



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *D. C. v Canada Employment Insurance Commission*, 2019 SST 733

Tribunal File Number: GE-19-1826

BETWEEN:

**D. C.**

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: Candace R. Salmon

HEARD ON: June 12, 2019

DATE OF DECISION: July 11, 2019

## **DECISION**

[1] The appeal is dismissed. The Appellant received earnings and those earnings were properly allocated under the provisions of the *Employment Insurance Regulations*.

## **OVERVIEW**

[2] The Appellant, who I will refer to as the Claimant, made a claim for employment insurance (EI) benefits for sickness. The Claimant received short term disability (STD) payments from his employer, and his claim for EI benefits was also established. This created a period of time where the Claimant received both STD and EI benefit payments at the same time. Due to this, the employer recovered the double paid benefits. The Canada Employment Insurance Commission, which I will refer to as the Commission, later determined that the Claimant was paid for three statutory holiday days, and that this money was not reported by him or allocated to his claim. The Claimant requested reconsideration, stating he was confused by the decision and did not intentionally leave information out of his claim. The Commission declined to change its decision. The Claimant appeals the decision to the Social Security Tribunal (Tribunal).

## **PRELIMINARY MATTERS**

[3] At the hearing, the Claimant submitted that the employer provided misinformation relating to his pay schedule and pay stubs. He sought permission to enter further evidence, being various pay stubs and two Records of Employment. I accepted this information, and it was submitted to the Tribunal on June 17, 2019.

## **ISSUES**

[4] **Issue #1:** Did the Claimant receive monies from the employer that constituted earnings?

[5] **Issue #2:** If yes, were the earnings correctly allocated?

## ANALYSIS

[6] When an EI claimant receives an amount of money from an employer, it has to be decided whether or not that money is “earnings” under the law.<sup>1</sup> If it is, then the earnings need to be allocated, meaning applied, to the proper weeks of the EI claim.<sup>2</sup> How the earnings get allocated depends on the reason why the monies were paid. Sums received from an employer are presumed to be earnings and must be allocated unless the monies fall within an exception or the sums do not arise from employment.<sup>3</sup> The burden is on the Claimant to demonstrate the amounts are not earnings.

[7] If earnings are allocated to weeks when EI is payable to a claimant, the earnings are deducted from the EI benefits.<sup>4</sup>

### **Issue 1: Did the Claimant receive monies from the employer that constituted earnings?**

[8] I find the sums in question, being three payments by the employer relating to statutory holiday pay, are earnings.

[9] The Claimant made an initial claim for special EI benefits for sickness on May 15, 2014. On July 25, 2018, the Commission sent a Request for Payroll Information form to the Claimant’s employer, identifying a number of weeks and asking the employer if the Claimant had earnings in those weeks. The employer replied on September 18, 2018, stating the Claimant did have earnings in the relevant weeks.

[10] On October 4, 2018, the Commission sent the Claimant a Request for Clarification of Employment Information form. On the form, it identified three periods of time where the Claimant stated he had no earnings, but the employer provided contradictory information. The table is produced, in part, below:

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<sup>1</sup> *Employment Insurance Regulations*, section 35

<sup>2</sup> *Employment Insurance Regulations*, section 36

<sup>3</sup> *Employment Insurance Regulations*, section 35(7)

<sup>4</sup> *Employment Insurance Act*, section 19

<b>For the week of (dd/mm/yy- dd/mm/yy)</b>	<b>You declared having earned</b>	<b>However your employer's records indicate that you earned the gross amount of</b>
29/06/2014-05/07/2014	0.00	208.80
03/08/2014-09/08/2014	0.00	208.80
31/08/2014-06/09/2014	0.00	208.80

[11] The Claimant spoke to a Commission investigator on October 10, 2018, and asked for more information. The Commission agent told the Claimant that he appears to have received EI benefits while also in receipt of earnings from the employer.

[12] The Claimant next spoke to the investigator on October 25, 2018. He stated that he was awaiting information from the employer and did not know where the alleged earnings came from, as he did not receive any earnings in the amount of \$208.80. The Commission agent encouraged the Claimant to complete the Request for Clarification of Employment Information form, and said she would look into the matter.

[13] The Claimant completed the form, as advised. He stated that he did not receive any of the money identified in the table. The Claimant stated his employer did overpay him at one point, but submitted that he had already repaid that money. The Claimant also stated that the pay stubs provided by the employer were incorrect and, in one instance, did not even reflect the dates under review.

