employer paid a total of \$3215.39 to the Appellant because she went on maternity leave. At the hearing, the employer stated that the money was paid as a "maternity top-up payment." The employer stated that the payment did not reduce the Appellant's entitlement to sick leave, vacation leave, severance pay, or any other accumulated credits. She stated that they calculated the payment so that the Appellant would receive her normal weekly earnings during the two-week waiting period, and then receive a supplement to her employment insurance benefits that would ensure that she received her normal weekly earnings for the next four weeks of her maternity leave.

[9] I acknowledge that the Commission argues that only approved Supplemental Unemployment Benefit (SUB) plans are not considered earnings. However, I find that there is

nothing in sections 38 or 39 of the EI Regulations that states that supplemental maternity payments must be part of an approved SUB plan. I also note that the *Digest of Benefit Entitlement Principles* (Digest) does not state that a supplemental maternity payment must be part of an approved SUB plan to be excluded from consideration as earnings. The Digest simply states that the payment must meet three conditions to be excluded from consideration as earnings: it must be made because of pregnancy or care of a child; it cannot exceed the normal weekly earnings when combined with the rate of weekly benefits; and it cannot reduce any leave credits (section 5.5.2.2 of the Digest).

[10] Any payment from an employer for pregnancy or care of a child made during the waiting period is explicitly excluded from the determination of earnings during the waiting period (paragraph 39(3)(b) of the EI Regulations). In other words, if the employer makes a payment during the waiting period to an employee because of the employee's pregnancy or so the employee may care for a child, that sum of money is not considered earnings during the waiting period.

[11] There is no reason to doubt the Appellant or the employer's credibility. I accept their statements and so I am satisfied that the employer paid the Appellant a sum of money equal to her usual earnings during the waiting period, and I am satisfied that this sum of money was paid because the Appellant was caring for her newborn child. Relying on section 39 of the EI Regulations, I find that this sum of money – \$1692.30 – is not earnings during the waiting period.

[12] Furthermore, I am satisfied that the employer paid the remaining sum of money – \$1532.09 – to the Appellant because she was on leave caring for her newborn child. I am satisfied that the payment did not affect the Appellant's entitlement to any other leave credits. I find that the employer calculated the payment based on the rate of weekly benefits in an effort to keep the total payment at the same level of the Appellant's normal weekly earnings. In short, I find that the bulk of the payment meets the conditions set out in section 38 of the EI Regulations, and so it is not earnings.

[13] However, I acknowledge that, when reviewing the numbers, a small portion of the maternity payment exceeds the Appellant's normal weekly earnings. I find that, if the payment

from the employer leads to the Appellant receiving more than her normal weekly earnings while receiving employment insurance benefits, only the amount that exceeds her normal weekly earnings is considered earnings (CUB 60638, section 5.5.2.2 of the Digest).

[14] According to the employer, the Appellant earned \$1692.30 biweekly; this is \$846.15 per week. The employer stated that they paid the Appellant a total of \$3215.39 as a supplemental maternity payment. \$1692.30 of this payment was meant to cover the two week waiting period, leaving \$1523.09 to supplement the Appellant's employment insurance benefits for the first four weeks of benefits. Put simply, the employer paid the Appellant \$380.77 each week to supplement her first four weeks of employment insurance benefits. Combined with her rate of weekly benefits of \$497, this means that the Appellant received a total of \$877.77, rounded to \$878, for each of the first four weeks of employment insurance benefits. This exceeds her normal weekly earnings by \$32, and so I find that this is the only portion of the employer's payment that is earnings.

[15] In summary, I find that the \$1692.30 the employer paid the Appellant to supplement her income during the two week waiting period is not earnings. I find that the bulk of the remaining maternity payment is not earnings, but because the supplemental maternity payment combined with the Appellant's rate of weekly benefits exceeds the Appellant's normal weekly earnings, I find that the amount that exceeds the Appellant's normal weekly earnings is earnings for the purposes of employment insurance benefits.

**Issue 2: How should it be allocated?**

[16] Earnings paid without the performance of any work are to be allocated to the weeks for which they are payable (subsection 36(5) of the EI Regulations).

[17] I have already found that the Appellant had earnings of \$32 in each week of her first four weeks of employment insurance benefits, because this is the amount of the employer's supplemental maternity payment that exceeded her normal weekly earnings. Since the employer stated that they paid the money to the Appellant as a supplement to her first four weeks of employment insurance benefits, I find that the money was payable in each of her first four weeks of employment insurance benefits. I find that \$32 should be allocated to each of the Appellant's

first four weeks of benefits – the weeks beginning January 19, January 26, February 2, and February 9, 2014.

**CONCLUSION**

[18] The appeal is allowed in part.

Amanda Pezzutto  
Member, General Division - Employment Insurance Section

HEARD ON:	February 19, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	K. N., Appellant Brenda O'Brien, Representative for the Appellant