



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *J. S. v Canada Employment Insurance Commission*, 2019 SST 899

Tribunal File Number: GE-19-1093

BETWEEN:

**J. S.**

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: Lilian Klein

HEARD ON: April 8, 2019

DATE OF DECISION: May 8, 2019

## **DECISION**

[1] The appeal is dismissed. I find the Appellant (who I refer to as the Claimant) received employment income during the second of his parental benefit weeks, and the Respondent (the Commission) allocated this income correctly to the week in which he earned it.

## **OVERVIEW**

[2] On February 4, 2018, the Claimant applied for and received two weeks of parental benefits for the weeks of February 4, 2018, and February 11, 2018. He returned to work on February 14, 2018. The Commission allocated his employment income from the week of February 11, 2018, against his benefits for that week, leading to an overpayment. It maintained this decision after he requested a reconsideration.

[3] The Claimant appealed this decision, arguing that he had taken unpaid leave from his employment for a total of 10 working days, and should therefore receive two weeks of parental benefits without any allocation of earnings against his benefits during the second week.

[4] I must decide if the Claimant's employment income during the week of February 11, 2019, counts earnings under section 35 of the *Employment Insurance Regulations* (EI Regulations), and whether it must be allocated under section 36.

## **ISSUES**

[5] **Issue 1: Did the Claimant have earnings during the week of February 11, 2018?**

[6] **Issue 2: Did the Commission allocate his earnings correctly?**

## **ANALYSIS**

## **Allocation of earnings**

[7] A claimant's income from any employment counts as earnings.<sup>1</sup> The Commission allocates employment income to the week in which the claimant earns it.<sup>2</sup>

[8] The allocation of earnings is important because when earnings are allocated to weeks in a claimant's benefit period, they can reduce, or even eliminate, the amount of benefits payable for that week.<sup>3</sup> If a claimant already received benefits, the allocation can lead to an overpayment of benefits.

[9] Claimants have the burden of proof, on a balance of probabilities, if they wish to argue that the income they received was not earnings, or that it was allocated incorrectly to a week when they received benefits.<sup>4</sup>

## **The Benefit Period**

[10] A benefit period starts on either the Sunday of the week in which the last day of work falls, or on the Sunday of the week in which the claimant applies for benefits, whichever is later.<sup>5</sup>

### **Issue 1: Did the Claimant have earnings during the week of February 11, 2018?**

[11] Yes. I find that the Claimant received earnings from his employer after he returned to work on February 14, 2018, following unpaid parental leave from his job. His ROE shows that his last day of paid work was January 30, 2018.

[12] The Claimant does not dispute that he earned income during the week of February 11, 2018. However, he argues that he should receive two full weeks of benefits irrespective of his return-to-work date, since he lost pay for 10 working days when he took parental leave. Alternatively, he argues that his wife should receive the three days he is being asked to repay in addition to her 33 weeks of parental benefits.

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<sup>1</sup> S. 35(1) of the *Employment Insurance Regulations* (EI Regulations).

<sup>2</sup> S. 36(4) of the EI Regulations.

<sup>3</sup> S 35(2) of the EI Regulations.

<sup>4</sup> *Bourgeois v Attorney General of Canada*, 2004 FCA 117.

<sup>5</sup> S 10(1) of the EI Act.

[13] The Claimant's benefit period began on February 4, 2018, the date he applied for benefits.<sup>6</sup> He submitted that the application did not specify that the benefit period must start on a Sunday. He argued that he therefore could not have known that ending work or returning to work mid-week would leave him open to losing benefits through allocation of any earnings during a partial working week.

[14] Even though he was not aware of the rules around benefit period start dates, I find that the Claimant's employment income during the week of February 11, 2018, counts as earnings under section 35 of the EI Regulations and is therefore subject to allocation under section 36.

**Issue 2: Did the Commission allocate the Claimant's earnings correctly?**

[15] Yes. I find that the Commission allocated his earnings correctly to the week of February 11, 2018, since earnings are allocated to the week in which they are earned. This mandatory allocation is the reason for the overpayment he is challenging.

[16] The Claimant does not dispute the allocation in principle. However, he argues that it should not have affected his ability to receive two full weeks of benefits to cover his 10 working days of unpaid leave.

[17] I sympathize with the Claimant's situation and acknowledge his suggestion that the benefit application should explain how ending or returning to work mid-week can affect benefit entitlement. However, I do not have the authority to rewrite the legislation or interpret it in any other way than its plain meaning.<sup>7</sup> Since he had earnings during the week of February 11, 2018, the Commission had to allocate them against his benefits that same week. This led to the overpayment of benefits that he is now liable to repay.<sup>8</sup>

**CONCLUSION**

[18] The appeal is dismissed.

Lilian Klein

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<sup>6</sup> This date is the later of the two options for a benefit period start date, in accordance with 10(1)(b) of the EI Act.

<sup>7</sup> *Attorney General of Canada v Kneé*, 2011 FCA 301.

<sup>8</sup> S 43 and 44 of the EI Act.

Member, General Division - Employment Insurance Section

HEARD ON:	April 8, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	J. S., Appellant