



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *A. M. v Canada Employment Insurance Commission*, 2019 SST 1418

Tribunal File Number: GE-19-3371

BETWEEN:

**A. M.**

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: Eleni Palantzas

HEARD ON: October 23, 2019

DATE OF DECISION: November 4, 2019

## **DECISION**

[1] The Appellant, A. M., is the Claimant in this appeal. His appeal is dismissed because he did not have an interruption of earnings. This means that the Claimant is not entitled to the 6 weeks of sickness benefits he received. The reasons below explain why.

## **OVERVIEW**

[2] The Claimant stopped working due to surgery. He made a claim for employment insurance sickness benefits to Canada Employment Insurance Commission, which I call the Commission in this decision. He received 6 weeks of sickness benefits and a “top-up” from his employer up to his normal weekly earnings. The Claimant did not report the top-up he received from his employer to the Commission. He considered it a gift offered to him by his employer and not other monies he had to report. The Commission however, determined that the top-up is earnings. Further, the amount he received from his employer is more than 60% of his normal weekly earnings, which means that he did not have an interruption of earnings according the *Employment Insurance Regulations* (Regulations). As a result, a claim should not have been established and the Claimant should not have received 6 weeks of sickness benefits. The Commission is asking that the Claimant return the benefits he was overpaid.

[3] The Claimant requested that the Commission reconsider its decision arguing that he did have an interruption in his earnings because the monies given to him by his employer were only top-up payments. The Commission considered whether the employer had an approved Supplementary Unemployment Benefit (SUB) plan so that the top-up payments are not considered earnings. The Commission confirmed however that the employer was not registered in a SUB plan and upheld its initial decision. The Claimant is dissatisfied with the Commission’s decision so he appealed to the Tribunal.

## **ISSUE**

[4] Did the Claimant have an interruption of earnings?

## ANALYSIS

[5] In order for the Claimant to qualify for employment insurance benefits, he must have an interruption in his earnings.<sup>1</sup> This means that he had to have stopped working due to his surgery and his earnings had to be reduced by more than 40% of his normal weekly earnings.<sup>2</sup>

[6] I must decide whether the Claimant's earnings were interrupted when he went off work for surgery and whether he was entitled to the six weeks of sickness benefits he received.

### **Issue 1: Did the Claimant have an interruption of earnings?**

[7] I find that the Claimant did not have an interruption in his earnings. In order to come to this conclusion, I first considered whether the top-up payments he received are considered earnings. Having found that they are earnings, I then considered whether his weekly earnings were reduced by more than 40% during the six weeks under review.

### **The top-up payments are earnings**

[8] The Claimant argues that he is entitled to both the sickness benefits and the top-up he received from his employer. He said that he did not ask for the top-up payments. His employer graciously offered it to him as a gift to help him pay his bills while he was off work for surgery. He therefore questions whether those payments are earnings since he did not work for that money.

[9] I find that the top-up payments the Claimant received from his employer are earnings for two reasons.

[10] First, the money he received is income that arises from his employment.<sup>3</sup> The employer made the payments to compensate the Claimant for the loss of earnings while he was off work due to surgery. I understand that the Claimant considered the top-up payments as an unexpected

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<sup>1</sup> According to subsection 7(2) of the *Employment Insurance Act* (Act), one of the criteria to qualify to receive benefits is that the insured person had an interruption of earnings from employment.

<sup>2</sup> This is according to subsection 14(2) of the Regulations

<sup>3</sup> Section 35 of the Regulations states that the earnings to be taken into account for the purpose of determining whether and interruption of earnings has occurred under section 14, are the entire income of a claimant arising out of any employment.

gift from his employer. However, unlike a wedding or birthday gift from his employer, these payments arise from their employee-employer relationship, not a personal relationship. Besides, the employer said that the payments were a short-term disability top-up (GD3-63). Further, the amounts prove that the payments are equivalent to the loss of earnings for each week up to 100% of his normal weekly earnings. These payments were not gifts from the employer.

[11] Second, the top-up payments are earnings because they cannot be excluded as earnings under an approved SUB plan. Supplemental payments that are made by an employer to an employee during a period of unemployment because of an injury may be exempt from being considered earnings under certain circumstances.<sup>4</sup> The Commission submits that the employer did not have an approved SUB plan so the top-up payments must be considered earnings. The Claimant did not provide any evidence to the contrary. In the absence of any evidence that the Claimant was paid a top-up as part of an approved SUB plan, I find that the top-up payments are earnings.

[12] Because the Claimant had earnings, they must be applied (allocated) to the period that he is entitled to receive benefits.<sup>5</sup> The Claimant did not perform services for the earnings he received. The earnings therefore must be allocated to the weeks they were payable.<sup>6</sup> The top-up earnings were therefore correctly applied to the weeks starting from August 21, 2016 until October 15, 2016. The Claimant also received benefits for six of these weeks. He was therefore overpaid \$3222.00 (6 weeks x \$537/week).

[13] The Commission advised the Claimant that he was not entitled to these benefits, not because of the allocation, but because he did not have an interruption of earnings. A claim for employment insurance benefits therefore should not have been established effective August 21, 2019. As a result, the Claimant should not have received any benefits so he was overpaid \$3222.00 for this reason.

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<sup>4</sup> Section 37 of the Regulations lists all the conditions that must be met in order for a supplemental unemployment benefit plan to exist.

<sup>5</sup> Section 36(1) of the Regulations states earnings must be allocated to a claimant's benefit weeks in the manner described in that section.

<sup>6</sup> Section 36(5) of the Regulations states that earnings that are payable to a claimant without the performance of services, or payable by an employer to a claimant in consideration of the claimant returning to or beginning work, shall be allocated to the period for which they are payable.

[14] I next considered whether the Claimant had an interruption of earnings.

**There was not an interruption of earnings**

[15] The Claimant confirmed that prior to going off work for his surgery; his average weekly earnings were \$1777.50. He did not work from August 21, 2016 to November 6, 2016. The Claimant also confirmed that he was paid sickness benefits for six of those weeks from September 4, 2016 until October 15, 2016 at a rate of \$537/week (GD3-54). The Claimant received a top-up payment from his employer for the same six weeks. He received his full salary of \$1777.50 for the weeks starting August 21, 2016 and September 4, 2016 and \$1240.50 for the other four weeks.

[16] I find that the Claimant did not experience an interruption of earnings according to the Regulations. For the six weeks in question, the Claimant received 100% of his salary for the weeks of August 21, 2016 and September 4, 2016 and 70% of his salary (\$1240.00 / \$1777.00) for the other four weeks until October 15, 2016. Although the Claimant stopped working due to his surgery, his earnings were not reduced by more than 40% of his normal weekly earnings. As a result, a claim for benefits cannot be established effective August 21, 2016.

[17] The Claimant must repay the benefits he was overpaid in the amount of \$3222.00.

**CONCLUSION**

[18] The appeal is dismissed.

Eleni Palantzas

Member, General Division - Employment Insurance Section

HEARD ON:	October 23, 2019
METHOD OF PROCEEDING:	In person

APPEARANCES:	A. M., Appellant
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