[14] The Claimant submitted a copy of his employer's Total Compensation documents, relating to the period when he was on medical leave. The documents state that the first 15 weeks of the Claimant's STD were paid by the company, with the next period paid jointly by the company and the Commission under a Supplemental Unemployment Benefits (SUB) plan. This was followed by a letter from the employer stating the Claimant was paid EI benefits for the same period when he received STD payments from the employer, so the employer recovered \$11,201 from him as repayment of salary and wages. The Claimant testified that he was told by the employer not to

claim any of his employer-paid benefits on his EI reports, and submitted that he thought the \$11,201 recovery by the employer covered the statutory holiday period benefits in question.

[15] The Claimant's paystub for the pay period dated June 22, 2014, until July 5, 2014, shows he was paid for 80 hours, which was reduced on the same paystub and replaced by his payment of EI benefits. There is also a STD top-up noted on the paystub, and amounts related to income taxes, pension, health care plan costs, and insurances are identified. There is no reference on the paystub to any statutory holiday pay.

[16] The Claimant's paystub for the pay period dated August 3, 2014, until August 16, 2014, is the same as the paystub above, except it also includes union dues. There is no reference on the paystub to any statutory holiday pay.

[17] The Claimant's paystub for the pay period dated August 31, 2014, to September 13, 2014, is the same as the paystub from June 22, 2014, until July 5, 2014, except it includes an amount for 3<sup>rd</sup> party liability and net recovery from a prior pay period. There is no reference on the paystub to any statutory holiday pay.

[18] On a paystub for the pay period dated April 27, 2014, until May 10, 2014, a handwritten note has been added that states, "While on STDP, need to understand pay is always paid 2 weeks prior, was for week April 16 to April 26 and Good Friday and Easter Monday = 16 hours paid at full rate of pay." The Claimant testified that this must have been an employer comment, because he did not write on the paystub. He also disputed the employer's statement, and said that in 2014 the pay was not paid two weeks delayed, and that the practice of doing that came into effect later.

[19] The paystub in question, for the pay period dated April 27, 2014, until May 10, 2014, shows the Claimant was paid for 80 hours at regular pay rates, and instead of the same 80 hours being recovered and replaced by an EI payment, only 64 hours were paid in EI benefits. The difference is 16 hours, which the Claimant was paid at the full, regular rate of pay. This is not a period under review in the Commission's decision, but shows how the employer tracked statutory holiday pay.

[20] On a paystub for the pay period dated July 6, 2014, to July 19, 2014, the employer has again added a handwritten note that says, "2 weeks prior is June 22 to July 5, 2014. STAT = July 1." The paystub shows the Claimant was paid for 80 hours at his regular pay rate, with 72 hours

being recovered and 72 hours being paid at the EI rate. The difference is 8 hours, which I find reflects the statutory pay from July 1, 2014.

[21] I find the Claimant was paid for statutory holiday pay as part of the “Basic Pay” line on his pay stub, because the employer continued to pay the Claimant for these statutory days and they were not recovered as part of the STD reduced regular earnings. I further find the evidence weighs more heavily towards the pay stubs reflecting the two-week period prior to payment, as the employer wrote on the paystub. The pay stubs which state they are for periods where a holiday should exist, like the stub dated June 22, 2014, until July 5, 2014, shows no evidence of any statutory benefit deduction, but the pay stub for the pay period from July 6, 2014, to July 19, 2014, appears to include the payment for July 1, 2014.

[22] I have reproduced the Commission’s decision relative to the overpayment and include paystub information for clarity:

<b>For the week of (dd/mm/yy- dd/mm/yy)</b>	<b>You declared having earned</b>	<b>However your employer’s records indicate that you earned the gross amount of</b>	<b>Difference between hours paid to Claimant and recovered in pay period</b>	<b>Difference in amount of money paid to Claimant and amount recovered by employer</b>
29/06/2014- 05/07/2014	0.00	208.80	8 hours  (80 hours – 72 hours)	208.80  (\$2088 minus \$1879.20) Page GD3-45
03/08/2014- 09/08/2014	0.00	208.80	8 hours  (80 hours plus 6.17 hours, minus 78.17 hours)	208.80  (\$2088 +\$161.04- \$2040.24) Page GD3-46
31/08/2014- 06/09/2014	0.00	208.80	No Stub	No Stub

[23] While the employer did not provide a paystub reflecting the statutory pay for Labour day, and instead enclosed one covering the period of Good Friday and Easter Monday, I find the evidence weighs more heavily towards the Labour Day pay stub reflecting the same information as the other paystubs that include statutory holiday pay.

