



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *L. X. v Canada Employment Insurance Commission*, 2019 SST 483

Tribunal File Number: GE-18-3763

BETWEEN:

L. X.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Gary Conrad

HEARD ON: April 9, 2019

DATE OF DECISION: April 29, 2019

DECISION

[1] The appeal is allowed.

OVERVIEW

[2] The Appellant separated from her employment due to illness and applied for Employment Insurance (EI) sickness benefits. After reviewing her initial claim for benefits the Canada Employment Insurance Commission (Commission) approved her claim for sickness benefits starting June 24, 2018. The Appellant received vacation pay from her employer, the Commission determined that income constituted earnings and allocated it to the weeks of June 17, 2018, to June 23, 2018, June 24, 2018, to June 30, 2018, and the balance to the week of July 1, 2018.

PRELIMINARY MATTERS

[3] The Tribunal received post-hearing submissions from the Appellant on April 9, 2019, which she had tried to send in previously but had made an error in attaching them to the email, consisting of medical information regarding her eye surgery, a copy of the cheque she wrote to her employer in the amount of \$2,850.06 returning her vacation pay, and a duplicate copy of her amended Record of Employment issued on November 30, 2018.

ISSUE

[4] Are the payments received by the Appellant from an employer considered earnings for benefit purposes and if so, how should they be allocated?

ANALYSIS

Are the payments received by the Appellant from an employer considered earnings for benefit purposes and if so, how should they be allocated?

[5] The Tribunal finds that the Appellant's vacation pay does constitute earnings, but as she has returned the entirety of the vacation pay, and thus has not been paid it at this time, it cannot be allocated at this time.

[6] Earnings are the entire income of a claimant arising out of any employment (subsection 35(2) of the *Employment Insurance Regulations* (Regulations)). Both “income” and “employment” are broadly defined in subsection 35(1) of Regulations. Income is any pecuniary or non-pecuniary income that is or will be received by a claimant from an employer or any other person; employment includes any employment, under any express or implied contract of service or other contract of employment.

[7] The Commission submitted that based on the facts on file at the time of the calculation of the Appellant’s claim for sickness benefits they determined that the vacation pay the Appellant received constituted earnings pursuant to subsection 35(2) of the Regulations because the payment was made to compensate the Appellant at the time of her separation from her employment.

[8] The Commission submitted that although the Appellant submitted an amended Record of Employment that now indicates there was no vacation pay paid to her on separation, this is contradictory to the information provided on the pay stubs previously submitted by the Appellant.

[9] The Appellant testified that she was paid \$2,850.06 in vacation pay, as she asked for that to be paid out when she was off work for her medical leave, but she paid it back to her employer at a later date.

[10] The accountant from the Appellant’s employer testified that once the Appellant paid back the vacation money, and the employer had accepted the repayment, they issued the amended Record of Employment dated November 30, 2018, to reflect that the Appellant had not been issued the vacation money as she had paid it back.

[11] The Tribunal finds that the Appellant did initially receive the \$2,850.06, vacation pay as supported by her testimony and the testimony of her manager, her original Record of Employment issued on June 29, 2018, and her pay stub for the period of June 1, 2018, to June 15, 2018. The Tribunal further finds that the Appellant did pay the vacation pay back, as supported by the copy of the cheque she wrote to her employer and the testimony of the Appellant, her employer’s accountant and the Appellant’s manager.

[12] The Tribunal finds that the \$2,850.06, in vacation pay constitutes earnings pursuant to section 35 of the Regulations as while the Appellant did pay it back, and thus has not been paid it at this time, it is income that will be received by the Appellant at some point from her employer and therefore it constitutes earnings. The Tribunal further notes that the Appellant did not dispute that the vacation pay was earnings.

[13] Having found that the amount the Appellant received is earnings, the Tribunal now turns to the question of how the earnings should be allocated.

[14] Subsection 36(8) of the Regulations deals with a situation where vacation pay is paid or payable to a claimant for a reason other than a lay-off or separation from an employment, such as where the vacation pay is paid or payable for a specific vacation period or periods, or in any other case where vacation pay is paid.

[15] 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, (subsection 36(9) of the Regulations).

[16] The Commission submitted that they allocated the Appellant's vacation pay pursuant to subsection 36(9) of the Regulations, as the payment was made for the reason of separation from employment, according to her normal weekly earnings of \$1,164.38 June 17, 2018, to June 23, 2018, \$1,164.00 from June 24, 2018, to June 30, 2018, with a balance of \$446.00 applied to the claim for the week beginning July 1, 2018.

[17] The Appellant testified that when she took her leave from her employer to get her surgery done she had the option to request vacation pay. The Appellant testified that she only expected to be away from work for a few days so she requested that all her vacation pay be paid out to her to cover her costs while she was away from work.

[18] The Appellant testified that her surgery got delayed and the time she was off work was extended so she decided to apply for EI sickness benefits. The Appellant testified that she returned the entire amount of the vacation pay that she received to her employer.

[19] The Appellant's manager testified that the Appellant ended up returning the entire amount of the vacation pay and they accepted the amount back and returned it to the Appellant's vacation account.

[20] The Appellant's employer's accountant testified that the Appellant returned the entire amount of the vacation pay to the employer and they accepted the amount back and that is why they issued the amended Record of Employment dated November 30, 2018, stating the Appellant did not receive any vacation pay.

[21] The Tribunal finds that it disagrees with the Commission's submission that the Appellant's earnings should be allocated pursuant to subsection 36(9) of the Regulations.

[22] The Tribunal finds that the vacation pay was not paid for the reason of separation from employment, it simply coincided with the Appellant's separation. The Tribunal finds that as per the Appellant's testimony, supported by her manager's testimony, she requested the vacation pay, it was not due or payable to the Appellant at the time of her separation; there was no obligation for her employer to pay it out at that time. That is, the reason why she was initially paid the money was not because she was separated from her employment, rather it is because she requested that her vacation be paid out to her.

[23] The Tribunal finds that the phrase "by reason of" would exclude a payment that is made at the same time as the separation by mere "temporal coincidence" (*Canada (Attorney General) v Savarie*, A-704-95), as would be the case with the Appellant having requested her vacation pay at the same time as, and having it paid out at, the time of her separation.

[24] The Tribunal finds that the Appellant's earnings should be not allocated pursuant to section 36(8)(a) of the Regulations as her vacation pay was not paid out for a specific vacation period or periods. The Tribunal further finds that the fact it was not paid for a specific period is not in dispute.

[25] The Tribunal finds that the Appellant's earnings should be allocated pursuant to section 36(8)(b) of the Regulations, whenever her vacation pay is eventually paid out, as 36(8)(b) is stated to cover all other cases where vacation pay is paid. As it stands now the Appellant has returned the vacation pay, so it has not been paid at this time, thus it cannot be allocated at this time.

[26] The Tribunal finds that when the vacation pay is paid out, at some point in the future, then it can be allocated pursuant to the Regulations, but as it has not been paid at this time, as the Appellant has returned the vacation pay, it cannot be allocated.

CONCLUSION

[27] The appeal is allowed. The Tribunal finds that the Appellant's vacation pay is earnings. The Tribunal further finds that as the Appellant has returned the vacation pay, and thus has not been paid it at this time, so it cannot be allocated pursuant to the Regulations at this time.

Gary Conrad

Member, General Division - Employment Insurance Section

HEARD ON:	April 9, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	L. X., Appellant