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

[TRANSLATION]

Citation: *N. L. v Canada Employment Insurance Commission*, 2019 SST 818

Tribunal File Number: GE-19-1922

BETWEEN:

N. L.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Employment Insurance Section

DECISION BY: Normand Morin

HEARD ON: June 4, 2019

DATE OF DECISION: June 7, 2019

Canada

DECISION

[1] The appeal is dismissed. The Tribunal finds that the money the Appellant received as vacation pay constitutes earnings under section 35 of the *Employment Insurance Regulations* (Regulations) and that the allocation of those earnings was made in accordance with the provisions set out in section 36 of the Regulations.

OVERVIEW

[2] The Appellant worked as a delivery driver for the employer X (employer) from April 18, 2017, to May 11, 2018, inclusive. On June 4, 2018, the Appellant filed a claim for benefits effective May 13, 2018. The Appellant worked for that employer again from May 14, 2018, to July 6, 2018, inclusive and received vacation pay after he stopped working for it. He then started working for the employer X the week after his employment with X ended.

[3] The Respondent, the Canada Employment Insurance Commission (Commission), determined that the money the Appellant had received as vacation pay from employer X was earnings and it was allocated. That means that the earnings were deducted from the Appellant's benefits.

[4] The Appellant argues that he should be repaid the money he received as vacation pay since he had not been on vacation during the weeks the amount was allocated and since he had worked during that period. He submits that the amount was therefore stolen from him by Employment Insurance, given that he did not receive benefits for all the weeks for which he was eligible due to the allocation by the Commission. On May 7, 2019, the Appellant disputed the decision following the Commission's reconsideration of it. That decision is the now being appealed to the Tribunal.

ISSUES

[5] The Tribunal must determine whether the money the Appellant received as vacation pay constitutes earnings under section 35 of the Regulations and, if so, whether the allocation of

those earnings was made in accordance with the provisions set out in section 36 of the Regulations.

[6] To make this finding, the Tribunal must answer the following questions:

a) Does the money the Appellant received as vacation pay constitute earnings?

b) If so, how should those earnings be allocated?

ANALYSIS

[7] The provisions on the determination and allocation of earnings for benefit purposes are set out in sections 35 and 36 of the Regulations respectively. Section 35 defines what constitutes income and employment and specifies what types of income must be considered earnings, while section 36 states how earnings must be allocated.

Does the money the Appellant received as vacation pay constitute earnings?

[8] Yes. The Tribunal finds that the money the Appellant received as vacation pay constitutes earnings under section 35 of the Regulations because that amount is income that was owed to him after working for the employer.

[9] Under section 35 of the Regulations, earnings are a claimant's entire income arising out of any employment. An amount received will not be considered earnings if it falls under the exceptions set out in section 35(7) of the Regulations or if it does not arise from employment.

[10] In this file, the Appellant acknowledged receiving $4,278.40 as vacation pay after he stopped working for the employer X (GD3-17, GD3-18, GD3-21, and GD3-22). The Appellant does not dispute the fact that that amount constitutes earnings.

[11] The Tribunal finds that that amount constitutes earnings because it is part of the Appellant's entire income arising from his employment, as section 35(2) of the Regulations indicates.

[12] That amount is connected to the Appellant's employment at X, since he was eligible for that amount and since it was paid to him in exchange for the work he did for that employer. Case law indicates that an amount of money will be considered earnings if an employee earns it as a result of their work, or in return for their work, or if a "sufficient connection" exists between the claimant's employment and the amount received (*Roch*, 2003 FCA 356).

[13] Furthermore, the amount the Appellant received does not fall under the exceptions set out in section 35(7) of the Regulations that would allow it to not be considered earnings.

How should those earnings be allocated?

[14] Section 36(9) of the Regulations specifies that earnings paid or payable to a claimant because of a lay-off or separation from an employment are allocated to a number of weeks that begins with the week of the lay-off or separation.

[15] Amounts that are determined to be earnings under section 35 of the Regulations must be allocated according to section 36 of the Regulations (*Boone et al*, 2002 FCA 257).

[16] When calculating the amount to be deducted from benefits, the Tribunal must consider the entire income of a claimant arising out of any employment (*McLaughlin*, 2009 FCA 365).

[17] In its October 10, 2018, decision, the Commission indicated that it had allocated the Appellant's earnings to the period covering the week starting on July 1, 2018, to the week starting on August 5, 2018 (GD3-25 and GD3-26).

