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

Citation : *K. D. v Canada Employment Insurance Commission*, 2019 SST 738

Tribunal File Number: GE-19-1594

BETWEEN:

K. D.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Employment Insurance Section

DECISION BY: Teresa M. Day

HEARD ON: July 9, 2019

DATE OF DECISION: July 15, 2019

Canada

DECISION

[1] The appeal is dismissed. The Commission correctly allocated the Appellant's buyout payment and vacation pay against his claim for employment insurance benefits (EI benefits). The Appellant is not entitled to any further EI benefits on his claim.

OVERVIEW

[2] The Appellant established a claim for employment insurance sickness benefits (sickness benefits) effective May 1, 2016. He was paid the maximum entitlement of 15 weeks of sickness benefits, but was still medically unable to return to work.

[3] On December 14, 2016, the Appellant, his Union and his employer, X (X), entered into a Memorandum of Settlement to resolve a number of grievances the Appellant had filed against X. Under this settlement, Xagreed to provide a "buyout" to the Appellant in exchange for the withdrawal of all grievances. The settlement also stipulated that the Union would make no further claims on behalf of the Appellant because he would no longer be an employee under the collective agreement. On December 22, 2016, the Appellant was paid $33,578.00 for the buyout, $488.50 for vacation pay and $88.00 for statutory holiday pay, and his employment was terminated effective the same day.

[4] On March 23, 2017, the Respondent, the Canada Employment Insurance Commission (Commission), determined that the buyout and vacation pay were earnings and allocated a total amount of $34,066.00 against the Appellant's claim from December 18, 2016 to December 23, 2017. This resulted in an overpayment in relation to his 15 weeks of sickness benefits. The Appellant asked the Commission to reconsider its decision, arguing he had neither requested nor consented to the allocation of the buyout against his entitlement to EI benefits. The Commission maintained its decision that the allocation of the buyout and vacation pay was correct, but it extended the Appellant's benefit period to the maximum number of weeks possible, namely 104 weeks. The benefit period extension effectively eliminated the overpayment on the Appellant's claim. It also extended his benefit period to the week of April 28, 2018.

[5] The Commission recommended the Appellant renew his claim after the allocation period ended ***if*** he was still unemployed.

[6] The Appellant renewed his claim effective December 24, 2017 and was told he could a maximum of 28 weeks of regular EI benefits. In fact, he only received 18 weeks of regular EI benefits from the week of December 24, 2017 to the week of April 28, 2018 because his benefit period ended on April 28, 2018.

[7] The Appellant believed he was entitled to 28 weeks of regular EI benefits. He appealed the reconsideration decision to the Social Security Tribunal (Tribunal), who dismissed his appeal. He then appealed to the Appeal Division of the Tribunal. The Appeal Division confirmed that the Appellant's benefit period cannot exceed 104 weeks and that he could not be paid benefits after his benefit period expired on April 28, 2018. However, the questions of whether the severance and vacation pay were earnings and, if so, whether they were properly allocated were referred back to the General Division for a new hearing before a different Member of the Tribunal.

[8] The new Member requested updated submissions from both the Appellant and the Commission, and these submissions were shared with all parties. The new hearing was held by teleconference on July 9, 2019.

ISSUES

[9] Are the Appellant's buyout/severance pay and vacation pay earnings that must be allocated against his claim for EI benefits?

[10] If these monies are earnings to be allocated, has the Commission allocated them to the correct time period of his claim?

ANALYSIS

[11] 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. In the present case, the Appellant established a standard 52-week benefit period when he made his initial application for benefits on May 24, 2016. He received 15 weeks of sickness benefits under that initial claim, but was medically unable to work so regular EI benefits were not payable. Nonetheless, his benefit period for the

claim established on May 24, 2016 continued to run. He received the buyout and vacation pay on December 22, 2016, which was within his original 52-week benefit period. As such, the Commission must determine if these monies are earnings to be allocated against his claim.

[12] 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.

[13] Subsection 35(2) of the EI Regulations defines "earnings" to be taken into account for allocation purposes as "the entire income of a claimant arising out of any employment".

[14] The Federal Court of Appeal has also 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*.

[15] Subsection 36(1) of the EI Regulations is subject to subsection (2), and sets out how the earnings (as determined under section 35 of the EI Regulations) shall be allocated to weeks of a benefits claim and, for the purposes referred to in subsection 35(2), establishes that they shall be the earnings of the claimant for those weeks.

