Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

Citation: M. C. v Canada Employment Insurance Commission, 2019 SST 480

Tribunal File Number: GE-18-2984

BETWEEN:

M. C.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Employment Insurance Section

DECISION BY: Teresa M. Day

HEARD ON: April 25, 2019

DATE OF DECISION: April 25, 2019

Canada

DECISION

[1] The appeal is dismissed, with a modification to the allocation of the $1,200.00 bonus paid to the Appellant for agreeing to work right up to the end of the employer's liquidation process.

OVERVIEW

[2] The Appellant established a claim for employment insurance benefits (EI benefits) effective June 24, 2018. According to the Appellant's Record of Employment (ROE), she received vacation pay and severance pay upon her separation from employment. The Respondent, the Canada Employment Insurance Commission (Commission), allocated these monies against her claim from June 24, 2018 to July 14, 2018, with a small balance applied against her claim for the week beginning July 15, 2018. The Appellant did not dispute the allocation of the monies identified as vacation pay, but argued that allocation of the $1,200.00 reported on the ROE as "severance pay" was incorrect because these monies were not severance but a "staying bonus" that was paid to her under a separate contract for services during the employer's liquidation process. The Commission maintained its decision and the Appellant appealed to the Social Security Tribunal of Canada (Tribunal).

PRELIMINARY MATTERS

[3] The Appellant did not attend the hearing of her appeal. The Tribunal waited 30 minutes beyond the scheduled time for the in-person hearing, but the Appellant never showed up. The Member then proceeded with the hearing in the absence of the Appellant in accordance with section 12 of the *Social Security Tribunal Regulations*. The Member was satisfied the Appellant received the Notice of Hearing, which was sent to her by E-mail on March 27, 2019. The Appellant authorized the Tribunal to communicate with her by E-mail in her Notice of Appeal (at GD2-2). The Notice of Hearing was sent to the E-mail address she provided, and the Tribunal has not received notice of any delivery failure in connection with that E-mail address. The Tribunal was therefore satisfied the Notice of Hearing was delivered to the Appellant by E-mail on March 27, 2019. The Tribunal also noted that a registry officer left voicemail messages for the Appellant on April 18th and 24th, 2019 reminding her of the in-person hearing for her appeal that would be proceeding on April 25, 2019.

ISSUES

[4] Did the Commission correctly allocate the vacation pay and statutory holiday pay the Appellant received upon separation from her employment?

ANALYSIS

[5] Where a claimant is in receipt of monies during a benefit period, consideration must be given to whether the monies received are considered "earnings" and, if so, whether these earnings should be allocated to the benefit period. Sections 35 and 36 of the *Employment Insurance Regulations* (EI Regulations) define what monies are considered "income", what is considered "earnings" for the purposes set out in section 35, and how these earnings are to be allocated to the benefit period. The Federal Court of Appeal has affirmed the principle that the entire income of a claimant arising out of any employment is to be taken into account in calculating the amount to be deducted from benefits: *McLaughlin v. Canada (AG), 2009 FCA 365.*

[6] As the Appellant did not request a reconsideration of the allocation of the monies identified as vacation pay or raise any issue with respect to the allocation of the vacation pay in her appeal materials, the Tribunal will only consider the allocation that the Appellant disputes, namely the allocation of the $1,200.00 identified on her ROE as "severance pay" from her employer that was paid upon separation from her employment.

Issue 1: Did the Commission correctly allocate the $1,200.00 payment?

[7] There is abundant jurisprudence from the Federal Court of Appeal that monies received from an employer upon separation from employment, such as vacation pay, pay in lieu of notice and severance pay, are considered earnings and should be allocated pursuant to subsections 36(9) and 36(10) of the EI Regulations (*Blais 2011 FCA 320, Cantin 2008 FCA 192, Lemay 2005 FCA 433, Tremblay A-106-96, Stone A-496-94*). In the case of vacation pay and severance monies, they must be allocated from the week of the separation from employment and in accordance with the Appellant's regular weekly earnings, as prescribed in subsection 36(9) of the EI Regulations.

[8] The Appellant's vacation pay was allocated to the correct period, namely starting from the week she was separated from her employment, as required by subsection 36(9) of the EI Regulations.

[9] However, the $1,200.00 payment to the Appellant should ***not*** have been allocated starting from the week of her separation from employment, as the Commission did in its July 25, 2018 decision letter (GD3-22 to GD3-23). This is because these monies were ***not*** severance, but earnings payable under a contract of employment for the performance of services. As such, they should have been allocated to the weeks in which the services were performed, as required by subsection 36(4) of the EI Regulations.

[10] The Tribunal agrees with the Appellant that the $1,200.00 payment was not severance pay. It was not paid to her because of her management position or her years of service; nor was it pay in lieu of notice of termination of her employment. These monies were paid to the Appellant pursuant to the "Store Management Stay Bonus" contract she entered into with her employer on May 30, 2018 (GD3-28 to GD3-31). Under this contract, the Appellant would receive a $1,200.00 "stay bonus" in exchange for committing to and remaining in her management role throughout the employer's entire liquidation sale period, namely until the date the store she was assigned to was closed. If she left her job during the liquidation period - but prior to the closure of her store, she would forfeit the whole bonus. This is clearly a contract of employment for the performance of services.

[11] The Appellant performed the services between May 30, 2018 (the date she signed the contract) and June 23, 2018 (the date her store was closed). The employer paid the $1,200.00 stay bonus to the Appellant with her final pay cheque issued on June 29, 2018, exactly in accordance with the terms of the Store Management Stay Bonus contract.

[12] The $1,200.00 stay bonus monies are earnings that must be allocated against the Appellant's claim pursuant to subsection 35(2) of the EI Regulations because they arose out of her employment. However, these earnings were payable under a contract of employment for the performance of services and, as such, they must be allocated pursuant to subsection 36(4) of the EI Regulations, that is to the period in which the services were performed.

[13] The Commission performed the allocation of the Appellant's $1,200.00 stay bonus incorrectly when it allocated the monies pursuant to subsection 36(9) of the EI Regulations, namely starting from the week of her separation from employment. The Commission must now revise its allocation in accordance with subsection 36(4) of the EI Regulations and the findings herein.

CONCLUSION

[14] The Tribunal finds that the $1,200.00 in monies paid to the Appellant by her employer on separation from employment are earnings that must be allocated.

[15] However, the Tribunal further finds that these monies were not properly allocated by the Commission in its July 25, 2018 decision.

[16] The Tribunal finds that the $1,200.00 are earnings payable under a contract of employment for the performance of services that was performed between May 30, 2018 and June 23, 2018. As such, the $1,200.00 must be allocated in accordance with subsection 36(4) of the EI Regulations, namely to the period in which the services were performed.

[17] The Commission must now revise its allocation in accordance with these findings.

[18] The appeal is dismissed, with modification to the period over which the $1,200.00 payment must be allocated.

Teresa M. Day

Member, General Division - Employment Insurance Section

HEARD ON:	April 25, 2019
METHOD OF PROCEEDING:	In person
APPEARANCES:	