[18] In its arguments, the Commission indicated it had detected a calculation error in its allocation of the Appellant's earnings because in the week of July 1, 2018, it had allocated $350.00 of the vacation pay when it should have allocated $592.37 in order to reach the Appellant's normal weekly earnings ($860.79). The Commission specified that it was going to make the correction on return of the file following the Tribunal's decision. (GD3-19, GD3-20, and GD4-2).

[19] The Appellant essentially disputed the fact that the earnings he received as vacation pay had been allocated to weeks during which he was not on vacation since he had worked for

another employer (X). He submitted that he had received benefits during fewer weeks than those for which he had been eligible, due to the Commission's allocation. According to the Appellant, by performing that allocation, the Commission stole his money as well as his right to vacation. He submitted that he was supposed to take his vacation in September 2018, but that he had not been able to since he had not received the amount he expected to receive in benefits (GD2-1).

[20] The Appellant explained that when he was employed at X, a placement agency, he was working for the business X, one of his employer's clients. He indicated that when he stopped working at X, on July 6, 2018, he was hired directly by X in the week that followed and therefore continued to work for that business. The Appellant noted that there had not really been any weeks in which he did not work after his employment with X ended. He specified that the business X had contacted X to explain that it had hired him, as indicated on the Record of Employment issued by X (observations of box 18 of the Record: "Hired by client"), (GD3-17). The Appellant explained that he had not been able to take the vacation he had accumulated at X to transfer it to his new employer, X. According to the Appellant, there has not really been a separation from employment, but rather a transfer of pay (GD2-1 to GD2-10).

[21] The Tribunal cannot accept the Appellant's argument that the earnings he received as vacation pay should not be allocated to the week established by the Commission because he had not been on vacation during those weeks since he had worked for his new employer (Énergies Sonic).

[22] The Tribunal finds that the $4,278.40 in vacation pay must be allocated under section 36(9) of the Regulations since it is earnings paid to the Appellant because of the separation from his employment at X. The Tribunal notes that the Federal Court of Appeal (Court) established that amounts paid because of employment separation and that constitute earnings under section 35 of the Regulations must be allocated under section 36(9) of the Regulations (*Boucher Dancause*, 2010 FCA 270; *Cantin*, 2008 FCA 192).

[23] In this case, the Tribunal finds that the Appellant's separation from employment was July 6, 2018, since the Record of Employment issued by X, on July 22, 2018, indicates that the

last Appellant's last day of work was July 6, 2018. Box 17 of the Record indicates that $4,278.40 was paid to the Appellant because he stopped working (vacation pay), (GD3-17 and GD3-18).

[24] The amount paid to the Appellant must be allocated to a number of weeks that begins with the week of separation, as section 36(9) of the Regulations state—that is, to a number of weeks that began on Sunday, July 1, 2018, because the Appellant's employment ended on July 6, 2018. The Tribunal notes that section 2 of the Act defines week as "a period of seven consecutive days beginning on and including Sunday, or any other prescribed period."

[25] Even if the Appellant argues that the earnings he received as vacation pay should not be allocated to the weeks established by the Commission, the fact remains that he stopped working for X on July 6, 2018, and that the allocation must be done as of the week of the separation from employment with that employer. The fact that the Appellant worked for the business X while he was employed by X does not change anything. There was a break in the employment relationship between X and the Appellant, even if he was hired directly by X afterwards.

[26] Considering the correction the Commission indicated it was going to make to allocate $592.37 and not $350.00 to the week starting July 1, 2018, the Tribunal finds that the $4,278.40 that the Appellant received as vacation pay was correctly allocated under section 36(9) of the Regulations (*Boone et al*, 2002 FCA 257; *McLaughlin*, 2009 FCA 365; *Boucher Dancause*, 2010 FCA 270; *Cantin*, 2008 FCA 192).

CONCLUSION

[27] The Tribunal finds that the $4,278.40 the Appellant received as vacation pay constitutes earnings under section 35(2) of the Regulations and must be allocated in accordance with section 36(9) of the Regulations effective the week of the separation, which is the week starting July 1, 2018, because the Appellant's employment ended on July 6, 2018.

[28] The Tribunal finds that those earnings were allocated in accordance with the provisions set out in sections 35 and 36 of the Regulations.

[29] The appeal is dismissed.

Normand Morin
Member, General Division – Employment Insurance Section

HEARD ON:	June 4, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCE:	N. L., Appellant