[16] Subsection 36(9) of the EI Regulations specifically addresses how earnings payable by reason of a lay-off or separation from an employment are to be dealt with, namely:

> (9) …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 (*emphasis added*).

Issue 1: Are the Appellant's buyout payment and vacation pay earnings that must be allocated against his claim for EI benefits?

[17] The onus is on the Appellant to prove that the monies in question constitute something other than earnings.

[18] On December 22, 2016, the Appellant's employer paid him a buyout of $33,578.00 and vacation pay of $488.50, less the statutory withholdings required by law (see remittance at GD3-36). The employer issued a Record of Employment the same day (at RGD11-20) indicating that the Appellant had received the following separation monies:

a)	Vacation Pay	$ 488.50
b)	Statutory Holiday Pay	$ 88.00
c)	Severance Pay	$33,578.00

[19] The Tribunal finds that these amounts were paid to the Appellant on account of his separation from employment effective December 22, 2016. The Memorandum of Settlement signed between the Appellant, his Union and X on December 14, 2016 (at RGD11-18) and the contemporaneous Voluntary Buyout Application (at RGD11-19) clearly contemplate payment of a buyout under the collective agreement upon the separation from employment by mutual agreement.

[20] The Tribunal finds that the vacation pay and buyout/severance pay are considered 'income' pursuant to subsection 35(1) of the EI Regulations because they were received by the Appellant from his employer. The Tribunal further finds that this income is considered 'earnings' pursuant to subsection 35(2) of the EI Regulations because the money arose directly from the Appellant's employment relationship with X. The Tribunal is supported in its analysis by the abundant jurisprudence where the Federal Court of Appeal has ruled that monies received upon separation, 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*).

[21] The vacation pay and buyout/severance pay monies paid to the Appellant by X on December 22, 2016 fall squarely within the Federal Court of Appeal jurisprudence and, as such, are all earnings that must be allocated against his claim for EI benefits.

[22] The Appellant testified that he had filed 5 very serious grievances against X for discrimination, harassment and violations of the collective agreement. In "retaliation" for those

grievances, X "forced" him to accept the buyout, which is something they have to offer a certain number of employees every year under the collective agreement. He accepted it because he was worried he'd be terminated after he was recently suspended from his employment, which he stated was through no fault of his own. The Appellant submitted that the discrimination he suffered in the workplace and the pressure he felt to take the buyout should preclude the buyout from being allocated against his claim for EI benefits.

[23] This argument does not change the characterization of the buyout as earnings that must be allocated against the Appellant's claim for EI benefits.

[24] The Appellant was represented by his Union and had the option of continuing with his numerous grievances. Instead, he entered into a settlement to bring all of his outstanding grievances to an end. One of the terms of the settlement was payment of a voluntary buyout in accordance with the provisions of the collective agreement, which clearly contemplated an annual workforce reduction (see RGD11-16). The calculation would be based on an employee's average weekly hours in the 52-week period prior to the buyout offer. The Tribunal finds that the buyout was intended to be a form of severance pay and, as such, constituted earnings to be allocated against his claim.

[25] The Appellant also testified that the amount of the buyout was not negotiable, but was calculated based on the formula provided for under Schedule "A" Buyout Option of the collective agreement (at RGD11-16). Employees accepting the buyout are deemed to have terminated their employment with X and have no right of recall or re-employment with the company. The Appellant submitted that the mandatory nature of the buyout process and the conditions he had to agree to should preclude the buyout from being allocated against his claim for EI benefits.

[26] This argument also does not change the characterization of the buyout as earnings that must be allocated against the Appellant's claim for EI benefits.

[27] The Buyout Option at RGD11-16 refers to the employees accepting the buyout as having "no right of recall or re-employment" with X. A right of recall exists when an employee is laid off and retains the right to be brought back to work under the provisions of a collective

agreement. A person on layoff with recall rights is still considered an employee, so the Buyout Option that X offered would clearly extinguish that possibility. A right to re-employment or reinstatement involves re-installing an employee to his or her position as it existed prior to a termination. The Federal Court of Appeal has held that monies paid to an employee for the express purpose of the relinquishment of reinstatement rights conferred under legislation or a collective agreement do not constitute earnings for allocation (see *Canada (AG) v. Meechan, 2003 FCA 368*). To bring himself within this exception, the Appellant must prove the following:

a) That his right to reinstatement existed;

b) That he sought reinstatement; and

c) That the monies were paid to compensate him for the relinquishment of his right to reinstatement.