[24] I note that the Claimant told the Commission that he did not dispute having received the statutory pay, but disputed that he should have to pay it back. The Claimant's wife testified that he is not paid holiday pay separately, and it is rolled into his basic pay.

[25] In order to be considered earnings, the income must be arising out of any employment or there must be a "sufficient connection" between the Claimant's employment and the sums received.<sup>5</sup>

[26] At the hearing the Claimant stated that he did not receive any payments of \$208.80 from the employer on his pay stubs or in his bank account. I find this would be correct, as the employer did not pay the amounts as \$208.80, but within the basic pay. When the employer recovered the money paid by EI to the Claimant, it did not recover the payment for the statutory holiday hours. Therefore, the Claimant was paid for statutory holiday hours at the same time he received EI benefits, and these are considered earnings which require allocation under the *Employment Insurance Regulations*. This is also reflected on the Record of Employment<sup>6</sup> dated May 24, 2018, which shows the Claimant received \$208.80 in insurable earnings in block 6 of 15c, representing the July 1 statutory holiday, and \$208.80 in insurable earnings at block 3 of 15c, reflecting the statutory pay for August 2014. The amount in block 1 represents a sum paid to the Claimant in the pay period ending September 13, 2014, which would include the statutory pay for Labour Day 2014.

[27] At the hearing, the Claimant argued that he had already paid back over \$11,000 in overpaid benefits and thought the holiday pay was included in that amount. I find that it was not, because the pay stubs clearly show the employer recouping only 72 hours instead of the 80 hours for which the Claimant was paid in weeks where a statutory holiday occurred. This means the Claimant was paid for 8 hours that was not recouped by the employer, in relation to holiday periods. This is also

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<sup>5</sup> *Canada (Attorney General) v. Roch*, 2003 FCA 356)

<sup>6</sup> The Claimant provided the Record of Employment as a post hearing document. It is included at GD6-3

confirmed on the Record of Employment noted above, which shows the payments of \$208.80 for two of the three dates in question. While the Claimant is correct that a letter from his employer states the money previously recovered related to wages and salary, I find a review of the paystub proves the employer did not recover the money relating to 8 hours of statutory holiday pay. I find the Commission's decision of April 5, 2019, accurately reflects the situation in this case, as the Claimant was paid three payments of \$208.80 by his employer in 2014, while also in receipt of EI benefits for sickness.

**Issue 2: Were the earnings correctly allocated?**

[28] Once an amount of money is found to be earnings under the *Employment Insurance Regulations*, it is necessary to allocate that sum.<sup>7</sup>

[29] In this case, the money paid to the Claimant was paid to compensate him for statutory holidays. Money paid to an employee to compensate for holiday periods must be allocated to the week in which the holiday occurred.<sup>8</sup>

[30] As the Commission allocated the money to the weeks where the holidays occurred, the money has been correctly allocated.

***Other Issues***

[31] In the Notice of Appeal, the Claimant stated that he should be able to benefit from the Commission's policy on writing off amounts wrongly paid, penalties, and interest.

[32] The *Employment Insurance Regulations* state that an overpayment **may** be written off if it does not arise from an error made by the Claimant or as a result of a false or misleading declaration.<sup>9</sup> The Commission submits that while the Claimant may have been confused by the paperwork and genuinely not realized he was paid for statutory holidays that needed to be claimed,

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<sup>7</sup> Sums which are determined to be earnings under section 35 of the *Employment Insurance Regulations* must be allocated under the provisions of section 36 of the same regulations.

<sup>8</sup> *Employment Insurance Regulations*, section 36(13)

<sup>9</sup> *Employment Insurance Regulations*, section 56(1)(e), **emphasis added**



whether or not his false statements were made knowingly is irrelevant. Ultimately, it decided his situation did not meet the criteria for the debt to be written-off.

[33] I have no jurisdiction to order a write-off of an overpayment. The jurisdiction lay with the Commission to make that determination.

**CONCLUSION**

[34] The appeal is dismissed. The Claimant received money from the employer in relation to statutory holiday pay, which is earnings requiring allocation to the week in which the holiday occurred.

Candace R. Salmon  
Member, General Division - Employment Insurance Section

HEARD ON:	June 12, 2019
METHOD OF PROCEEDING:	In person
APPEARANCES:	D. C., Appellant