[28] The Appellant has proven none of these things. The Appellant testified that he was suspended on March 27, 2016 and "forced to go on medical leave" while he awaited his knee surgery because the employer refused to accommodate his disability. In the grievance he filed on March 29, 2016 (RGD11-4), he demanded to be put back on the schedule and allowed to work as per his doctor's recommendations. However, he had not been terminated at the time of the buyout. In the Memorandum of Settlement, the parties explicitly confirm that there was no discipline issued to the Appellant in connection with the medical leave, and that the Appellant provided the medical documentation the employer requested. The final ROE indicates the Appellant was paid up to May 2, 2016.

[29] The Appellant testified that he then applied for EI benefits and, after serving his waiting period, he received 15 weeks of sickness benefits - but he was unable to work for medical reasons until December 18, 2016. He signed the Memorandum of Settlement on December 14, 2016 and, by his own admission, was laid off due to a shortage of work on December 22, 2016 (testimony at the hearing and post-hearing submissions at RGD12-3).

[30] The Tribunal finds no evidence that the Appellant was ever terminated such that he had a contractual or statutory right to reinstatement as at December 22, 2016. The Tribunal also finds no evidence that he sought reinstatement in the negotiations around the December 14, 2016

Memorandum of Settlement, or that the buyout monies were paid for the express purpose of compensating him for the relinquishment of a right to reinstatement. The Memorandum of Settlement dealt not only with the March 29, 2016 grievance, but with the other grievances filed by the Appellant – for which he claimed damages for discrimination and workplace harassment (see RGD11-5 to RGD11-7). The Memorandum of Settlement does not contain a clear statement indicating that the monies were paid to relinquish reinstatement rights. It merely states the Appellant will no longer be an employee under the Collective Agreement effective his last day of work. For all of these reasons, the Appellant's buyout cannot be characterized as exempt from allocation under the narrow exemption for relinquishment of reinstatement rights.

[31] The Appellant further testified that he never authorized or consented to the allocation of his buyout, and that he only netted $23,950.74 after withholdings for income tax and other statutory deductions. The Appellant submitted that when the Commission allocated the gross amount of the separation monies, he was penalized twice – once by having to pay income taxes and once by losing his full 28 weeks of EI benefits.

[32] This argument does not change the characterization of the buyout as earnings that must be allocated against the Appellant's claim for EI benefits.

[33] The Appellant is not required to authorize or consent to an allocation against his claim. All employers have an obligation to report monies paid to claimants on their ROEs. All employers also have an obligation to update and amend ROEs when monies are paid as a result of a separation from employment. Any resulting allocation is mandated by the relevant sections of the EI Act and the EI Regulation and a claimant cannot avoid the application of the allocation provisions when in receipt of earnings during a benefit period.

[34] Similarly, the Appellant cannot avoid the application of the Income Tax Act with respect to the statutory withholdings to be remitted upon payment of the buyout/severance pay, vacation pay and statutory holiday pay.

[35] The Tribunal finds that the Commission correctly concluded that the vacation pay and buyout/severance pay as reported on the ROE at RGD11-20 are earnings that must be allocated against the Appellant's claim for EI benefits.

Issue 2: Did the Commission correctly allocate the Appellant's buyout and vacation pay?

[36] The payment of vacation pay and the buyout/severance pay to the Appellant was triggered by the severance of his employment relationship with X on December 22, 2016 (see GD3-24). Put another way, there was no need for X to pay any of these monies to the Appellant but for the severance of the employment relationship.

[37] The Federal Court of Appeal has ruled that it is the motive for the payment rather than the date of payment that is relevant to the application of subsection 36(9) of the EI Regulations (*Brulotte 2009 FCA 149* and *Lemay, supra*); and that where an employer is liable to pay monies in accordance with provincial employment standards legislation, the monies are due and payable by reason of the cessation of work and must, therefore, be allocated from the date of the lay-off or separation from employment (*McKee 2006 FCA 184, Guilbault A-1235-84*, and *Tremblay, supra*).

[38] The Tribunal finds that because the vacation pay and buyout/severance pay were paid to the Appellant by reason of his separation from employment, these monies must be allocated as prescribed in subsection 36(9) of the Regulations. That is, they must be allocated to the number of weeks that begins with the week of the separation as prescribed in subsection 36(9) of the EI Regulations and in accordance with the Appellant's regular weekly earnings from his employment. It is not within the Tribunal's discretion to move, postpone or otherwise allocate earnings other than as prescribed in the EI Regulations.

[39] The Tribunal finds that the Commission correctly concluded that the total amount the Appellant received for vacation pay and buyout/severance pay ($34,066 as per GD3-25) is earnings that must be (and was) allocated from December 18, 2016 (the Sunday of the week of the Appellant's last day of work on December 22, 2016) to December 23, 2017 according to the Appellant's regular weekly pay, pursuant to subsection 36(9) of the EI Regulations.

[40] The Tribunal has reviewed the detailed allocation calculations at RGD5b and the 53-week allocation schedule at RGD5c and finds both of them to be correct.

[41] The Appellant could not receive any EI benefits until the allocation period was over because the allocation of his vacation pay and buyout/severance pay is deemed to be his earnings

in those weeks. This means that the earliest week he could have received regular EI benefits was the week of December 24, 2017 – assuming he was still unemployed and available for work.

[42] The Appeal Division has already confirmed that the Appellant's benefit period cannot exceed 104 weeks and that it had to end April 28, 2018.

[43] While he may have been entitled to receive a maximum of 28 weeks of regular EI benefits based on the insurable hours accumulated in his employment at X during the 52-week period prior to his initial application for benefits - **he was never guaranteed a full 28 weeks of regular EI benefits**. The Commission's letter confirming the renewal of the Appellant's claim was very clear:

> "The maximum number of benefit weeks payable to you is 28. The period in which you can claim the weeks payable to you ends April 28, 2018. The maximum benefits payable may be reached before the date indicated, in which case no further benefits will be paid." (RGD11-33)

[44] The Appellant renewed his claim effective December 24, 2017 and received regular EI benefits for every week from that point until his extended benefit period ended in the week of April 28, 2018. At that point, the Appellant reached the maximum benefit period duration of 104 weeks on the claim he established effective May 1, 2016. The Tribunal therefore finds the Appellant cannot be paid any further EI benefits on this claim.

[45] The Appellant testified that he was on sick leave and unable to work for 33 weeks, but he only received 15 weeks of sickness benefits – followed by 16 "unpaid weeks" when he was sick and received nothing. The Appellant submitted that the 104 weeks "shouldn't count" during the 33 weeks he was unable to work for medical reasons. If the 104-week long benefit period was suspended so that the weeks he was unable to work wouldn't count, then he could collect his full 28 weeks of regular EI benefits.

[46] This argument does not assist the Appellant.

[47] The Tribunal acknowledges the Appellant's disappointment at not receiving additional EI benefits on his claim. However, he cannot avoid the application of the legislation to his

situation. The EI Regulations do not allow any discretion with respect to the application of the allocation provisions in sections 35 and 36 to the monies received by the Appellant.

[48] Similarly, there is no discretion with respect to the extension of a benefit period beyond the 104-week maximum stipulated in subsection 10(14) of the EI Act. Moreover, there is no provision anywhere in the EI Act or EI Regulations that would permit the Tribunal to "suspend" a benefit period or otherwise declare that certain weeks within a benefit period do not "count" towards the total number of weeks for which benefits may be paid. The Tribunal does not have discretion to vary the clear wording in the legislation, no matter how compelling the circumstances. The Tribunal is supported in its analysis by the Supreme Court of Canada's statement in *Granger v. Canada (CEIC), [1989] 1 S.C.R. 141*, that a judge is bound by the law and cannot refuse to apply it, even on grounds of equity.

[49] Finally, the Tribunal notes the Appellant's testimony that he was actually fit to return to work in October 2017, contrary to the medical certificate at RGD11-59 which stated he was fit to return to his regular job "from December 28, 2017". The Appellant submitted that his renewal claim should be activated from October 2017, which would allow him to collect his full 28 weeks of regular EI benefits.

[50] This argument also does not assist the Appellant. As set out above, the allocation on his claim was in effect until the week of December 24, 2017 and, as a result, he could not have received any EI benefits prior to December 24, 2017.

CONCLUSION

[51] The Tribunal finds that the monies paid to the Appellant for vacation pay and buyout/severance pay upon his separation from employment at X are considered earnings, and that they have been properly allocated to his claim for EI benefits. As a result, the Appellant is not entitled to any further EI benefits on this claim.

[52] The appeal is dismissed.

Teresa M. Day

Member, General Division - Employment Insurance Section

HEARD ON:	July 9, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	K. D., Appellant